Niranjan Patel Vs. Uoi

Niranjan Patel Vs. Uoi

SooperKanoon Citation : sooperkanoon.com/948537

Court : Delhi

Decided On : Apr-17-2012

Judge : The Honourable Ms. Justice Mukta Gupta

Appeal No. : W.P.(CRL) 755 OF 2011 & Crl.M.A. 6299 OF 2011 (stay)

Appellant : Niranjan Patel

Respondent : Uoi

Judgement :

1. By this petition, the Petitioner seeks quashing of the order and inquiry report dated 14th May, 2011 passed by the learned Additional Chief Metropolitan Magistrate-01, Patiala House Courts, New Delhi under Section 5 of the Extradition Act, 1962 in CC. No.79/1/08 whereby the learned Additional Chief Metropolitan Magistrate recommended extradition of the Petitioner to the United States of America (USA).

2. Learned counsel for the Petitioner contends that the request for extradition made by the Government of USA was in breach of mandatory provisions of the Indo-US Extradition Treaty (in short „the Treaty?), especially Article 9(4)(a) of the said Treaty which provides that the request for extradition relating to a person, who has been convicted of an offence for which extradition is sought shall be supported by “a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that a person has been convicted”. Since copy

of conviction order has not been annexed with the extradition request, such a request becomes non-est in law and the Central Government and the learned Additional Chief Metropolitan Magistrate could not have acted on such a request. It is further contended that in the absence of a copy of the order of conviction, an adverse presumption is liable to be drawn against the Requesting State and the Union of India and a presumption in favour of the Petitioner that the judgment of conviction, if supplied, would establish the consistent case of the Petitioner that he was convicted for a political offence. Learned counsel contends that the learned Additional Chief Metropolitan Magistrate erred in concluding that the offences stated to have been committed by the Petitioner were covered under Sections 420/467/468/109/120B of the Indian Penal Code (IPC) as equivalent offences to the ones for which the Petitioner was convicted by the Courts in the USA. None of the facts or documents on record establishes the essential ingredients of offences either under Section 420 or 476 or 468 IPC and a fortiori, neither Section 109 nor Section 120-B of IPC would be applicable to the facts of the case. Lastly, the learned Additional Chief Metropolitan Magistrate has not considered other facts and circumstances pointed out by the Petitioner to oppose the request for his extradition.

3. Per contra learned counsel for the Respondent states that Article 2 of the Treaty states that an offence which is punishable by more than one year and is not a political offence is an extraditable offence. The Petitioner has been convicted and sentenced to undergo imprisonment for a period of 37 months for offences relating to visa frauds. The offences relating to visa frauds cannot fall in the category of political offences. Further the order on sentence passed by the US Courts is accompanied by a statement of conviction by the judicial authority, which was duly supplied to the Petitioner. Thus, the requirement of Article 9(4)(a) of the Indo US Extradition Treaty stands fulfilled. The Petitioner has been tried and convicted of the offences, which are not political in nature and the burden lies on the petitioner to prove that he has been extradited for political offence in case he wants to fall within the ambit of exception.

4. I have heard learned counsel for the parties.

5. Briefly the facts of this case are that on 29th June, 2007, the Petitioner was convicted by a Court in USA for offence under Title 18 US Code, Section 371, conspiracy to defraud the US, 18 USC Section 1546(a), immigration fraud and misuse of visa/permit and 18 USC Section 2 committing, aiding and abetting the commission of offence against the US and was sentenced to 37 months imprisonment vide order dated 2nd October, 2007. In November, 2007, the Petitioner left the US for India via Qatar where he was detained. The Petitioner spent a month in a jail at Qatar but was finally allowed to proceed to India. On 22nd November, 2007, INTERPOL issued a red corner notice against the Petitioner pursuant to which he was arrested in Vadodra, Gujarat on 12th July, 2008. Thereafter, on 5th September, 2008, a formal request was received from the US Government in terms of the Treaty, to initiate extradition proceedings against the Petitioner and on the basis of such request, vide an order dated 13th October, 2008 the Government of India made a request under Section 5 of the Extradition Act, 1962 for magisterial enquiry into the said request. Meanwhile, the Petitioner was granted bail on certain terms and conditions by the learned Additional Chief Metropolitan Magistrate vide order dated 20th January, 2009. On 14th May, 2011 the learned Additional Chief Metropolitan Magistrate concluded his enquiry and recommended extradition of the Petitioner to the USA. This order dated 14th May, 2011 is impugned by the Petitioner before this Court.

