THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.12.2012

+ W.P. (CRL) 1530/2010

BRIJ BHUSHAN BANSAL … Petitioner

Versus

UNION OF INDIA & ANOTHER … Respondents

WITH

+ W.P. (CRL) 1531/2010

YATINDRA KUMAR AGGARWAL & ANOTHER… Petitioners

Versus

UNION OF INDIA & ANOTHER … Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Amit Bansal
For the Respondents : Mr A.S. Chandhiok, ASG with Mr P.S. Parmar, Mr N.K. Matta, Mr Satish Aggarwal, Ms Inderjit Sidhu and Ms Jasbir Kaur

AND

+ W.P. (CRL) 44/2011

HIMANSHU KULSHRESTHA … Petitioner

Versus

UNION OF INDIA & ANOTHER … Respondents

Advocates who appeared in this case:

For the Petitioner : Ms Shyamila Pappu, Sr Advocate with Mr B.B. Pradhan and Mr A.K. Yadav
For the Respondents : Mr A.S. Chandhiok, ASG with Mr P.S. Parmar,

Mr N.K. Matta, Mr Satish Aggarwal, Ms Inderjit Sidhu and Ms Jasbir Kaur

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MS JUSTICE VEENA BIRBAL

JUDGMENT

BADAR DURREZ AHMED, J

1. An interesting question has been raised in these writ petitions and that is – whether the considerations which are required to be taken into account under Section 31(1)(d) of the Extradition Act, 1962 are to be examined by the Central Government prior to the issuance of an order of Magisterial Inquiry passed under Section 5 thereof or at the stage of consideration indicated in Section 8 of the said Act ?

2. On 29.01.2010, a *note verbale* was issued by the Embassy of the United States of America, New Delhi to the Ministry of External Affairs, Government of India requesting the extradition and continued detention or arrest of Mr Brij Bhushan Bansal [petitioner in WP(Crl) No.1530/2010], Ms Julie Aggarwal (Shivani Aggarwal) and Mr Yatindra Kumar Aggarwal [both of whom are petitioners in WP (Crl) No.1531/2010] and Mr Himanshu Kulshrestha [petitioner in WP(Crl) No.44/2011] in accordance with the Extradition Treaty. The said *note*

verbale indicated that the charges on the basis of which Extradition was being sought had been set forth in the indictment dated 06.08.2004 and the superseding indictment dated 04.01.2006 returned in the District Court for the Eastern District of Pennsylvania. The relevant documents containing the charges, etc. were attached with the said *note verbale*.

3. Acting on the said *note verbale*, the Ministry of External Affairs passed an order on 22.04.2010, which is to the following effect:-

"MINISTRY OF EXTERNAL AFFAIRS
CPV DIVISION, EXTRADITION SECTION
PATIALA HOUSE ANNEXE, TILAK MARG
NEW DELHI – 1100 001 PH: 23073380 FAX: 23070644

T-413/48/2005
22nd April, 2010

ORDER

1. Whereas the fugitive criminals Mr. Brij Bhushan Bansal, Ms. Julie Agarwal, Mr. Yatindra Kumar Agarwal and Mr. Himanshu Kulshrestha, who are presently in India, are wanted by the Government of United States of America for prosecution in respect of certain offences.

2. Whereas the extradition request has been made under the Extradition Treaty between the Government of the Republic of India and the Government of the United States of America currently in force.

3. Whereas the Government of the United States of America has submitted the extradition request, through diplomatic channels, for the extradition of the fugitive criminals to the United States of America; and

4. Whereas the offences alleged to have been committed by the fugitive criminals Mr. Brij Bhushan Bansal, Ms. Julie Agarwal, Mr. Yatindra Kumar Agarwal and Mr Himanshu Kulshrestha, are stated in the US request to be extraditable in terms of Article 2 of the Extradition Treaty between India and USA and which has been declared applicable to the Republic of India vide Order GSR 633 (E) dated 14th September, 1999.

