* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 26.05.2017
Delivered on: 09.08.2017

\+ **W.P(CRL) 2899/2015**

OMESH CHANDER KASHYAP ..... Petitioner

versus

UNION OF INDIA ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.S.B. Upadhyaya, Sr. Adv. with Mr.B.K. Shahi, Mr.Naveen Kumar, Mr.Nishant Kumar & Mr.Ram Naresh.

For the Respondent : Mr.Rajesh Gogna, CGSC with Mr.L.Gangmei, Ms.Vipra Bhardwaj & Mr.Akhilesh Sagar.

CORAM:-
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. Omesh Chander Kashyap faced an enquiry before the learned Additional Chief Metropolitan Magistrate-01, Patiala House Courts, New Delhi in connection with his extradition to Canada and the learned Additional Chief Metropolitan Magistrate vide order dated 31.03.2015, after a full fledged enquiry under Section 7 of the Extradition Act, 1962 (hereinafter called as 'Act') recommended for the extradition of the petitioner to Canada, the requesting State. The

Government of India through the Ministry of External Affairs, CPV Division (Externment Section), vide order dated 04.12.2015 communicated to the petitioner that the Central Government intends to accept the enquiry report of the learned Magistrate for extraditing the petitioner, and such intimation was in the nature of a notice to the petitioner to avail of his remedies as against such acceptance of the enquiry report for extraditing him.

2. By the present writ petition, the report of the learned Additional Chief Metropolitan Magistrate dated 31.03.2015 under Section 7 of the Act and the decision of the Central Government to accept such report vide communication dated 04.12.2015 are sought to be quashed as being without application of mind and against the tenets of extradition laws.

3. The note verbal No.0004 dated 06.01.2003 from the Canadian High Commission making a request for the extradition of the petitioner was received in the Ministry of External Affairs, Government of India. Pursuant to such a request, the Government of India, in exercise of its powers under Section 5 of the Act, made a request to the learned ACMM-01 by letter dated 24.03.2003 to enquire into the case of the petitioner regarding his extradition. In the aforesaid note verbal No.0004 dated 06.01.2003 (Exh.CW-1/A), the following charges were levelled against the petitioner for his extradition to Canada:-

i) Indecent assault on Maureen Williams between 29.12.1978 and 14.05.1980 near St.John's, New foundland, attracting the offence under Section 149(1) of the Criminal Code of Canada;

ii) During the same period, unlawful commission of acts of gross indecency with Maureen Williams, offending Section 157 of the Criminal Code of Canada;

iii) Unlawfully committing sexual assault upon Tina Hollihan on or about 28.02.1990 which is contrary to Section 271(1)(a) of the Criminal Code of Canada

iv) Sexual assault on Mary Anne Thorne between 08.01.1990 and 07.03.1990 at St.John's New foundland, which is an offence under Section 271(1)(a) of the Criminal Code of Canada.

4. In support of the aforesaid charges, a number of documents were also sent to the Government of India which were, in turn, transmitted to the Court of learned ACMM holding enquiry against the petitioner.

5. The petitioner appeared before the learned ACMM and was granted interim bail on 11.07.2003 which was confirmed on 27.08.2003.

6. The learned ACMM, found that the offences listed by the Government of Canada were covered under Article 3 of the Extradition Treaty between Government of Canada and Government of India which came into force on 07.08.1987. The learned ACMM after examining one witness namely Sh.D.K.Ghosh, Consultant, Ministry of External Affairs and taking into account the documentary evidence including the affidavits of the victims, the documents brought on record by Sh.D.K.Ghosh and the statement of the petitioner as well as the documents brought on record by him came to the conclusion that prima facie, a case was made out for extradition of

the petitioner to the requesting State for facing trial. As such by order dated 31.03.2015, the petitioner was recommended for his extradition to the requesting State.

7. The petitioner was informed of his right to file a written statement/representation in accordance with Section 7(4) of the Act, which the petitioner filed before the Central Government.