6. Section 2 (c) of the Extradition Act, 1962 defines “extradition offences” as:-

“(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 and includes a composite offence.”

7. Since an Extradition Treaty exists between the Government of Republic of India and the Government of the United States of America, the definition of the extradition offence as provided in this Treaty would be applicable in view of the provision of Section 2(c)(i) of the Extradition Act, 1962. Article 2 of the Treaty states:

“Article 2

Extraditable Offences

1. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists or an attempt or a conspiracy to commit, aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, any offense described in paragraph 1.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;

(b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; or

(c) whether or not it relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request, even if the latter offense is punishable by less than one year?s deprivation of liberty, provided that all other requirements for extradition are met.”

8. Further by virtue of Article 1 extradition can be sought of a person, who, by the authorities in the requesting State is formally accused of, charged with or convicted of an extraditable offence. Article 4 of the Treaty further provides that

the extradition shall not be granted if the offence for which the extradition is requested is a political offence. Article 4 of the Treaty reads as under:-

“Article 4

Political Offenses

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses:

(a) a murder or other willful crime against the person of a Head of State or Head of Government of one of the Contracting States, or of a member of the Head of State ?s or Head of Government?s family;

(b) aircraft hijacking offenses, as described in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on December 16, 1970;

(c) acts of aviation sabotage, as described in the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on September 23, 1971;

(d) crimes against internationally protected persons, including diplomats, as described in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, done at New York on December 14, 1973;

(e) hostage taking, as described in the International Convention against the Taking of Hostages, done at New York on December 17, 1979;

(f) offenses related to illegal drugs, as described in the Single Convention on Narcotic Drugs, 1961, done at New York on March 30, 1961, the Protocol Amending the Single Convention on Narcotic Drugs, 1961, done at Geneva on March 25, 1972, and the United Nations Convention against Illicit Traffic in

Narcotics Drugs and Psychotropic Substances, done at Vienna on December 20, 1988;

(g) any other offense for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; and

(h) a conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses."

9. Section 31(1) (a) of the Extradition Act provides that a fugitive criminal shall not be surrendered or returned to a foreign State if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the Magistrate or Court before whom he may be produced or Central Government that the order of requisition or warrant for his surrender is sought has been made with a view to punish him for an offence that is of a political character. Section 31(1) (a) of the Extradition Act reads as under:-

"31. Restrictions on surrender. (1) A fugitive criminal shall not be surrendered or returned to a foreign State or Common Wealth Country-

1. if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the Magistrate or Court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character;"

For this purpose, the definition of fugitive criminal is as given under Section 2(f) of this Act, which reads:
"Section 2(f) "fugitive criminal" means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State."

10. For political offences their Lordships in Rajender Kumar Jain and others v. State through Special Police Establishment and others, 1980 (3) SCC 435 observed:

“19. We may now consider Shri Ram Panjwani's argument that the Criminal law of India does not recognise 'political offences' and so there cannot be withdrawal from a prosecution on the ground that the offences involved are 'political offences'. It is true that the Indian Penal Code and the Code of Criminal Procedure do not recognise offences of a political nature, as a category of offences. They cannot, in the ordinary course of things. That does not mean that „offences of a political character are unknown to jurisprudence or that judges must exhibit such a naivette as to feign ignorance about them. Offences of a political character are well-known in International Law and the Law of Extradition. The Indian Extradition Act also refers to „offences of a political character?. For our present purpose it is really unnecessary to enter into a discussion as to what are political offences except in a sketchy way. It is sufficient to say that politics are about Government and therefore, a political offence is one committed with the object of changing the Government of a State or inducing it to change its policy. Mahatma Gandhi, the father of the Nation, was convicted and jailed for offences against the Municipal laws; so was his spiritual son and the first Prime Minister of our country; so was the present Prime Minister and so were the first President and the present President of India. No one would hesitate to say that the offences of which they were convicted were political. Even as we are writing this judgment we read in the morning's newspapers that King Birendra of Nepal has declared a "general amnesty to all Nepalese accused of political changes". The expression 'political offence' is thus commonly used and understood though perhaps 'political offence' may escape easy identification.”

11. Article 9 of the Treaty provides for the procedure and documentary requirement for extradition.

“Article 9.

Extradition Procedure and Required Documents

1. All requests for extradition shall be submitted through the diplomatic channel.

2. All requests for extradition shall be supported by:

(a) documents, statements, or other types of information which describe the identity and probable location of the person sought;

(b) information describing the facts of the offense and the procedural history of the case;

(c) a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested;

(d) a statement of the provisions of the law describing the punishment for the offense; and

(e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.

3. A request for extradition of a person who is sought for prosecution shall also be supported by:

(a) a copy of the warrant or order of arrest, issued by a judge or other competent authority;

(b) a copy of the charging document, if any; and

(c) such information as would justify the committal for trial of the person if the offense had been committed in the Requested State.

4. A request for extradition relating to a person who has been convicted of the offense for which extradition is sought shall also be supported by:

(a) a copy of the judgment of conviction or, if such copy is not applicable, a statement by a judicial authority that the person has been convicted;

(b) information establishing that the person sought is the person to whom the conviction refers;

(c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and

(d) in the case of a person who has been convicted in absentia, the documents required in paragraph 3."

12. Once a request for extradition is received in India, the Central Government may by virtue of Section 5 of the Extradition Act issue an order to any Magistrate who would have jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction to inquire into the case. Section 5 of the Extradition Act reads as under:

"5. Order for magisterial inquiry. Where such requisition is made, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case."

13. Section 7 of the Act lays down the procedure that is to be followed before the Magistrate in such an inquiry:-

"7. Procedure before Magistrate. (1) When the fugitive criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and 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.

(2) Without prejudice to the generality of the foregoing provisions, the magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show 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.

(3) If the Magistrate is of opinion that a prima facie case is not made out in support of the requisition of the foreign State, he shall discharge the fugitive criminal.

(4) If the Magistrate is of opinion that a prima facie case is made out in support of 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, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government."

14. In Sarabjit Rick Singh v. Union of India (UOI), (2008) 2 SCC 417 their Lordships held:

"34. Sections 208 and 209 of the Code of Civil Procedure, 1898 contemplate taking of such evidence as may be produced in support of the prosecution or on behalf of the accused that may be called for by the Magistrate. Compliance of the principle of natural justice or the extent thereof and the requirement of law is founded in the statutory scheme. The Magistrate is to make an enquiry. He is not to hold a trial. The Code of Criminal Procedure makes a clear distinction between an enquiry, investigation and trial. Authority of the Magistrate to make an enquiry would not lead to a final decision where for a report is to be prepared. Findings which can be rendered in the said enquiry may either lead to discharge of the fugitive criminal or his commitment to prison or make a report to the Central Government forwarding therewith a written statement which the fugitive criminal may desire to submit for consideration of the Central Government. Sub-section (2) of Section 7 envisages taking of such evidence as may be produced in support of the requisition of the foreign State as also on behalf of the fugitive criminal. It is open to the fugitive criminal to show that the offence alleged to have been committed by him is of political character or the offence is not an extraditable offence. He may also show that no case of extradition has been made out even otherwise. The Magistrate, therefore, in both the situations is required to arrive at a prima facie finding either in favour of fugitive criminal or in support of the requesting state. [See Sohan Lal Gupta v. Asha Devi Gupta (Smt) and Ors. (2003) 7 SCC492].