5. Therefore, the Government of India i.e. Ministry of External Affairs, having been satisfied on the basis of the material submitted by the Government of the United States of America, that the warrant of arrest were issued by the U.S. District Court for the Eastern District of Virginia, having lawful authority to issue the same, hereby requests under Section 5 of the Extradition Act 1962 (34 of 1962) the Additional Chief Metropolitan Magistrate (New Delhi) Patiala House Courts, New Delhi, to inquire into the extradition request as to the extraditability of the offences involved, by determining whether a prima facie case exists in terms of the Extradition Act, 1962 (34 of 1962) and the Extradition Treaty between the Government of the Republic of India and the Government of the United States of America, and other applicable laws.

Deputy Passport Officer Extradition
(Under Secretary) to the Government of India

The Additional Chief Metropolitan Magistrate (New Delhi
Patiala House Courts
New Delhi."

4. It is apparent from the above order that it was passed in purported exercise of power under Section 5 of the Extradition Act, 1962 (hereinafter referred to as 'the said Act'). Shortly thereafter, in May 2010, the Union of India moved an application under Section 6 of the said Act for issuance of warrants of arrest against the above mentioned fugitive criminals. On 29.06.2010, the Additional Chief Metropolitan

Magistrate, Patiala House Courts, New Delhi passed an order directing that the inquiry under the said Act, which had been marked to that court by virtue of the order dated 22.04.2010 be checked and registered. The said order dated 29.06.2010 also notes the fact that an application had been filed under Section 6 of the said Act. After going through the said request for inquiry and the application under Section 6 of the said Act, the learned ACMM directed issuance of warrants of arrest of the said fugitive criminals to be executed through the SSP Agra (U.P.) and Jaipur (Rajasthan), returnable on 12.08.2010. Thereafter, Brij Bhushan Bansal and Yatindra Kumar Aggarwal and Shivani Aggarwal filed the above mentioned writ petitions [WP (Crl) 1530/2010 and WP (Crl) 1531/2010]. On 01.10.2010, while issuing notice in the writ petition, this court directed that the order dated 29.06.2010 be kept in abeyance, subject to the petitioner's not leaving the country and depositing their passports. Subsequently, Mr Himanshu Kulshrestha filed WP (Crl) 44/2011.

5. At this juncture, it would be relevant to point out that earlier, on 19.04.2005, on the basis of information received from US Drug Enforcement Authority, joint raids were conducted by the Narcotics Control Bureau and cases were initiated against the petitioners and on the said date, the petitioners in WP (Crl) 1530 and 1531 were arrested. Three

separate cases were registered against the petitioners. One case was registered in Delhi, another in Jaipur (Rajasthan) and the third one in Agra (U.P.). In Delhi, it was Case No.52/2005 under Sections 21, 22, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'). That case is pending before the learned Additional Sessions Judge, New Delhi. In that case, Mr Brij Bhushan Bansal is the accused.

6. In Jaipur, Case No.34/2005 was registered under Sections 8(c), 22, 23 and 29 of the NDPS Act against Brij Bhushan Bansal, Yatindra Kumar Aggarwal and Shivani Aggarwal. It would be relevant to point out that Brij Bhushan Bansal is Shivani Aggarwal's father and Yatindra Kumar Aggarwal is Shivani Aggarwal's husband. In that case, the Sessions Court at Jaipur acquitted all the three accused by virtue of a judgment and / or order dated 28.08.2009 and consequently, the three accused were released from jail on 28.08.2009 after having spent more than four years in custody. The State, however, did not accept the decision of the Sessions Court and preferred an appeal before the High Court of Rajasthan, Jaipur Bench which is pending.

7. Insofar as the Agra case is concerned, it was registered as Case No.8/5/DZU/2005 under Sections 21, 22 and 23 of the NDPS Act in which Mr Brij Bhushan Bansal is an accused. That case is still pending before the Sessions Court in Agra (U.P.). Mr Himanshu Kulshrestha was also sought to be accused in the Agra case, but his remand was declined by the Sessions Court by an order dated 20.04.2005 and he was discharged on the ground of lack of evidence against him. As such, there is no case pending against Himanshu Kulshrestha in India insofar as the aforesaid offences are concerned.