8. The petitioner had earlier challenged the enquiry report of the Magistrate before this Court vide Crl.M.C.No.1936/2015. In the aforesaid proceeding, taking into account the fact that extradition process was pending before the Central Government and there was an apprehension in the mind of the petitioner that he shall be extradited, a bench of this Court directed that if at all the Central Government is inclined to accept the enquiry report, an advance notice be given to the petitioner so that, if necessary, he may proceed for the remedies available to him in law. A bench of this Court in Bail Appln. No.1091/2015 also granted bail to the petitioner vide order dated 29.05.2015.

9. Thereafter, the petitioner received a communication dated 04.12.2015 by the Central Government; the operative portion of which reads as follows:-

> *"I am directed to refer to your written statement dated 07.04.2015 in the case of the request of the Govt. Of Canada for the extradition of Mr. Omesh Chander Kashyap from India, pursuant to Section 7 (4) of the Extradition Act, 1962*
>
> *2. The written statement/representation has been carefully examined by the Central Government in light of*

the provisions of Section 29 of the Extradition Act, 1962, which provide as follows:-

> *"if it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise, it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order, at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged."*

3. It is observed that the averments made in the written statement/ representation were also made before the Hon'ble Enquiry Magistrate, who, after examining the facts placed before him in the extradition proceedings has recommended the extradition.

4. After careful consideration of the matter, including the report of the Enquiry Magistrate dated 31.03.2015; the written statement submitted by Bishwajit Kumar Shahi, Advocate on behalf of the petitioner Omesh Chander Kashyap dated 07.04.2015; the provisions of the Extradition Treaty between the Government of the Republic of India and the Government of Canada; the provisions of the Extradition Act, 1962 and especially that of Section 29 of the Extradition Act, the Central Government is inclined to accept the extradition request made by the Government of Canada for the extradition of Omesh Chander Kashyap.

5. This may kindly be treated as an advance notice of seven days or the purpose of extradition of Mr. Omesh Chander Kashyap to Canada in terms of the judgment of

the Hon'ble High Court of Delhi dated 19.05.2015 read with the judgment of Hon'ble Court dated 29.05.2015.

6. This issues with the approval of the competent authority."

10. By the present petition, the petitioner has challenged the aforesaid communication which is in the nature of an order-cum-notice to him that the inquiry report, recommending the extradition of the petitioner to the Government of Canada, has been accepted by the Central Government. Since the proceeding in Crl.M.C.No.1936/2015 referred to above was still pending consideration and had not been finally disposed of, the present case was directed to be listed along with Crl.M.C.No.1936/2015 and a direction was issued vide order dated 09.12.2015 not to extradite the petitioner in the meanwhile.

11. Now to the basic merits of the case as to whether any interference is required either with respect to the finding arrived at by the learned ACMM in inquiry report under Section 7 of the Act or the decision of the Central Government in terms of Section 8 of the Act.

12. In order to appreciate the contentions of the parties i.e. the petitioner and the Central Government, it would be first necessary to note certain key provisions of the Extradition Act, 1962 which will have a direct bearing on the facts of the present case.

13. Sections 4 & 5 of the Act deal with requisition for surrender of a fugitive criminal of a foreign State and on such requisition, the competence of the Central Government to direct an inquiry into the offence by a Magistrate.

*4. **Requisition for surrender**. A requisition for the surrender of a fugitive criminal of a foreign State may be made to the*

Central Government-- (a) by a diplomatic representative of the foreign State at Delhi; or (b) by the Government of that foreign State communicating with the Central Government through its diplomatic representative in that State and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of the foreign State the Government of India.

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."*

14. On the request of the Central Government, the Magistrate concerned is required to inquire into the case in the same manner and with the same jurisdiction and powers, as nearly as it may be, as if the case were one triable by a Court of Sessions or High Court. While inquiring into the case, the Magistrate is also required to take such evidence as may be produced in support of requisition or on behalf of the a fugitive criminal. A fugitive criminal would be entitled to show that the offences for which he is sought to be extradited are of political character and, therefore not an extraditable offence.

15. If the Magistrate, inquiring into the case is prima facie of the view that the fugitive criminal ought not to be extradited, he shall discharge the aforesaid fugitive criminal. In case the opinion is otherwise, the fugitive criminal is required to be committed to prison to await the orders of the Central Government and send the enquiry report to the Central Government along with the written statement of the fugitive criminal, should such a statement be filed on his behalf,

for the consideration of the Central Government. On receipt of such a report and the written statement on behalf of the fugitive criminal, the Central Government has to take a decision whether to extradite the fugitive criminal or not and in case it forms an opinion favouring the surrender of the accused to the requesting State, a warrant for the custody and removal of the person concerned is issued for sending the fugitive criminal to the requesting State.

