Ram K. Mahbubani Vs. Union of India (Uoi) and anr.

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Court : Delhi

Decided On : Sep-12-2008

Reported in : 153(2008)DLT471; 2008(106)DRJ906

Judge : Vikramajit Sen and; V.K. Shali, JJ.

Acts : Indian Extradition Act, 1962 - Sections 2, 3, 3(3), 4 to 11, 5, 6, 12 to 18, 24, 34, 34B and 1343; Extradition Act, 1870; Fugitive Offenders Act, 1881; Extradition Act, 1903; Bare Act; Extradition (Amendment) Act, 1993 - Sections 8; Code of Criminal Procedure (CrPC) , 1973 - Sections 228; Indian Penal Code (IPC) - Sections 415, 417 and 420; Civil Procedure (CPC), 1908

Appeal No. : W.P.(CRL) 1249/2007

Appellant : Ram K. Mahbubani

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : Rahul Mehra, Adv. for Ministry of External Affairs

Advocate for Pet/Ap. : D.C. Mathur, Sr. Adv. and; D. Banerjee, Adv

Disposition : Petition dismissed

Judgement :

Vikramajit Sen, J.

1. In this writ petition three prayers have been asked for ' firstly for the issuance of a writ of Habeas Corpus securing the release of the Petitioner under Section 24 of the Extradition Act, 1962 ('Extradition Act' for short); secondly, for quashing of the Orders of the learned ACMM dated 31.5.2007 and 28.7.2007 whereby, according to the Petitioner, he has been detained; and thirdly, for staying the proceedings in the Court of the learned Additional Chief Metropolitan Magistrate (ACMM).

2. The Petition discloses that the Petitioner was detained at Chennai Airport on 04.05.2005. He was subsequently released on bail by Order dated 12.5.2005 by 'the Madras Court', subject to his depositing the original Passport in that Court and executing a Bond for a sum of Rupees Ten Thousand. The Respondents have clarified that this was a 'provisional arrest' as requested for by the Government of the United States of America (USA) as envisaged in Article 12 of the Extradition Treaty between the Government of the Republic of India and the Government of USA, duly published in the Gazette of India Extraordinary dated September 14, 1999. The Respondents have further stated that the provisional arrest was pursuant to the powers contained in Section 34-B of the Extradition Act. The Orders dated 12.5.2005 are of the Judicial Magistrate, Alandur, Chennai. The Petitioner thereafter filed a Writ of Mandamus seeking the return of his Sri Lankan passport and for his discharge under Section 24 of the Extradition Act. In its Order dated 15.11.2006 a learned Single Judge of the High Court of Judicature of Madras noted that the case had been initiated 18 months prior thereto and

that it was 'strange' that no action was taken thereafter. Therefore, the retention of the Passport was without legal authority. That Writ Petition was allowed and the Inspector of Police, CB CID (Metro), Chennai was directed to return the Passport to the Petitioner forthwith.

3. In the meanwhile, on 10.10.2006, the Embassy of the USA made a request for the extradition of the Petitioner. Several documents were annexed to the request. The Government of India by Order dated 7.5.2007, together with Corrigendum dated 11.6.2007, requested the Chief Metropolitan Magistrate, Delhi to inquire into the alleged offence. This Order is reproduced for ease of perusal:

Whereas the fugitive Mr. Ram K. Mehbubani, a dual national of Sri Lanka and US, who is presently in India, is wanted by the U.S. judicial authorities for trial in respect of certain criminal offences.

2. Whereas the Government of the United States of America has submitted a formal request on 10.10.2006 (at) 37-39, through diplomatic channels, for the extradition of the said fugitive to the United States of America; and

3. Whereas the offence alleged to have been committed by the fugitive Mr. Ram K. Mehbubani is stated to be extraditable by the US authorities in terms of Article 2 of Extradition Treaty currently in force between the Government of the Republic of India and the Government of the United States of America.

4. Therefore, the Central Government, having been satisfied on the basis of the material submitted by the Government of the United States of America, that the warrants of arrest were issued by the United States District Court, New Jersey having lawful authority to issue the same, hereby requests under Section 5 of the Indian Extradition Act 1962 (34 of 1962), the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi, to inquire into the alleged offence.

5. The extradition request with all enclosures received from the Government of the United States of America for the extradition of the fugitive Mr. Ram K. Mehbubani including the warrant of arrest issued by the United States District court, New Jersey are being sent herewith.