8. After the acquittal of the petitioners in the Jaipur case, the above mentioned extradition request was made by the Embassy of the United States of America (USA), New Delhi through its *note verbale* dated 29.01.2010. According to the learned counsel for the petitioners, the request for extradition was not made in good faith and it was made only to compel Mr Brij Bhushan Bansal's son (Dr Akhil Bansal), who had been convicted in USA, to withdraw his appeal in exchange of the withdrawal of the extradition request. Anyhow, the gravamen of the submissions on behalf of the petitioners is whether the consideration under Section 31(1)(d) of the said Act is to be done prior to the issuance

of an order of Magisterial Inquiry under Section 5 of the said Act or after the inquiry at the stage of Section 8 thereof.

9. According to the learned counsel for the petitioners, Section 31(1)(d) prohibits the surrender of the petitioners, who are facing trial for similar offences in India, till they are acquitted or have served the sentence upon conviction. It is contended that a similar prohibition is contained in Article 14 of the Indo-US Extradition Treaty. It is further contended that Section 29 of the said Act empowers the Central Government to stay any proceedings and cancel the warrant issued under the said Act at any stage if, *inter alia*, the request for extradition is not made in good faith and if it would be unjust or inexpedient to surrender the fugitive criminal for any reason whatsoever. Consequently, it was submitted that, before making an order for a Magisterial Inquiry under Section 5 of the said Act, the Central Government is required to apply its mind on the extradition request by seeing if any of the prohibitions contained in Sections 29 and 31 and, particularly Section 31(1)(d) are applicable to the said request. It was contended that an application of mind was necessary at the stage of Section 5 itself in view of the expression "if it thinks fit" used in that Section.

10. According to Mr Amit Bansal, who had appeared on behalf of Brij Bhushan Bansal, Shivani Aggarwal and Yatindra Kumar Aggarwal, the present cases are squarely covered by the decision of a Division Bench of this court in ***Pragnesh Desai v. Union of India and Another*****: 109 (2004) DLT 899 (DB)**. Reliance was placed on paragraphs 3, 4, 5, 8 and 13 of the said decision. According to the learned counsel, it has been categorically held in that decision that a Magisterial Inquiry under Section 5 can be ordered only after the Central Government has formed a view that the request does not fall within the ambit of Section 31.

11. A passing reference was also made to the decision of the Madras High Court in the case of ***Mohammed Jafeer v. The Government of India*****: Manu/TN/8868/2006** (Habeas Corpus Petition No. 1243/2005 decided on 26.04.2006). Mr Amit Bansal submitted that the Central Government, in para 9 of its counter-affidavit, has clearly stated that the offence for which extradition has been sought is different from the offence for which the petitioner is facing trial in India. Thus, according to the learned counsel, in view of the provisions of Section 31(1)(d), the respondents have admitted that the petitioners cannot be surrendered. As such, according to the learned counsel, the need for any inquiry by a Magistrate no longer subsists inasmuch as, according to him, the

petitioners cannot, in any event, be surrendered to the requesting state (USA) because of the pendency of the cases at Delhi, Jaipur and Agra. It was reiterated that the Central Government ought to apply its mind to the prohibitions to surrender contained in Sections 29 and 31 of the said Act at the threshold itself because if the prohibitions are attracted, the Magisterial Inquiry would not be required and the extradition request could be rejected at the outset.

12. It was also contended that one of the charges in the US court was of money laundering and that money laundering had become an offence in India only on 01.07.2005 when the Prevention of Money Laundering Act, 2002 was notified, whereas the offence had been allegedly committed by the petitioners in the year 2004. Consequently, it was submitted that the offence with regard to money laundering was not an extraditable offence under Article 2(1) of the Indo-US Treaty which required an extraditable offence to be an offence in both the countries. It was further submitted that more than 10 counts for which the petitioners are charged in USA relate to money laundering offences and, therefore, the petitioners cannot be extradited for the same. This, according to the learned counsel for the petitioners, was a clear-cut case and, therefore, no inquiry was required to establish the same. It was submitted that when,

on the face of it, the petitioners cannot be extradited, it should not be insisted that the petitioners should surrender and subject themselves to a Magisterial Inquiry. Consequently, it was pointed out that the writ petitions be allowed and the impugned order dated 22.04.2010 ordering a Magisterial Inquiry and all the proceedings pursuant thereto be quashed and be set aside.