> *"(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 extraditions 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*

8. Surrender of fugitive criminal *– If upon receipt of the report and statement under sub-section (4) of Section 7, the Central Government is of opinion that the fugitive criminal ought to be surrendered, to the foreign State, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant."*

16. Section 10 of the Act deals with the material which could be received in evidence by the enquiry Magistrate:-

10. ***Receipt in evidence of exhibits, depositions and other documents and authentication thereof.***

(1) In any proceedings against a fugitive criminal of a foreign State under this Chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence.
(2) Warrants, depositions or statements on oath, which purport to have been issued or taken by any court of justice outside India or copies thereof, certificates of, or judicial documents stating the facts of, conviction before any such court shall be deemed to be duly authenticated if- - (a) the warrant purports to be signed by a judge, magistrate or officer of the State or country where the same was issued or acting in or for such State or country; (b) the depositions or statements or copies thereof purport to be certified, under the hand of a judge, magistrate or officer of the State or country where the same were taken, or acting in or for such State or country, to be the original depositions or statements or to be true copies thereof, as the case may require; (c) the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a judge, magistrate or officer of the State or country where the conviction took place or acting in or for such State; (d) the warrants, depositions, statements,

copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State or country where the same were issued, taken or given."

17. It would also be necessary, in this context to refer to the provisions of Sections 24, 25 & 29 of the Act.

***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 1*xxx 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.*

***25. Release of persons arrested on bail-**In the case of a person who is a fugitive criminal arrested or detained under this Act, the provisions of the Code of Criminal Procedure, 1973 relating to bail shall apply in the same manner as they would apply if such person were accused of committing in India the offence of which he is accused or has been convicted, and in relation to such bail, the magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers and jurisdiction as a court of session under that Code.*

***29. Power of Central Government to discharge any fugitive criminal-**If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise, it is unjust or inexpedient to surrender or return the fugitive criminal, it*

may, by order, at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged."

18. Thus, if a fugitive criminal has been committed to prison to await his surrender to the requesting State but has not been conveyed out of India within two months of such committal, the aforesaid fugitive criminal shall be discharged unless sufficient cause is shown to the contrary.

19. The Central Government is further authorized to discharge any person, at any stage, which would include the stage of pendency of an inquiry under Section 7 of the Act, if it appears to it that the charges against the fugitive criminal are trivial or that the extradition has not been sought in good faith or in the interest of justice or is being sought for political reasons, rendering the extradition to be unjust or inexpedient. The same very conditions have been laid down under Section 31 of the Act which lists certain restrictions on surrender.

31. Restrictions on surrender-*A fugitive criminal shall not be surrendered or returned to a foreign State (a) 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; (b) if prosecution for the offence in respect of which his surrender is sought is according to the law of that State or country barred by time; (c) unless provision is made by that law of the foreign State or in the extradition treaty with the foreign State that the fugitive criminal shall not be determined or tried in that State for an offence other than-*

- (i) the extradition offence in relation to which he is to be surrendered or returned; (ii) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or (iii) the offence in respect of which the Central Government has given its consent;] (d) if he has been accused of some offence in India, not being the offence for which his surrender or return is sought, or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise; (e) until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.

For the purposes of sub-section (1), the offence specified in the Schedule shall not be regarded as offences of a political character. (3) The Central Government having regard to the extradition treaty made by India with any foreign State may, by notified order, add or omit any offence from the list given in the Schedule."

20. The purpose of an inquiry under Section 7 of the Act is only to determine whether there is a prima facie case or existence of reasonable grounds warranting a fugitive criminal to be sent to the requesting State. It is not the purpose of the inquiry to decide about the guilt or innocence of a fugitive criminal. The jurisdiction of the Magistrate is limited to only finding out as to whether the offences for which a fugitive criminal is charged are extraditable offences and are not of political character. The inquiry before the Magistrate under Section 7 of the Act is not a full fledged trial but is limited to finding out whether a prima facie case is made out or not for surrendering a fugitive criminal.