4. It appears that on 26.5.2007 a petition was filed by the Union of India in the Court of ACMM under Section 6 of the Extradition Act, praying for the issuance of non-bailable warrants against the Petitioner for his immediate arrest, and for an order impounding his travel documents. The aforementioned Petition was accompanied by the following thirteen documents:

(i) Original request letter No. T-413/25/2005 dated May 7, 2007 issued by the Ministry of External Affairs (CPV Division) requesting therein this Hon'ble Court to inquire into the alleged offence as an Inquiry Officer as per Section 5 of the Indian Extradition Act, 1962.

(ii) True copy of Note Verbale No. 05-290/CONS dated May 4, 2005 sent by the Embassy of the United States of America at New Delhi to the Ministry of External Affairs requesting provisional arrest for the purpose of extradition of Ram K. Mahbubani.

(iii) True copy of the Diplomatic Note vide Note No. 06-794/CONS dated October 10, 2006 sent by the Embassy of the United States of America at New Delhi to the Ministry of External Affairs transmitting a request (including an original set of documents accompanied by one copy thereof) to extradite Ram K. Mahbubani aka M. Ram to the United States, duly issued under the signature and seal of the US Secretary of State, Condoleeza Rice, original copy of which is enclosed herewith.

(iv) Original certificate of Authentication No. WAS/CONS/4151/9/06 dated September 15, 2006 by Shri Alok Pandey, First Secretary (Consular), Embassy of India, Washington D.C.

(v) Original of the Certification dated September 15, 2006 issued under the signature and seal of Mr. David Warner, Associate Director, Office of International Affairs solemnly stating therein that original affidavit with

attachments, of Assistant District Attorney R. Joseph Gribko, of the District of New Jersey, are being offered in support of the request for the extradition of the said Fugitive Criminal.

(vi) Original affidavit with attachments, of Assistant District Attorney R. Joseph Gribko, of the District of New Jersey which was sworn before a United States Magistrate Judge of the District of New Jersey, on August 30, 2006 and which is offered in support of the request for the extradition of the said Fugitive Criminal.

(vii) Certified copy of the indictment in docket No. 97-CR-673 (Exhibit A).

(viii) Certified copy of the Warrant of arrest for Ram K. Mahbubani, signed by U.S. District Court Magistrate Judge Joel Pisano (Exhibit B).

(ix) Affidavit dated November 28, 2005 of Sandra Holthhouse an employee working with North Supply Company from 1971 to 1993, sworn before the Hon'ble Judge of the District Court (Exhibit C).

(x) Affidavit dated December 8, 2005 of Eli White and accompanying copy of a photograph of Ram K. Mahbubani (Exhibit D).

(xi) True copy of Ram K. Mahbubani's US Passport application (Exhibit E).

(xii) True copy of letters sent on Gifties Letterhead (Exhibit F).

(xiii) Copy of the Treaty between the Government of the Republic of India and the Government of the United States of America, which is currently in force.

5. On 28.7.2007 the learned ACMM dismissed the bail application of the Petitioner. This appears to have acted as the catalyst for the filing of the present Writ Petition.

6. Generally stated, in all common law countries only those offences committed within its national boundaries are prosecuted by the State concerned. It is axiomatic that crimes committed in a particular country are of no direct concern to others. Extradition runs counter to this concept in that one country assists another in apprehending a person accused of or found guilty of the commission of an offence in the other country. This obligation has its origins as an important precept of comity of nations. Extradition is of ever increasing relevance since crime is very often of transnational dimensions, and criminals can easily and speedily traverse the globe and escape to different legal jurisdiction with intent to defeat the ends of justice. The observation in Liangsiriprasert v. Government of the United States of America (1991) 1 AC 225 that 'it is no direct concern of English society if a crime is committed in another country' is already archaic. The world is fast becoming a global village and increasingly the same crimes are being committed by the same persons in different countries. While prosecution is the preserve of the society where the offence has allegedly been committed, the fight against crime, if it is to succeed, should be sans national borders. Section 34 of the Extradition Act stipulates that an extradition offence committed by any person in a foreign state shall be deemed to have been committed in India and such person shall be liable to be prosecuted in India for such offence.

7. One of the earliest statutes dealing with the subject of extradition is the Extradition Act, 1870 and the Fugitive Offenders Act, 1881, which, along with the Indian Extradition Act, 1903, stood repealed by the Extradition Act, 1962. The Extradition Act contains five Chapters. Originally, prior to the amendment effected by the Extradition (Amendment) Act, (66 of 1993) Chapter-II comprising Sections 4 to 11 contained the caption ' 'EXTRADITION OF FUGITIVE CRIMINALS TO FOREIGN STATES AND TO COMMONWEALTH COUNTRIES TO WHICH CHAPTER III DOES NOT APPLY'. Chapter-III containing Sections 12 to 18 concerned ' 'RETURN OF FUGITIVE CRIMINALS TO COMMONWEALTH COUNTRIES WITH EXTRADITION ARRANGEMENTS'. Section 11 gives statutory effect to the caption at the head of the Chapter-II as it originally ordained that nothing in Chapter-II would apply to fugitive criminals of commonwealth countries to which Chapter-III applied.