36. In a proceeding for extradition no witness is examined for establishing an allegation made in the requisition of the foreign State. The meaning of the word "evidence" has to be considered keeping in view the tenor of the Act. No formal trial is to be held. Only a report is required to be made. The Act for the

aforementioned purposes only confers jurisdiction and powers on the Magistrate which he could have exercised for the purpose of making an order of commitment. Although not very relevant, we may observe that in the Code of Criminal Procedure, 1973, the powers of the committing Magistrate have greatly been reduced. He is now required to look into the entire case through a very narrow hole. Even the power of discharge in the Magistrate at that stage has been taken away."

15. In Smt. Nina Pillai and others v. Union of India and others, 1997 Crl.LJ 2359, this Court, considering the scope of inquiry to be conducted by a Magistrate under the Extradition Act, observed:-

"9. We have given our careful consideration and thought to the submissions made by the learned Counsel for the petitioner. It is clear from the scheme of the Extradition Act that pursuant to a request made under Section 4 of the Act, the order contemplated to be passed for a Magisterial inquiry under Section 5 does not contemplate a pre-decisional or prior hearing. Section 5 of the Act is an enabling provision by which, a Magistrate is appointed to inquire into the case. The Magistrate on the order of inquiry being passed by Central Government issues a warrant of arrest of the fugitive criminal. The whole purpose is to apprehend or prevent the further escape of a person who is accused of certain offences and/or is convicted and wanted by the requesting State for trial or for undergoing the sentence passed or to be passed. The Act contains sufficient safeguards in the procedure to be followed in the inquiry by the Magistrate to protect the fugitive criminal. The Magistrate is to receive evidence from the requesting State as well as of the fugitive criminal. The fugitive criminal is entitled to show that the offences of which he is accused or convicted are offences of political character or not an extradition offence. Besides, the Magistrate, if he comes to a conclusion that a prima facie case is not made in support of the requisition by the requesting State, he is required to discharge fugitive criminal. The Act also has provisions under section 25 of the Act for grant of bail. The Act under section 29 confers wide powers on the Central Government to discharge the accused or cancel any warrants issued, if it finds that the application for surrender of return of the fugitive criminal has not been made in good faith. It may also discharge the fugitive

criminal in the interest of justice or for political reasons if it is unjust or inexpedient to surrender or return the fugitive criminal. We are of the view that the challenge to Section 5 of the Act on the ground that it does not provide any pre-decisional hearing or is vocative of natural justice is without any merit and misconceived and it must fail.

11. We may notice here that upon receiving information with sufficient particulars from a requesting State that a fugitive criminal is wanted for any alleged offence committed in the requesting State or for undergoing trial or sentence, the Central Government passes an order under Section 5 of the Act, appointing a Magistrate to inquire into the case. The Criminal Procedure Code also provides for the arrest of a person without warrant who is concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned in the offence, under Section 41 of the Code. Accordingly, on credible information being received from a requesting State, with sufficient particulars, about a person having been involved in any offence, the said person could be arrested in India without warrant. It is now fairly well-settled that the Magisterial inquiry which is conducted pursuant to the request for extradition is not a trial. The said enquiry decides nothing about the innocence or guilt of the fugitive criminal. The main purpose of the inquiry is to determine whether there is a prima facie case or reasonable grounds which warrant the fugitive criminal being sent to the demanding State. The jurisdiction is limited to the former part of the request and does not concern itself with the merits of the trial, subject to exceptions, as outlined in the preceding paragraph 7, in which case the request for extradition is denied by the Central Government."