21. The next issue involved would be as to what material would constitute evidence before a Magistrate for him to take a decision. Section 10 of the Act clearly embodies the receivable materials by the inquiring Magistrate. The consistent view of the Courts in India has been that in an inquiry conducted on the request of the Central Government, a Magistrate is only required to find out whether a prima facie case is made out for the extradition. The mode and the manner of inquiry as defined in the Act clearly makes out that there is no insistence on any strict standard of proof.

22. Likewise, it would be difficult to conceive of a situation where a superior Court, while entertaining a writ petition would look into the merits of the inquiry report as if it were deciding an appeal against a judgment of conviction. A limited judicial review is permissible in cases of this kind. What is required to be seen is whether the procedure provided for the inquiry has been complied with and whether the inquiry report has been formulated within the parameters of law in the context of the provisions of the Extradition Act, 1962.

23. The contentions of the petitioner as against the enquiry report, recommending his extradition, has to be tested on the touchstone of above propositions.

24. A bare perusal of the enquiry report reveals that the entire documents placed before the learned Magistrate was taken into account. The defence of the petitioner was also recorded. It was suggested by the petitioner before the Magistrate that the request for his extradition was out of malafides and vengeance on the part of the Canadian Government. The petitioner was a practicing psychiatrist in

St.John's, New Foundland, Canada and during his stay in Canada, a mammoth scandal of child sexual abuse by ecclesiastical authorities was reported, leading to resignation of many senior Episcopal/temporal authorities of the Church. The Government of Canada was interested in hushing up the controversies. In that context, the petitioner had submitted a psychiatry report of a child to the Court of Judge Reid. This report was not liked by people in the authority. The inquiry into such child abuse remained dormant for a number of years and news about it started pouring in only from 1988. On public protest, a Royal Commission of Enquiry was constituted to examine the charges regarding the sexual abuse of young boys at Mount Cashel Orphanage. In the aforesaid enquiry, the petitioner also participated. Because of his depositions in the inquiry, the Government of the day was not happy. There were widespread resentment against him, which forced him to come back to India. Many years thereafter, such a request was made by Government of Canada.

25. It appears from the records that a warrant of arrest had been issued against the petitioner on September 17, 1991 by a Court in Canada. The charges leveled against the petitioner were found to be akin to offences under Sections 354 and 509 of the IPC, punishment for which at both the places i.e. at the requesting State as well in this country is more than one year. The offences alleged against the petitioner were not found to be of political nature. The perspective of the learned Magistrate is clearly revealed by the following observations in the Inquiry report:-

" Now the only requirement to be satisfied is 'Prima facie case'. In this regard law is well settled that being Enquiry Court this court is not required to appreciate the evidence on merits. The only consideration before this court is to examine the case to form an opinion whether FC can be put to trial on the basis of information received and its admissibility.

The Ld counsel for the FC has raised two fold contentions in support of his defence. The first contention of Ld counsel for FC is that FC stayed in the Requesting State upto February 1991 and thereafter again visited in March 1991 for two months. Till that time no complaint was pending against him. Even after institution of the criminal proceedings he was never summoned or called in the Requesting State and therefore he cannot be considered as fugitive criminal.

The second contention raised by the Counsel for FC is that the extradition proceedings are initiated against the FC out of vengeance and as a political and a religious persecution. Ld counsel for FC elaborated that the FC was a renowned psychiatrist at the Requesting State during 1975-1976 when a gigantic scandal was exposed by him involving widespread sexual and physical abuse to children on the part of clergy (Christian brothers) in the province of New found land and Labrador in Canada. The said scandal was widely publicized forcing high ranking officials to resign from the positions due to the testimony of the FC before the Court and subsequently before Royal Commission of Inquiry. Ld counsel for the FC stressed that due to exposure of the scandal the FC had to leave the said country and to return his home in India. After his return he was falsely implicated in the instant proceedings out of vendetta and revenge. Ld counsel for FC further submits that the entire scandal was penned down by Michael Harris in his book titled "Unholy orders".

