
(2004) 02 DEL CK 0015

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 1469 of 2003

Pragnesh Desai

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 05-02-2004

Acts Referred:

Citation : (2004) 1 AWC 899 : (2004) 73 DRJ 84

Hon'ble Judges : D.K. Jain, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Maulik Nanavati, for the Appellant; K.K. Sud, Addl. Solicitor General, Satish Aggarwal, Jayant K. Sud and Neeraj Jain, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.—Challenge in this writ petition, under Articles 226 and 227 of the Constitution, is to the legality and validity of order dated 23 October 2003, passed by the Government of India, against the petitioner u/s 5 of the Indian Extradition Act, 1962 (for short "the Act") and to his continued judicial custody.

2. The factual background, on which the foundation of this judicial action is laid, is as follows:

The petitioner, though of Indian origin being born in India, is a naturalized citizen of the United States of America and is a permanent resident of that country. On or about 7 February 2003 the petitioner and his fiancée, namely, Leona Swiderski, flew to India. Upon arrival at Bombay, they got separated at the airport. The petitioner claims to have lodged a missing report at the police station on the same day. On or about 8 February 2003, the police found the body of Leona Swiderski lying by the side of the road at Ahmedabad national highway No. 8, near Varsova village. Autopsy conducted by the local authorities revealed that her death was caused by asphyxia due to strangulation. The petitioner was arrested on 11 February 2003 and was charged with the murder of Leona Swiderski. However, he was acquitted by the Sessions Court, Thane, on 26

September 2003.

3. While the petitioner was in judicial custody pending trial before the Sessions Court, Thane, on or about 5 May 2003, the United States District Court for the District of New Jersey registered a complaint (No. 03-8042) against the petitioner charging him with one count of wire fraud (engaging in a scheme to obtain money and property by false and fraudulent pretenses, representations and promises, by transmitting and causing to be transmitted in interstate and foreign commerce by means of wire communication, certain writings, signs and signals and pictures for the purposes of executing such scheme) for the purpose of obtaining a \$ 1 Million life insurance policy on the life of Leona Swiderski, in violation of Title 18, United States Code, Sections 1343 and 2. The Magistrate Judge also issued a warrant for the arrest of the petitioner based on the charges contained in the complaint.

4. On 7 May 2003, the Embassy of the United States of America made a request to the Government of India, Ministry of External Affairs, to provisionally arrest the petitioner for the purpose of his extradition, as the petitioner was wanted in the United States to stand trial for the aforementioned offences. In the said request it was also mentioned that provisional arrest is covered by Article 12 of the Extradition Treaty between the United States and the Republic of India, signed on 25 June 1997, entered into force on 21 July 1999. The said offence was stated to be covered by Article 2 of the Treaty. Subsequently, vide Embassy note dated 23 July 2003, supporting material for United States' request for extradition of the petitioner was furnished to the Government of India.

5. Pursuant to the request received from the Embassy of United States, the petitioner was provisionally arrested on 8 October 2003, but was released on bail on 10 October 2003 by the Chief Judicial Magistrate, Thane. On 23 October 2003 the Government of India, Ministry of External Affairs, (CPV Division) Extradition Section, issued an order u/s 5 of the Act requesting the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi to enquire into the alleged offences. On the basis of the said order, the petitioner was produced before the Chief Judicial Magistrate, Thane on 29 November 2003 for taking him into magisterial custody. The Magistrate took the petitioner in custody and directed the police to produce him before the Court concerned in New Delhi. Accordingly, the petitioner was brought to Delhi in custody and produced before the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi, who committed the petitioner to judicial custody on 2 December 2003. Since then the petitioner is in custody in Central Jail, Tihar. Petitioner's bail application was rejected by the Magistrate. As noted above, order dated 23 October 2003 is the subject matter of challenge in this petition.

6. We have heard Mr. Maulik Nanavati , learned counsel for the petitioner and Mr. K.K. Sud, learned Additional Solicitor General of India.

7. Mr. Nanavati, learned counsel for the petitioner, has strenuously urged that

since no request for extradition of the petitioner to the United States had been received within sixty days of his provisional arrest, as stipulated in Section 34B of the Act, his detention beyond the period of sixty days from 8 October 2003 is illegal. It is also submitted that the impugned order, issued u/s 5 of the Act, is otherwise not sustainable because it has been issued without any application of mind on the part of the Government of India. The submission is that though the petitioner is alleged to have committed an offence in the United States, he has been wrongly labelled as a fugitive inasmuch as he is not fleeing away from law nor is he trying to avoid his return to the United States and had in fact approached the United States Embassy at Bombay to extend his visa to enable him to travel back to the United States; the offence with which he has been charged in the United States is a bailable offence and he cannot be arrested in India for the said offence and he was prevented from traveling back to his country because of requisite travel documents. Learned counsel asserts that none of these vital aspects have been taken into consideration while passing the impugned order. It is also contended that in the light of the protection available to the petitioner under Article 21 of the Constitution, reasonable time limit has to be read in Sections 5 and 7 of the Act, so that a person is not kept in custody for long on account of delay in magisterial inquiry u/s 5 or in passing of final orders by the Central Government u/s 7 of the Act.