8. The reproduction of the Extradition Act in the AIR . is not accurate. This would be evident from a perusal of

Section 8 of Act 66 of 1993 since the amendments are not restricted to Section 11 but span the entire statute. As on date, the dichotomy between Commonwealth countries and other countries has totally lost its relevance. Presently, the only distinction relates to those few countries who have signed Extradition Treaties with India, and have opted that Chapter-III and not Chapter-II of the Extradition Act would apply. Chapter-II concerns the extradition of fugitive criminals to those nations who have either not entered into extradition arrangements with India or having done so have preferred that Chapter-III, along with the other provisions of the Extradition Act, would govern their requests. This is the position that obtains owing to the Indo-US Extradition Treaty. It appears that a statute similar to the Extradition Act does not exist in the USA and therefore it was essential to spell out in detail in the said Treaty itself all the provisions that would regulate an Indian request for extradition of a fugitive criminal from the USA. It is trite that these questions are invariably predicated on reciprocity.

9. Mr. Mathur, learned Senior Counsel for the Petitioner, has vociferously voiced the view that it is Chapter-III and not Chapter-II that applies to the Petitioner herein, who enjoys dual citizenship of the USA as well as of Sri Lanka. As has already been mentioned above, an Extradition Treaty between India and the USA came into effect on 14.9.1999. A conjoint reading of Sections 3 and 12 of the Extradition Act mandates the Central Government to notify the States to which Chapter-III will apply so far as extradition arrangements are concerned. For the present purposes, the Extradition Treaty between India and the USA itself notifies that 'the provisions of the said Act, other than Chapter-III, shall apply to the United States of America'. In other words, Chapter-III does not apply to request for extradition between India and USA.

10. Nevertheless, we shall succinctly adumbrate the fasciculus comprising Sections 12 to 18 which are found in Chapter-III of the Extradition Act. Section 12 deals with the applicability of Chapter-III and not Chapter-II, along with the other provisions of the Extradition Act. Section 13 provides for the apprehension and return of a fugitive criminal to the requesting foreign state on the strength of an endorsed warrant or a provisional warrant (Section 14), respectively dealt with Sections 15 and 16. Section 17 provides that if the Magistrate is satisfied, on inquiry, firstly that the endorsed warrant has been duly authenticated and secondly that the offence of which the person is accused, or has been convicted is an extradition offence, he shall commit the fugitive criminal to prison to await his return. The Magistrate is also obligated to send a Certificate of Committal to the Central Government. Section 18 empowers the Central Government to issue a warrant for custody and removal to the foreign state concerned of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant. Briefly stated, the obligations cast on the Magistrate under Chapter-III are not of a judicial nature stricto senso, in that the scope of inquiry is clerical or secretarial in substance. The Magistrate has to ascertain whether the formalities pertaining to the authentication of the 'Endorsed Warrant' have been complied with and secondly that the offence for which the fugitive criminal has been accused or has been found guilty is punishable with imprisonment for a term not less than one year under the laws obtaining in both countries. The provisions of Chapter-II, it shall be seen, require a wider scrutiny and the exercise of judicial functions.

11. Chapter-II is a pandect comprising Sections 4 to 11. Section 5 prescribes that where a Requisition is received in the manner set-down in the preceding provision, the Central Government has the discretion to issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had occurred within his jurisdiction directing him to inquire into the case. Under Section 6 the Magistrate must simultaneously issue a warrant for the arrest of the fugitive. Section 7 is of great importance as it bestows on the Magistrate powers of inquiry akin to that of the Court of Session or High Court. Thus, the Magistrate would be competent to inquire into a case of murder, in respect of which extradition has been requested for, despite the fact that ordinarily he would not be empowered by the Code of Criminal Procedure, 1973 (CrPC) to do so. Conceptually, this should not pose any problem since the Magistrate is to return a finding only of a prima facie character; he does not sentence or punish the fugitive criminal.