However, the contentions raised by Counsel for FC are his defence which can be considered during trial

only. This Court being an Enquiry Court cannot out rightly reject the sworn testimony in the form of affidavits of the victims without giving them an opportunity to prove their case. Further the victims are innocent persons having no grievance against the FC as admitted by FC during his cross examination. Further warrant of arrest against FC was issued by a Judicial Court after perusing the record which has to be honoured.

In view of above discussion, I am of the considered opinion that prima facie case is made out for Extradition of the FC Omesh Chander Kashyap to the requesting State to stand trial. Hence, I hereby recommend to Union of India the extradition of the fugitive criminal Omesh Chander Kashyap to the Requesting State i.e. Canada. Enquiry concluded accordingly.

A copy of this report be sent to UOI through the Ld. SPP for UOI and one copy be given to the fugitive criminal free of costs. The fugitive criminal is also being informed of his right to file the written statement/representation as per section 7(4) of Extradition Act, 1962.

File be consigned to Record Room."

(Emphasis provided by me)

26. Taking into account the limited nature of inquiry under Section 7 of the Act, this Court does not find any perversity or illegality in the report recommending for extradition of the petitioner.

27. Assailing the decision of the Central Government in accepting the report of the Magistrate, it has been submitted that surrender or extradition of the petitioner has a direct bearing to his rights under Article 21 of the Constitution of India and, therefore, the provisions of Sections 24 & 29 of the Act has to be strictly interpreted/enforced.

28. It has been submitted that Section 24 of the Extradition Act mandates that if a fugitive criminal has not been conveyed to the

requesting State within two months of his committal to the prison, he has to be discharged unless sufficient grounds are shown for not discharging him. The report of the Magistrate, it has been argued was submitted on 31.03.2015 and the decision of the Central Government to accept the same was taken on 04.12.2015. The petitioner was granted bail on May 29, 2015. It has further been submitted that there was no stay over the proceedings pending with the Central Government. In that view of the matter, the petitioner, is required to be discharged as he could not be conveyed within two months of his committal to the prison. It has next been submitted that Section 29 of the Act read with Article 5 of the Extradition Treaty between India and Canada provides that extradition may be refused if: a) the offence is of a political character; b) if the request is out of malafides i.e. not in good faith or not in the interest of justice or unjust and c) if it is otherwise inexpedient to surrender the fugitive criminal. In the aforesaid context, it has been submitted that the request for extradition was made almost 27 years after the date of the alleged offences. The petitioner had been a resident of Canada till 1991 and during his stay in Canada, there was no accusation or complaint against him. Apart from this, the inquiry under Section 7 also was conducted for 10 long years. The petitioner is stated to be 85 years of age, having no criminal case against him in this country. On the strength of the aforesaid, it was submitted that the request for surrender is highly oppressive; has not been made in good faith; is inexpedient and not in the interest of justice.

29. It has been argued on behalf of the petitioner that the decision of the Central Government is not an informed decision as none of the grounds mentioned in Section 29 of the Act has been addressed and there has been a mechanical formation of opinion for accepting the inquiry report.

30. Mr.S.B.Upadhyay, learned senior advocate appearing for the petitioner has also drawn the attention of this Court to Article 4 of the Treaty which provides that the request for extradition may be refused if a fugitive could be tried for the concerned offence in his own country. It has been submitted that this provision of the Treaty is in tune with the requirements under Section 34 & 34A of the Extradition Act, 1962 which provide that an extradition offence committed by any person in a foreign country shall be deemed to be committed in India and such person shall be liable to be prosecuted in India for such offence and if the Central Government is of the opinion that a fugitive criminal cannot be surrendered, it may take steps to prosecute him in India.

31. The petitioner has also raised the plea that no grounds have been discussed in the order of the Central Government and thus it is a non-speaking order which is an anathema in modern day decision making process.