13. Ms Shyamila Pappu, the learned senior counsel, appearing on behalf of Mr Himanshu Kulshrestha in WP (Crl) 44/2011, submitted that Mr Kulshrestha was only an employee of the other petitioners and was a computer operator. He was only putting down on the computer what his bosses told him to do and the Agra court, realizing this, discharged him on the ground of lack of evidence. Therefore, there was no reason whatsoever for proceeding with any Magisterial Inquiry insofar as Mr Himanshu Kulshrestha was concerned. She also adopted the other arguments advanced by Mr Amit Bansal on behalf of the other petitioners.

14. Mr A.S. Chandhiok, the learned Additional Solicitor General, appearing on behalf of the respondents, submitted that extradition was governed not only by the Indo-US Treaty, but the procedure indicated in

the said Act. He took us through the relevant provisions, including Sections 4, 5, 6, 7, 8, 29 and 31 as also Section 2(c) (extradition offence) and 2(f) (fugitive criminal). Mr Chandhiok submitted that the decision of this court in ***Pragnesh Desai****(supra)* and, particularly, the observations made therein in paragraph 13, which had been relied upon by the learned counsel for the petitioners, were in the nature of *obiter dicta* and the said decision could not be regarded as a precedent on that aspect of the matter. He placed reliance on the Constitution Bench decision of the Supreme Court in the case of ***Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and Others*****: AIR 1955 SC 367**, wherein, according to Mr Chandhiok, the Supreme Court held that under the extradition law, if a person is extradited from the requested country, there must be a Magisterial Inquiry. In view of this categorical statement contained in the Constitution Bench decision in ***Hans Muller*** *(supra)*, Mr Chandhiok submitted that the somewhat contrary observations in ***Pragnesh Desai*** *(supra)* would not hold. In any event, according to Mr Chandhiok, the said observations in ***Pragnesh Desai*** *(supra)* were not the ratio of the case, but constituted *obiter dicta* and, therefore, did not constitute a binding precedent.

15. A reference was also made by Mr Chandhiok to the Supreme Court decision in ***Sarabjit Rick Singh v. Union of India*****: 2007 (93) DRJ 712 (DB)** and, in particular, to paragraphs 18 and 19, wherein it has been observed that Section 5 of the said Act is an enabling provision. A reference was also made to ***S.K. Gupta v. Union of India and Others: AIR 1977 (Delhi) 209 (1)***. This case was cited for the proposition that a subjective opinion is not justiciable. In other words, according to Mr Chandhiok, the decision of the Central Government to order a Magisterial Inquiry was not justiciable.

16. Mr Chandhiok submitted that the application of mind that the Central Government has to do with regard to the prohibitions contained in Section 31 of the said Act would come into play only at the stage of Section 8, that is, after a Magisterial Inquiry and not at the stage of ordering a Magisterial Inquiry under Section 5 of the said Act. It was also contended that under Section 5, the Central Government had the option to outright reject the request for extradition or to go in for a Magisterial Inquiry. In this case, the Central Government, based upon the material furnished by the Embassy of the United States of America, New Delhi alongwith its *note verbale* dated 29.01.2010 thought it fit to order a Magisterial Inquiry under Section 5 of the said Act. This, according to

the learned counsel, was clearly discernible from para 5 of the order dated 22.04.2010 where it is clearly mentioned that the Government of India, that is, the Ministry of External Affairs, having been satisfied on the basis of the material submitted by the Government of USA that the warrants of arrest were issued by the US District Court having lawful authority to issue the same, is making the request under Section 5 of the said Act to the Additional Chief Metropolitan Magistrate, New Delhi to inquire into the extradition request as to the extraditability of the offences involved, by determining whether a *prima facie* case exists in terms of the said Act and the Extradition Treaty between the Government of Republic of India and the Government of USA and other applicable laws. This clearly indicates that the Central Government had applied its mind to the material placed before it and it is only thereafter that it took the decision to order a Magisterial Inquiry under Section 5 of the said Act. Consequently, according to Mr Chandhiok, this action on the part of the Central Government cannot be faulted and called in question.