12. This question was raised and clarified by the Division Bench in Charles Gurmakh Sobhraj v. Union of India 29(1986) DLT 410; Maninder Pal Singh Kohli v. Union of India : 142(2007)DLT209 and by a Single Bench in Nina

Pillai v. Union of India 1997 I AD (Delhi) 463; Kamlesh Babulal Aggarwal v. Union of India 2008 VI AD (Delhi) 37 was recently decided by a Division Bench of which one of us (Vikramajit Sen, J.) was a member holding, inter alia, that (a) Section 7 is independent of Section 17, (b) the enquiry under Section 7 is similar to an indictment or the framing of charges under Section 228 of the CrPC and (c) under Section 7 (3) and (4) of the Extradition Act the Court is only to satisfy itself that a prima facie case exists in support of the requisition for extradition. The Special Leave Petition against this Judgment has been dismissed by the Supreme Court on 15.5.2008. In Sarabjit Rick Singh v. Union of India 2008 I AD (CrI.) (S.C.) 161, the request of the USA for extradition of the Petitioner was 'recommended' by the learned ACMM, Delhi, which Order was affirmed by the Division Bench of this Court. Their Lordships have opined that in extradition proceedings 'no witness is examined for establishing an allegation made in the requisition of the foreign state.... No formal trial is to be held...whereas the contents of a documents is to be proved for the purposes of trial but not for the purposes of arriving at an opinion in regard to the existence of a prima facie case in an enquiry. Strict formal proof of evidence in extradition proceedings is not the requirement of law'. By virtue of Section 7, the Magistrate has the power, inter alia, to take such evidence as may be produced in support of the requisition of the foreign state on the one hand and on behalf of the fugitive criminal on the other.

13. It will be at once obvious that the Magistrate has greater judicial powers and responsibilities under Section 7 than those contained in Section 17. The first sub-section of Section 7 clarifies that when the Magistrate inquires into the case, he shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session or High Court. The second Sub-Section empowers the Magistrate to take evidence and consider the case as may be produced in support of the requisition of the foreign state as well as evidence on behalf of the fugitive criminal in order to dispel any doubt that the offence of which the fugitive criminal is accused or has been convicted is an offence of political character, or is not an extradition offence. It will be relevant to refer to the Schedule to the Extradition Act which enumerates the offences which are not to be regarded as offences of political character. Sub-section (3) thereafter clarifies that the Magistrate is to return only a prima facie finding pertaining to the requisition of the foreign state, and if he arrives at the conclusion that a prima facie case is not made out, he shall discharge the fugitive criminal. Sub-section(4) thereafter spells out that if the Magistrate is of the opinion that a prima facie case is made out for the requisition of the foreign state, he may commit the fugitive criminal to prison to await the orders of the Central Government and shall report the result of his inquiry to the Central Government, and shall forward together with such report a written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.

14. In contradistinction, Section 17 prescribes a simple procedure and lays down what is expected of the Magistrate. Sub-Section (1) of Section 17 restricts the magisterial inquiry to ascertainment of the existence of an endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and secondly that the offences of which the person is accused or has been convicted is an extradition offence. If the findings are in favour of the requisition, the Magistrate must commit the fugitive criminal to prison to await his return; the Magistrate should also forthwith send to the Central Government a certificate of the committal. Sub-section(2) empowers the Magistrate to detain or release such person, dependent on the outcome of his inquiry. Sub-section (3) enjoins the Magistrate to report the result of his inquiry to the Central Government, and simultaneously to forward any written statement which the fugitive criminal may desire to submit for the consideration of the Government. The obvious and substantial difference is that since the inquiry under Section 17 is of a secretarial nature, the Magistrate has not been vested with the powers of a Court of Session or of a High Court. He has also not been vested with any power of taking or recording evidence or of perusing the evidence produced in support of the requisition. Furthermore, discretion has been granted to the Magistrate under Section 7(4) to commit the fugitive criminal to prison, whereas this discretion is missing under Section 17(1). Our inquiry reveals that only two Treaties, that is between India and Bhutan and India and Turkey, make Chapter-III applicable, whereas in all other cases of Treaties or Arrangements it is Chapter-II, along with the provisions, other than Chapter-III that are enforced. This position is also obvious on a reading of Section 3 of the Extradition Act which is to the effect that the Central Government may, by notified

order, direct that the provisions of this Act, other than Chapter III, shall apply to such foreign States or part thereof as may be specified in the order. Application of Chapter-III is, therefore, the exception and if it is to be applied, there must be an explicit indication to that effect. This is obviously for the reason that the countries across the world prefer to reserve the right to a Judicial Officer to come to at least a prima facie conclusion that the fugitive criminal, whose extradition is prayed for, deserves to be removed from that country to a foreign country to face prosecution at the place where the culpable act has taken place. As has already been mentioned, a request for an extradition of a person for political considerations would normally be turned down.