32. A reference has been made to a decision rendered by the Supreme Court in ***Kranti Associates Pvt Ltd and Anr. Vs. Masood Ahmed Khan and Ors, (2010) 9 SCC 496*** wherein the Supreme Court after analyzing the decisions of various Courts has summarized the importance of a reasoned order as follows:-

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is

faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37].)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v.University of Oxford [2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

33. As opposed to the aforesaid contentions raised on behalf of the petitioner, Mr.Rajesh Kumar Gogna, learned CGSC has argued that the petitioner has not yet been conveyed to the requesting State because of the deference to the Court orders, which though did not stay the extradition of the petitioner in specific terms, but directed for

giving an opportunity to the petitioner to avail of his remedies and which the petitioner did by preferring a Crl.M.C. No.1936/2015 and the present writ petition. That apart, it has been argued that the requirement of Section 24 of the Act is attracted when a fugitive criminal is committed for being conveyed to the requesting State in prison and has not been surrendered within two months of the committal. In the present case, it has been argued that within 60 days of his committal, the petitioner was granted bail and it does not make any difference if he was released after 60 days. The petitioner, it has again been suggested cannot take advantage of his own efforts in forestalling his extradition to the requesting State.

34. Mr.Gogna has next argued that an order for inquiry under Section 5 of the Act and a decision whether to accept or not to accept the report of the Magistrate under Section 8 of the Act are sovereign functions which cannot be reviewed judicially. It has been submitted that Chapter 2 of the Extradition Act is a complete Code in itself and deals with all the circumstances which may be encountered by the Central Government from the date of receipt of the requisition for surrender and handing over the custody of the fugitive criminal to the requesting State. The provisions of Section 29 of the Act is exercised by the Central Government at its discretion and on satisfaction of certain conditions namely extraditable offence being trivial, request for surrender been politically motivated and the extradition to be unjust, unfair and inexpedient in the interest of justice. So far as the decision on the aforesaid issues are concerned, it is in the domain of the sovereign functions of the State and no fetters could be put on the

Central Government for exercising sovereign powers. Section 8 of the Act does not contemplate of providing any detailed reason for accepting the report of the inquiry by the Magistrate. Once such a report is accepted, it tantamounts to the State having taken a conscious decision to surrender the fugitive criminal to the requesting State after taking into consideration the requirements under Section 29 of the Act. The decision under Section 29 of the Act could be taken even during the pendency of the enquiry under Section 7 of the Act. Nonetheless, once a decision has been taken, it presupposes an informed decision, taking into account the relevant factors i.e. non trivial nature of the offence alleged and the same being not of a political character. In case the report is not accepted, then only a detailed reason has to be given for such non acceptance. Lastly, it has been argued that a judicial review of such action of the State is very limited. A reference has been made to the decision of the Supreme Court in ***Sarabjit Rick Singh vs. Union of India*, *(2008) 2 SCC 417*** wherein it has been held as follows:-

> *"**49.** The superior courts while entertaining a writ petition exercise a limited jurisdiction of judicial review, inter alia, when constitutional/statutory protection is denied to a person. But when it is required to issue a writ of certiorari, the order under challenge should not undergo scrutiny of an appellate court. Jurisdiction of the superior court in this behalf being limited inter alia to the question of jurisdiction, it was obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the court while exercising the statutory powers. Contention in regard to prejudice in such a situation is required to be considered. A person informed in law and having taken all possible objections*

evidently knew that non-disclosure of Statute 846 in verbatim did not prejudice him. Had he been prejudiced he would have taken the said point at the outset. He did not do so. We are, therefore, of the opinion that it is not possible for us to allow the appellant to raise such a contention for the first time before us."

35. In ***Darshan Kumar vs. Union of India, 1998 SCC Online Del.234***, a bench of this Court held as follows:-

> ***"18.*** *We have examined the original file produced for our perusal by learned Counsel for the respondent in which opinion of the Extradition Magistrate was examined as also the record of the Extradition Magistrate. Respondent No. 2 on the basis of the material on record came to the conclusion that "in view of the enabling clauses of the Indian Extradition Act and the treaty with Canada, as well as the purely criminal nature of the offences, alleged to have been committed by Darshan Kumar, it will be expedient to extradite him". This Court in exercise of its powers of judicial review under Article 226 of the Constitution of India, will not substitute its own opinion to that of the Government since Court is not sitting in appeal over the decision of the Government. The Court is only concerned with the decision making process. There is nothing wrong in the decision making process. Not only the opinion of the Extradition Magistrate, but also other relevant documents including the representation of the petitioner dated 2.4.1997 was before respondent No. 2, which as per the notings on the file was duly considered and in the light of the requirements of Section 29 of the Act, appropriate orders in accordance with the provisions of the Act was passed. There is nothing to suggest that the said material was not duly considered by the respondent. Neither the Extradition Magistrate nor respondent No. 2 are concerned with the merits of the case in which petitioner is involved.*