8. Per contra, learned Additional Solicitor General has submitted that though a request for petitioner's provisional arrest, surrender and return to the United States had been received by the Government of India on 7 May 2003 and 24 July 2003 respectively, but since during this period he was facing trial in Thane Sessions Court and the final outcome of the trial was not known, these requests could not be given effect to. Immediately on his release upon acquittal, follow up action was taken, which included an order u/s 5 of the Act. It is submitted that no fresh request u/s 37B(2) of the Act was required from the United States, after the petitioner was provisionally detained. Insofar as the stand of the petitioner that he was ever willing to return to the United States is concerned, it is urged by the learned Solicitor that since a reference u/s 5 has already been made, statement in this regard can be made by the petitioner before the Magistrate only because once a reference u/s 5 has been made, it cannot be withdrawn. It must culminate into a report by the Magistrate u/s 7 of the Act.

9. Thus, the core questions for our consideration are: (i) whether or not the request received from the United States on 23 July 2003, i.e. prior to the provisional arrest of the petitioner u/s 34B(1) of the Act, for surrender and return of the petitioner, was valid and could form the basis for the issue of impugned order, dated 23 October 2003, u/s 5 of the Act and (ii) whether in the absence of a fresh request from the United States for his return after the provisional arrest of the petitioner on 8 October 2003, his continued detention beyond the period of sixty days there from is illegal in terms of Sub-Section (2) of Section 348 of the Act?

10. In our opinion, on a plain reading of Section 34B of the Act, the propositions canvassed by learned counsel for the petitioner are without substance. Section 34B reads as follows:

"34-B Provisional arrest:- (1) 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 competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.

(2) A fugitive criminal arrested under sub-section (1) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period."

11. Sub-section (2) of Section 34B, on which too much emphasis is laid in the petition, provides that if no request for surrender or return of a fugitive criminal is received within sixty days of his provisional arrest under Sub-section (1), he shall be discharged upon the expiry of the said period. It is evident that Sub-section (1) is an urgency provision for the purpose of putting a fugitive criminal under provisional arrest, pending receipt of a request for his surrender or return, so that he does not flee in the meanwhile. The mandatory stipulation of discharge of the person detained upon the expiry of sixty days from the date of his arrest is a safeguard against keeping the liberty of a person in suspended animation for an indefinite period without any accusation or complaint etc. It is clear that the Section does not postulate that a request for surrender or return of a fugitive criminal has to be only after fugitive's provisional arrest. In other words, provisional arrest of a fugitive under Sub-section (1) is not a condition precedent for a request for his surrender to the requesting country. It is equally not mandatory that a request for immediate arrest under Sub-section (1) must precede a requisition for surrender of a fugitive criminal either under Chapter II, which lays down the procedure for extradition of fugitive criminals to foreign State, with which there is no extradition arrangements or Chapter III of the Act, which sets out the procedure for return of fugitives to foreign States with extradition arrangements, as in the present case.

12. In the light of our interpretation of Section 34B of the Act, we are of the view that the said Section has no bearing in so far the requisition/request for return of the fugitive criminals to foreign State is concerned. A request for return of a fugitive is made and processed in accordance with the procedure laid down in Chapters II and III of the Act and not under the miscellaneous Chapter V, in which Section 34B appears. These Chapters do not contain any provision fixing time limit for such a request. In our opinion, since in the present case a request for surrender and return of the petitioner had already been received from the United States before he was put under provisional arrest, there was no breach of Sub-Section (2) of Section 34B of the Act and Therefore, his detention either on 8 October 2003, pursuant to request for provisional arrest u/s 34B(1) or pursuant to the impugned order u/s 5 of the Act cannot be said to be illegal. It was not seriously disputed by learned counsel for the petitioner that petitioner

was re-arrested pursuant to warrants of arrest issued by the Additional Chief Metropolitan Magistrate, New Delhi in terms of Section 6 of the Act.

13. As regards the plea of the petitioner that the impugned order suffers from the vice of non-application of mind to the relevant material touching upon the question whether the petitioner was a fugitive criminal, we are of the view that having regard to the Scheme of the Act, particularly the procedure prescribed for dealing with a request for extradition, there is hardly any scope for the Central Government to enter upon a detailed enquiry in this behalf, before making an order for magisterial enquiry u/s 5 of the Act. What is required to be examined is whether there is prima facie evidence of the commission of the offence which is extraditable; the offence is not a political offence or that the requisition is not a subterfuge to secure custody for trial for a political offence. When, on the basis of the material received, the Central Government has formed the view that the request for surrender does not fall within the ambit of Section 31 of the Act, enumerating restrictions on surrender and orders a magisterial enquiry, it would neither be prudent nor proper for this Court to interfere in exercise of powers under Articles 226 or 227 of the Constitution.