15. We do not find any provision in the Extradition Act which renders it applicable only if a Treaty or an Arrangement has been entered into between India and the said foreign countries. A requisition for extradition can always be made, but in the absence of a Treaty or an Arrangement, India has the unfettered right not to accede to the request for extradition. The Indo-US Treaty, in terms, notifies that the provisions of the Extradition Act, other than Chapter-III, shall apply. It is indeed paradoxical that Mr. Mathur, learned Senior Counsel for the Petitioner, contends before us that it is Chapter-III which must be complied with in the present case. As we have already analysed, Chapter-III expects almost negligible exercise of judicial mind, which no fugitive criminal would want if another choice is available. If Chapter-III were to apply, and Mr. Mathur's arguments necessarily implies that Chapter-II does not apply, the Magistrate would not be required even to form a prima facie opinion, that the case as contained in the Requisition, is made out. All that is expected of the Magistrate is to ensure the existence of an endorsed warrant for the apprehension of the Petitioner, and that it is duly authenticated, and that the offence of which the petitioner is accused is an extradition offence. As per Section 17 he would then have no discretion but to commit the Petitioner to prison to await his return regardless of whether there is or is not any substance in the charges or indictment.

16. Extradition offence has been defined in Section 2(c) of the Extradition Act to mean (i) in relation to a foreign State, being a Treaty state, an offence provided for in the Extradition Treaty with that State; (ii) in relation to a foreign State other than a Treaty State an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State. Since the powers of the Magistrate are much wider as envisaged in Section 7 than what is contemplated by Section 17, it is conceivable that when a requisition is received, to which Chapter-III applies, the Magistrate concerned would be expected to do no more than to ascertain that the offence in the Requisition is also an offence in both countries attracting imprisonment for a term of not less than one year; or that it is in fact an offence mentioned in the Treaty exchanged between India and the requisitioning State. The Magistrate would not have to conclude that a prima facie case has been made out. In actual terms, the fugitive criminal would not be prejudiced if the provisions of the Chapter-II rather than Chapter-III of the Extradition Act are applied. A writ of Habeas Corpus would normally not issue where no prejudice is caused to the Petitioner and, to the contrary, he has received protection or consideration which is much wider and meaningful than what is provided under the statue. We have perused the documents filed by the Respondents in the Court of learned ACMM, all of which have been authenticated in the manner provided by law, viz., a certificate of authentication has been issued by the Embassy of India in the USA. So far as the existence of an endorsed warrant is concerned as soon as the Government of India makes a request under Section 5 of the Extradition Act, the endorsement would be deemed to have come into effect. The Order dated 7.5.2007, as corrected by Corrigendum dated June 11, 2007, constitutes such an endorsement. In any event, the discussion is academic and of little consequence since it is Chapter-II and not Chapter-III which is relevant to the case in hand.

17. We must now turn our attention to the question of whether an extradition offence has been mentioned in the requisition for the extradition of the Petitioner. Mr. Mathur, learned Senior Counsel for the Petitioner, has both eloquently and vehemently argued that the offence mentioned in the requisition is 'wire fraud' as covered by Title 18, United States Code, Sections 1343 and 2, which has been cited in the Indictment and the Warrant of Arrest. Article 2(1) defines extraditable offence with reference to the punishment that can be given, viz., that it should be punishable for a period of more than one year. Article 2(3) clarifies that an offence

shall be an extraditable offence regardless of whether it is similarly categorised or nomenclature or described by the same terminology. The learned ACMM has returned a finding that the offence for which the Petitioner has been indicted and for which warrants of Arrest had been issued against him are defined in Section 420 of the Indian Penal Code (IPC) and are punishable for more than one year. Mr. Mathur has contended that Section 420 prescribes the punishment for cheating but does not define it. There can be no gainsaying that the definition of cheating is contained in Section 415 of the IPC. We are, however, not impressed with the argument that because the learned ACMM has stated that cheating is defined in Section 420 of the IPC, his Order should be set aside. Every Appellate Court, and much more a Writ Court, should take the trouble to ascertain the essence of the relevant Order and not be impressed by minor irregularities which may have accidentally or inadvertently crept in. Neither Appellate Courts nor Writ Courts should adopt a pedantic or superficial approach while analysing the Judgment of a lower or inferior Court. On our perusal of the Order dated 18.8.2008 we can come to no conclusion other than that the learned ACMM meant that the offence for which the Petitioner has been indicted would be punishable, if tried in India under Section 420 of the IPC.