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20. *This submission deserves outright rejection. The opinion that a* ***prima facie*** *case is made out in support of the requisition of a foreign State; as envisaged in Sub-section (4) of Section 7 of the Act, is the opinion on the requisition of the Foreign State for surrender of a fugitive criminal. Section 7 has to be read in the light of the provisions of Section 29. Only the Central Government is to take into consideration the nature of a case whether it is trivial or not alongwith other factors. On consideration of those factors, the request of the Foreign State may be allowed or declined by Central Government. Magisterial inquiry is confined to the extent of considering the question as to whether the offence alleged against the fugitive criminal is or is not an extradition offence or that the offence is not of a political nature. The Magistrate rightly did not go into those questions raised on behalf of the petitioner that he was not guilty of the offence alleged for which it was rightly remarked that he can appear and defend himself before the appropriate Court in Canada and face the trial."*

36. On the requisition/request of a foreign country, if the Central Government directs for an inquiry into the offence against a fugitive criminal, such inquiry is only for a limited purpose of finding out as to whether there is a prima facie case for extradition of the person concerned, in which event, it is to be decided by the Magistrate that the offence is not of a political character and it is an extraditable offence. Since the Magistrate, while holding an enquiry under Section 7 of the Act acts judicially, the report would be amenable to the writ jurisdiction as the same would be revisable. But what is to be seen by

the superior Court is whether the inquiry was conducted in a proper manner as contemplated under Section 7 of the Act. It is almost well settled that such an enquiry would not be a kind of trial for finding out the guilt or innocence of the fugitive criminal but only for the purposes of accepting the requisition of the demanding State. The provisions of Section 10 of the Act further make it clear as to what materials are receivable as evidence for the Magistrate to form an opinion. In the absence of any requirement of taking oral evidence, it can safely be concluded that such an inquiry is not a trial and, therefore, the standard of proof also would also not be the one which is seen in an ordinary trial. Similarly, it is the discretion of the Central Government to either accept the report or to reject the same. If it accepts the report recommending the extradition, necessary warrant for the custody and removal of a fugitive criminal is issued for his delivery at a designated place. The Central Government, could form its opinion regarding discharge of a fugitive criminal even during the pendency of the enquiry under Section 7 of the Act.

37. Though a detailed reason by the Central Government in accepting the report of the inquiry Magistrate is not contemplated under Section 8 of the Act, nonetheless this Court does not accept the proposition of the respondent that the decision of the Central Government, in this regard would not be amenable to writ jurisdiction as it is a sovereign function of the State, prohibiting any judicial scrutiny of the same.

38. The concept of sovereign immunity has undergone a great change with the passage of time. The original concept of sovereignty

was of a unitary State where a "sovereign" was a political superior who was not subject to any other political superior. Today, sovereignty vests with people. In fact the Preamble to the Constitution of India itself suggests that the people of the country are sovereign. The English doctrine of Parliamentary sovereignty held sway over a long period of time. But, later ideas started gaining ground that it is the people who are sovereign and who elect the Parliament. The source of power to a sovereign flows from people. The archaic concept of sovereignty, therefore, does not survive today. Since sovereignty vests with people, it is difficult to accept the argument that a decision of the State when it is relatable to the liberty or the life of a person, remains a sovereign function eliminating any scrutiny or judicial review. The Legislature, the Executive and the Judiciary have been created to serve the people. True it is that there are certain functions of the State like defence of the country, International relationship with countries, foreign affairs, decision regarding waging war, power to acquire and retain territory are some of the decisions which may not be amenable to the law of the land but if the function of a State like any welfare activity or any other Governmental function cannot remain excluded from the judicial scrutiny, more so when it concerns the fundamental right of life of a citizen or a person.