16. In Kamlesh Babulal Aggarwal v. Union of India (UOI) and another, 2008(104) DRJ 178, it was observed:

"15. In our opinion, the power of the Magistrate in conducting an inquiry under Section 7 of the Act is akin to framing of the charge under Section 228 of the Code of Criminal Procedure, 1973. At the stage of the framing of charge even a strong suspicion founded upon material and presumptive opinion would enable the court

in framing a charge against the accused. At that stage, the court possess wider discretion in the exercise of which it can determine the question whether the material on record is such on the basis of which a conviction can be said reasonably to be possible. The requirement of Section 228 also is of a prima facie case. Sufficiency of evidence resulting into conviction is not to be seen at that stage and which will be seen by the trial court. At that stage meticulous consideration of materials is uncalled for. The persons who are not examined by the original investigating agency may be examined by another investigating agency to make the investigation more effective. The materials so obtained could also be used at trial. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the court is satisfied that a prima facie case is made out for proceeding further, then a charge has to be framed. The sifting of evidence at this stage is permissible only for a limited purpose to find out a prima facie case but the court cannot decide at this stage that the witness is reliable or not. At the stage of framing of charge, evidence is not to be weighed. The court is not to hold an elaborate inquiry at that stage.

16. Section 7 (3) and (4) of the Act in fact require a prima facie case only "in support of requisition". Reading the said provision Along with Section 29, we feel that the ambit of inquiry under Section 7 is in fact narrower than Section 228 Cr PC and is limited to find that the fugitive is not being targeted for extraneous reasons."

17. In the present case, the Petitioner is a fugitive convict. Thus clause 4 of Article 9 of the Treaty would be applicable according to which a copy of the judgment of conviction or if such a copy is not available, a statement by a judicial authority that the person has been convicted has to be annexed with the extradition request. Learned counsel for the Petitioner contends that non-supply of conviction order has made the request non-est in law and in absence of such an order of conviction, an adverse presumption is liable to be drawn against the Requesting State as the Petitioner was not able to prove that the offences for which he was convicted are of political character for want of the copy of conviction order. I find no merit in these contentions. Although a copy of conviction order was not

annexed with the extradition request, the order on sentence was annexed with the request in which the Sections under which the Petitioner was convicted were mentioned. Further the copy of the order on sentence was accompanied by the copy of statement indicating the offences for which petitioner has been convicted of. Article 9.4 (a) itself gives option of providing a statement by a judicial authority that the person has been convicted, if the copy of the judgment is not available. Thus the non-supply of copy of order of conviction does not ipso facto vitiate the inquiry proceedings under Section 5 of the Extradition Act.

18. From the perusal of the various provisions and decisions on the issue it is evident that extradition of a person can be sought only in a case where such a person is formally accused of, charged with or convicted of an extraditable offence by the authorities of a Requesting State and not in a case where such a request is sought for an offence that is of a political character. Further when a formal request is made under Section 5 of the Extradition Act by the Central Government a prima facie case needs to be made out in support of the requisition of the foreign state by virtue of Section 7 of this Act. If such a case is made out, the Magistrate will recommend extradition of a fugitive criminal except if it is for extraneous reasons malafidely sought. The Petitioner is, at this stage, entitled to prove that the offence for which he is convicted is a political offence and hence he should not be extradited by virtue of Section 31(1) (a) of this Act and Article 4 of the Extradition Treaty. Such an inquiry proceeding is neither a fresh trial nor is it an appeal against the order of conviction passed by the US Court. Further to show that the petitioner is being extradited for a political offence, the onus lies on the petitioner to prove the same. In the present case the petitioner has not discharged the said onus except alleging that he was convicted for political offence. Article 2(3)(a) of the Treaty also states that the offence would be an extraditable offence „whether or not the laws in the contracting States place the offences within the same category of offences or describe the offences by same terminology?. None of the grounds raised by the petitioner prove that the offences for which the Petitioner is convicted is of political character.

19. In the light of above discussion, the writ petition and application are dismissed.