18. Pinochet (No. 3) [2000] 1 AC 147 states that ' 'the most important requirement is that the conduct complaint of must constitute the crime under the law of both the States of Spain and U.K. This rule is known as double criminality rule'. This requires that the conduct of the fugitive criminal in U.S.A. should be transposed to India and then consideration must be given as to whether it constitutes crime in India.

19. As can be expected from the erudition and sagacity of Mr. Mathur, he had drawn our attention to the views of the Supreme Court in Hridaya Ranjan Prasad Verma v. State of Bihar 2000 SCC (Cri.) 786 and Anil Mahajan v. Bhor Industries Ltd. (2006) 1 SCC (Cri.) 746. We do not find either of these cases relevant to the issue before us since the learned ACMM was not required to conduct a trial or to return a finding of guilt in respect of the offences for which the Petitioner has been indicted in the USA; he has merely to satisfy himself that, prima facie, an offence punishable in both countries has been committed. The jural duties of determining guilt fall within the province of the criminal courts in the requesting country, that is USA, which will put the Petitioner on Trial, if and when he is extradited. We should not lose sight of the fact that the Petitioner is not being tried for an offence committed in this country; he must face trial with regard to the indictment and warrant issued by the Magistrate Judge of the District of New Jersey. For the purposes of the request for extradition the learned ACMM had only to satisfy himself that, had the acts which the Petitioner has allegedly committed taken place in India, it would attract a punishment in excess of one year or that the said acts are punishable in both countries. It is true that on this aspect the Magistrate must return a definite finding and not a prima facie finding. A prima facie finding relates to whether on the basis of the documents forwarded to the Magistrate and/or the evidence recorded by him it appears to him that prima facie there is sufficient material for the fugitive criminal to stand or face a trial. In the case in hand the Magistrate has returned a definite finding that the offence for which the Petitioner has been charged in USA is also an offence for which a punishment has been provided under Section 420 of the IPC (which amounts to cheating under Section 415 of the IPC).

20. We are, therefore, unable to accept the contention raised on behalf of the Petitioner that the offence for which the Petitioner has been indicted in the Court of the District Judge, New Jersey would be punishable under Section 417 of the IPC, that is, for a period which may extend only to one year. This is for the reason that prima facie the Petitioner has dishonestly induced the complainant persons in the USA to deliver sundry property.

21. Before moving to the next point we must underscore that an Appeal against the Order of the learned ACMM has not been provided for in the Extradition Act and, therefore, while exercising the extraordinary powers of a Writ Court, we would interfere with the decision of the concerned Court only if it is perverse in the strict legal sense. We will be loathe to impose and substitute the understanding we prefer with regard to that of the learned ACMM. In any event, so far as the present case goes, we are in agreement with the learned ACMM that the offence for which the Petitioner has been indicted in the USA corresponds to cheating as envisaged under Section 415 of the IPC for which punishment of upto seven years is provided under Section

420 of the IPC. The Order which has been obliquely and indirectly questioned before us is dated 18.8.2008. The Petitioner has not directly assailed that Order by invoking any provision of law available to him, a fact we cannot be unmindful of. Having argued the matter fully after bringing that Order into issue, the matter must rest within the parameters of this Judgment.

22. Mr. Mathur, learned Senior Counsel for the Petitioner, has assailed vociferously what he has termed as 'multiple arrests' of the Petitioner. We have already narrated the asseverations in the Petition which are to the effect that the Petitioner was detained on 4.5.2005 at Chennai Airport, pursuant to a Red Corner Notice issued by International Criminal Police Organization (Interpol). In view of this categoric pleading we do not find it necessary to go into the issue whether he was in fact arrested on 1.5.2005. It has not been contended that this was not a provisional arrest. Secondly, a provisional arrest has not been covered in Chapter-II, although it has been so dealt with in Chapter-III of the Extradition Act. However, in Chapter-V, which is the miscellaneous pandect of the Extradition Act, provisional arrest has been provided for in Section 34-B which was introduced into the statute by the amendments carried out in 1993. It states that on receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal. Section 16 under Chapter-III, which we have already found not to be applicable to the present case, similarly speaks of powers of a Magistrate to issue a provisional warrant. Avowedly, however, the Petitioner was not arrested on the orders of any Magistrate acting under the Extradition Act or any other Act. The Petitioner was apprehended on 1.5.2005 in response to a Red Corner Notice issued by Interpol albeit consequent to a request made by USA.

23. On this aspect of the case, the fifth sub-article of Article 12 of the Indo-US Treaty is reproduced below for facility of reference:

Provisional Arrest

1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offence;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought; and

(f) a statement that a request for extradition for the person sought will follow.