39. The very scheme of the Extradition Act, 1962 dispels the presumption of such functions being sovereign in nature. Otherwise there would have been no requirement of entrusting an inquiry to a Magistrate for finding out whether the requisition is for an offence which is extraditable or not or whether the offence charged against the

fugitive criminal is or is not of a political nature. The very element of an inquiry by a judicial Magistrate, takes away such function of extraditing a fugitive criminal from the pale of clear sovereign functions which admits of no interference. Any action of the State has to be an informed action and within the parameters of law. Otherwise the whole purpose of setting up the process of law would be defeated.

40. Having said that, the other proposition that similar restrictions are implicit in exercise of judicial review by a Court of law is also reiterated. From a reading of Section 8 of the Act, it does not appear that there is any requirement of giving a detailed reason for accepting the report of the Magistrate. The safeguard to a fugitive criminal for a just decision is ensured by a judicial inquiry. The inquiry report being amenable to judicial scrutiny is also a check on the procedure being fair and equitable. No further check value at the stage of a decision under Section 8 of the Act is called for.

41. A conjoint reading of Sections 8 and 29 of the Act makes it very evident that the Central Government is perfectly within its powers to decline the request for extradition under certain circumstances and discharge the fugitive criminal. Such a decision could be taken even during the pendency of the enquiry under Section 7 of the Act or after the report has been submitted. The discharge under Section 29 of a fugitive criminal can only be directed if a decision to accept the enquiry report under Section 8 of the Act is not taken. Once the report is accepted under Section 8 of the Act, there is no question of discharge of the fugitive criminal under Section 29 of the Act. Section 29 of the Act merely provides the power to the Central Government to

take a decision unilaterally, even in the event of it directing for an inquiry under Section 5 of the Act or the pendency of the inquiry under Section 7 of the Act. However, such powers are subject to the decision of the Central Government under Section 8 of the Act. If the Central Government has taken a decision under Section 8 of the Act to accept the enquiry report, it definitely presupposes that the Central Government has taken a call after taking into account that the offences charged against the fugitive criminal are not trivial in nature and that the extradition has been made in good faith, in the interest of justice and is not politically motivated. The decision to accept the report of the Magistrate can only be based on a finding that it is not unjust or inexpedient for surrendering/returning the fugitive criminal.

42. An informed/reasoned decision is indicative of application of mind. The reasons have already been recorded in the report under Section 7(4) by the inquiry Magistrate. If it is accepted by the Central Government, it amounts to ratification/confirmation of the same grounds and no further expatiation over the issues are required. If the Central Government takes a decision, differing with the report, or during the pendency of the inquiry, takes a decision in terms of Section 29 of the Act, then reasons for the same may be required to be stated.

43. In the present case, the Central Government vide the impugned notification has communicated to the petitioner that all the grounds urged by him and the provisions of the Extradition Act have been considered and the report of the Magistrate is accepted. In the opinion of this Court, no further reasons are required to be given. This is not

because of the aforesaid function of the State being a sovereign one, but because the reasons have already been given in the inquiry report and which has only been ratified by the Central Government.

44. After the perusal of the inquiry report and the decision of the Central Government, this Court is of the opinion that all the necessary materials have been adverted to by the Magistrate as well as the Central Government. The offences for which the petitioner has been charged are extraditable offences, being punishable in both the countries (India and Canada) and are not barred by limitation in the requesting country. The materials provided to the Magistrate under Section 10 of the Act have been gone into and it has rightly been held that the grounds of political vendetta raised by the petitioner are only in the nature of his defence, consideration of which was beyond the scope of enquiry under Section 7 of the Act.

45. After giving an anxious consideration to the entire materials, this Court is of the view that no interference is called for either with respect to the report of the Magistrate or the decision of the Central Government to accept the report recommending the extradition of the petitioner.

46. The writ petition, therefore, fails.

47. However, taking into account the fact that the petitioner has participated in the inquiry proceeding diligently for a very long time, it is directed that the petitioner be not extradited for a period of 30 days, to be counted from the date of pronouncement of this order so as to enable him to avail of his remedies available to him under the law.

48. The writ petition is thus disposed of with the aforesaid observations.

CRL.M.A.18022/2015 (stay) & 5905/2016 (for discharge)

1. In view of the main petition having been dismissed, these applications have become infructuous.

2. The applications are disposed of accordingly.

ASHUTOSH KUMAR, J

AUGUST 09, 2017
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