14. The judicial review being a part of the basic structure of the Constitution of India, powers of this Court under Article 226 of the Constitution cannot be circumscribed in any way by any law. But the judicial decisions over the years have evolved some self-imposed restraints as a matter of propriety, policy and practice, which may be observed while dealing with cases under all laws. Some of these restrictions, illustrated by the Apex Court in *Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another*, are: (i) discretionary jurisdiction may not be exercised for correcting mere errors of law or of facts acting as a Court of appeal or revision; (ii) resort to this jurisdiction is not permitted as an alternative remedy for relief which may be obtained by other mode prescribed by Statute; (iii) under this jurisdiction the Court does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which, the writ is claimed; (iv) the Court does not interfere on the merits with the determination of the issues made by the authority invested with Statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by the extraneous considerations or is made in contravention of the principles of natural justice or any Constitutional provision; (v) the Court may intervene where: (a) the authority acting under the concerned law does not have requisite authority or the order passed is in breach of the provisions of the concerned law or (b) when the authority has exceeded its power or jurisdiction or has failed to exercise jurisdiction vested in it and (c) where the authority has exercised its power dishonestly or for an improper purpose and (vi) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by applying wrong test or misconstruction of

Statute or by omitting to take into consideration the relevant material.

15. Prof. Wade in his treatise "Administrative Law" also said that the doctrine that powers must be exercised reasonably has to be reconciled with no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes the bounds, it acts ultra vires. The Court must, Therefore, resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. If the decision is within the confines of reasonableness, it is no part of Court's function to look further into its merits.

16. In the instant case, we do not find any material to hold that the Central Government has acted with some ulterior motive or upon irrelevant considerations or has failed to take into account the relevant considerations, in referring the matter to the Magistrate for enquiry, warranting our interference.

17. As regards the question of fixing some time limit for either completion of inquiry u/s 7 of the Act, or in Central Government's taking final decision u/s 8 of the Act, we are again of the considered opinion that this is not a case where any such directions are called for in exercise of extra-ordinary jurisdiction of this Court under Article 226 or the power of superintendence under Article 227 of the Constitution. True that the Courts are duty bound to zealously guard the human rights and personal life and liberty of a person and it is in fact a Constitutional mandate under the canopy of Article 21 of the Constitution, which lays down that no person shall be deprived of life or personal liberty, except according to the procedure established by law but we do not feel that the procedure prescribed in the Act for processing the request for return of a fugitive is unfair, unreasonable or arbitrary, depriving the person concerned of his personal liberty for an indefinite period, as is sought to be pleaded. Even otherwise, though the powers conferred on the High Court under Articles 226 and 227 of the Constitution have no limits but, more the power, due care and caution is to be exercised while invoking these powers. In our view, these powers ought not to be exercised to curtail the powers of any authority, be it administrative or judicial, save under exceptional circumstances, which, in our opinion, do not exist in the present case.

18. However, before parting, we may take stock of some developments which have taken place during the pendency of the writ petition. As noted above, petitioner's bail application has been rejected by the Magistrate vide order dated 19 December 2003. The petitioner may have a statutory remedy to challenge the said order, if so advised. However, what is pertinent to note is that in his application for grant of bail, the petitioner had stated that he was always willing to go back to the United States at the earliest point of time. In fact he had even moved another application dated 9 December 2003 before the Magistrate, averring that he had no objection if the prayer of the authorities to extradite him

is allowed . Although this application was withdrawn on 19 December 2003 but a statement was made before us by learned counsel for the petitioner that he was still willing to surrender to the United States Embassy in India for the purpose of extradition. We feel that once the petitioner has himself given consent to his surrender to the Requesting State, detailed extradition proceedings may not be required. We say so on a bare reading of Article 18 of the Extradition Treaty between the Government of Republic of India and the Government of the United States of America, signed on 14 September 1999, which is in the following terms:

"Article 18: Waiver of Extradition:

If the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without further proceedings".

At the time of hearing, learned counsel for the petitioner had stated that he would be moving an appropriate application in this behalf before the learned Magistrate. We are confident that as and when such an application is moved, the learned Magistrate shall expedite his report u/s 7 and the Central Government shall also take a final decision u/s 8 of the Act as expeditiously as practicable.

19. Subject to what is observed in paragraph 18 above, we do not find any merit in the petition and the same is dismissed accordingly. There will, however, be no order as to costs.