3. The Requesting State shall be notified without delay of the disposition of its application and the reasons for any denial.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 9.

5. The fact that the person sought has been discharged from custody pursuant to paragraph (4) of this Article

shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

24. Similar provisions are to be found in Article 11 of the Indo-Canadian Treaty; Article 10 of the Indo-Russian Treaty; Article 12 of the Indo-UK Treaty and Article 18 of the Indo-Turkish Treaty. It appears to us that the legality of re-arresting a fugitive criminal despite his release from a provisional arrest has assumed the nature of a general tenet of extradition law. It is palpably obvious that the existence of such a provision has fatal consequences so far as the arguments addressed before us on behalf of the Petitioner are concerned.

25. So far as the Extradition Act and the Indo-US Treaty are concerned, a provisional arrest would metamorphose itself into a 'regular arrest' as soon as the machinery in this regard is set in motion. Inexplicably, the Government of the USA did not set into motion the machinery available to transform the provisional arrest of the Petitioner into the more enduring one as envisaged in the Extradition Act. By virtue of Section 34-B the Petitioner became entitled in law to be discharged upon the expiry of sixty days from the date of his arrest since no request for his surrender or return had been received within that period. In the event, the Petitioner had been released on bail by Order dated 12.5.2005 of the Judicial Magistrate, Alandur, Chennai. It was for this reason there was no restraint on his personal liberty. He had approached the High Court of Judicature at Madras after some delay and his Passport was returned to him in terms of Order dated 15.11.2006.

26. The implementation of Treaty arrangements has posed problems in courts for several centuries. In Jolly George Varghese v.The Bank of Cochin : [1980]2SCR913 one of the questions that had arisen was whether the International Covenants on Civil and Political Rights would prevail over the provisions of the Code of Civil Procedure, 1908 (CPC). Their Lordships observed that ' 'The Covenant bans imprisonment merely for not discharging the decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the Court. India is now a signatory to this Covenant and Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'. Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter'. This conundrum has also concerned the Supreme Court on two other occasions, viz. In re, Berubari Union and Exchange of Enclaves : [1960]3SCR250 and Maganbhai Ishwarbhai Patel v. Union of India : [1969]3SCR254 . Maganbhai contains a precise analysis of the legal position obtaining in the USA, United Kingdom, France as well as India. Paragraph 26 of Maganbhai is reproduced for easy perusal:

26. In the United States of America a treaty concluded with a foreign State by the President of the United States alone, without the consent of the Senate, is not, according to their Constitution, binding upon the Nation and the foreign power derives no rights under it (See McNair Law of Treaties, p.80 quoting from Crandall : Treaties, Making and Enforcement, Chapter XIV). As Chief Justice Taft put it : a treaty is the supreme law and a treaty may repeal a statute and vice versa. It is only when the terms of a treaty require that a law must be passed that it has to be so passed : Foster v. Nielsen (1828-30) 2 Peters 253. See also Dickinson : Law of Nations 1057.

27. We do not need to delve further into this question since there is no repugnancy between the Extradition Act or any municipal enactment in the USA on the one hand and the provisions of the Indo-US Treaty on the other. In fact, so far as India is concerned, the position is to the contrary. Section 3(3)(c) of the Extradition Act stipulates that ' 'Where the notified order relates to a treaty State the Central Government may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State'. In other words, Parliament has delegated the power of modification of the provisions of extradition to the Central Government. This discussion is necessary for the reason that the provisions of Section 34-B (or for that matter Section 16 falling in Chapter- III) does not contain terms empowering the re-arrest of a fugitive criminal after his discharge or release from provisional arrest. In our opinion, the re- arrest of a fugitive

criminal is impliedly sanctioned under the Extradition Act. It seems to us that Article 12(5) of the Indo-US Treaty sufficiently empowers the re-arrest of a fugitive criminal after his release from provisional arrest. By operation of Section 3(3)(c) of the Extradition Act the said Article of the Indo-US Treaty assumes the qualities of enforceable law. So far as the position obtaining in the USA is concerned, the provisions of the Indo-US Treaty would override municipal/domestic legislation that may have been previously prevailing in the event of any repugnancy.

28. Finally, we shall consider the contention of Mr. Mathur, learned Senior Counsel for the Petitioner, that by operation of Section 24 of the Extradition Act the Petitioner must be deemed to have discharged. His argument is that the request for the extradition of the Petitioner was received from the U.S. Government on 10.10.2006. Non-bailable Warrants were issued by the learned ACMM against the fugitive criminal on 31.5.2007. Consequent thereto, the Petitioner was arrested in Chennai on 29.6.2007. Mr. Mathur argues that proceedings under the Extradition Act ought to have been completed on or before 28.8.2007, as thereafter the Petitioner would be entitled to be discharged by virtue of Section 24 of the Extradition Act. The said Section reads as follows:

24. Discharge of person apprehended if not surrendered or returned within two months.' If a fugitive criminal who, in pursuance of this Act, has been committed to prison to await his surrender or return to any foreign state is not conveyed out of India within two months after such committal, the High court upon application made to it by or on behalf of the fugitive criminal and upon proof that reasonable notice of the intention to make such application has been given to the Central Government may order such prisoner to be discharged unless sufficient cause is shown to the contrary.

29. The starting point of the period prescribed by Section 24 is the date on which the fugitive criminal (Petitioner) has been committed to prison. The Section does not speak of an arrest. Advanced Law Lexicon clarifies the position thus:

'Arrest' and 'commit'. By arrest is to be understood to take the party into custody. To commit is the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution'. 'Commit' has been explained in Black's Law Dictionary to connote the sending of a person to prison, and/or directing an officer to take a person to a penal institution. The same Dictionary defines 'arrest' as : a seizure or forcible restraint; the taking or keeping of a person in custody by legal authority especially in response to a criminal charge; the apprehension of someone for the purpose of securing the administration of the law, especially for bringing that person before a Court. The words are not synonymous to each other. In the case in hand, there was no committal of the Petitioner prior to 18.8.2008, as stands clarified by the Order dated 25.8.2008. If any doubt remains, it would be dispelled by reading further into the Section. The fugitive criminal should have been committed to prison either to await his surrender or for his return to the concerned State. We must revert back to Section 7(4) which empowers the Magistrate to commit the fugitive to prison if the Magistrate is of the opinion that a prima facie case has been made out in support of the requisition of the State concerned. Thereafter, Section 8 speaks of the surrender of the fugitive criminal to the concerned State. Both these Sections are in Chapter-II of the Extradition Act. In those cases where Chapter-III and not Chapter-II is applicable, if upon making the secretarial, punctilious or formal inquiry, as postulated by Section 17, the Magistrate is satisfied that the endorsed Warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted is an extradition offence, the Magistrate shall commit the fugitive criminal to prison to await his return, presumably to the State concerned. Section 18 clarifies the manner in which the 'return' is to be effected by the Central Government. From this analysis, it is obvious that the words 'surrender' and 'return' are terms of art, having special connotation in the context of the Extradition Act. Our conclusion in the present case is that the prescription contained in Section 24 of the Extradition Act would commence on 18.8.2008 and two months would ordinarily have to be computed from that date.

30. In the end, we are reminded of the legal maxim actus curiae neminem gravabit which translates to ' 'An

act of the court will prejudice no one'. Courts in India are bludgeoned by dockets and for this reason it is well-nigh impossible to adhere to time limits that are set by statutes. Parliament has incorporated such constraints, inter alia, not only in the Extradition Act but also in the CPC by requiring the disposal of injunction applications within thirty days. What should be simultaneously addressed by Parliament is whether the required or optimum strength of judges, keeping the population of India as the necessary foundation, is in existence. In the present case, the Petitioner has indubitably received an elaborate hearing. Keeping the dockets on the Roster of the learned ACMM in perspective, it would have been impossible for the Court to give a day-to-day hearing. Even if it did so, the hearing itself may have stretched beyond the period of two months. If the very narrow interpretation, suggested by Mr. Mathur, is to be adopted, a fugitive criminal would easily escape extradition by initiating and then protracting proceedings in Court. A much more disturbing possibility is that a Judge may give a hurried and punctilious audience to the Petitioner and hurriedly pass an order keeping the statutory time constraints before him. Plainly, therefore, in cases where a Petitioner initiates legal proceedings, the prescribed period must be held to have come to a temporary halt or cessation and it would stand revived on the passing of an order disposing of the litigation.

31. Although in the present case there may be no impediment in the path of the Government to bring the extradition proceedings to their logical end, since the relevant period would end on 17.10.2008, we clarify that the period between 18.8.2008 and the date of the pronouncement of this Judgment would stand excluded from the prescribed prescription period of Section 24 of the Extradition Act.

32. In this analysis, we find no merit in the Writ Petition and, therefore, recall all interim Orders. Writ Petition is dismissed with costs quantified at Rupees Ten Thousand. Bail Bonds are cancelled. Surety stands discharged. Petitioner shall be taken into custody.