17. As regards the plea that the offences themselves are not extraditable, it was submitted by Mr Chandhiok that such pleas are to be examined by the Magistrate during his inquiry under Section 7 of the said Act. If the Magistrate is of the opinion that a *prima facie* case is not

made out in support of the requisition by the Government of USA, he shall discharge the fugitive criminals, i.e., the petitioners. On the other hand, if the Magistrate is of the opinion that a *prima facie* case is made out in support of the requisition, the Magistrate may then commit the fugitive criminals to prison to await the orders of the Central Government and he is required to report the result of his inquiry to the Central Government and forward with such report any written statement which the fugitive criminals may desire to submit for the consideration of the Central Government. In that eventuality, the provisions of Section 8 would apply and it would then be for the Central Government to arrive at an opinion as to whether the fugitive criminals ought to be surrendered to the foreign state (USA). At that point, while deciding as to whether the fugitive criminals are to be surrendered to the foreign state, the Central Government would obviously have to look to the provisions of Section 31 of the said Act which imposes restrictions on surrender. If the Central Government is of the opinion that the fugitive criminals ought to be surrendered and there are no restrictions on surrender, then it may issue a warrant for the custody and removal of the fugitive criminals and for their delivery at a place or to a person to be named in the warrant.

18. Thus, according to Mr Chandhiok, the Magisterial Inquiry is an enabling provision and is for the benefit of the fugitive criminal to have a judicial inquiry prior to any order of surrender to the requesting state. He further submitted that the issuance of a warrant for arrest under Section 6 of the said Act was only for the purposes of bringing a fugitive criminal before the Magistrate so that the inquiry can proceed. It was also submitted that Section 29 of the said Act empowers the Central Government to stay any proceedings under the said Act and direct any warrant issued or endorsed under the Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged if it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for surrender or return of the fugitive criminal not being made in good faith or in the interest of justice or for political reasons or it is otherwise unjust or inexpedient to surrender or return the fugitive criminal. This is a power which the Central Government has and which can be exercised by the Central Government at any point of time during the extradition proceedings. This, however, does not give any right to the fugitive criminal to claim a consideration by the Central Government on the above issues *de hors* a Magisterial Inquiry.

19. In rejoinder, Mr Amit Bansal reiterated that the Central Government has to apply its mind with regard to the provisions of Section 31(1)(d) of the said Act at the stage of Section 5 itself and there is no indication in the said Act that such a consideration is to be reserved only for the stage of Section 8 of the said Act. It was also reiterated that the observations in ***Pragnesh Desai*** *(supra)*, particularly those in paragraph 13 of the said decision were not *obiter* and were not watered down because of the observations of the Supreme Court in ***Hans Muller*** *(supra)* because, according to Mr Amit Bansal, the Supreme Court in ***Hans Muller*** *(supra)* did not deal with the question of the scope of application of mind by the Central Government before making an order of a Magisterial Inquiry under Section 5 of the said Act. On the contrary, ***Hans Muller*** *(supra)* is in favour of the petitioners inasmuch as it holds that the Central Government has unfettered power to refuse extradition under Section 3(1) of the Indian Extradition Act, 1903, which, according to the learned counsel, was in *pari materia* to Section 5 of the said Act. It was also contended that the decision of the Division Bench in ***Sarabjit Rick Singh*** *(supra)* was not relevant since that case dealt with the scope of a Magisterial Inquiry under Section 7 and was not concerned with the scope of application of mind by the Central Government under Section 5

and, therefore, there is no conflict with the decision of the Division Bench in ***Pragnesh Desai*** *(supra)*. It was, therefore, reiterated that the writ petitions be allowed.

20. Before we embark upon a discussion of the submissions made by the counsel for the parties, it would be proper for us to set down the relevant provisions of the Extradition Act, 1962. They are as under:-

> "**2. Definitions.**—In this Act, unless the context otherwise requires,—(a) "composite offence" means an act or conduct of a person occurred, wholly or in part, in a foreign State or in India but its effects or intended effects, taken as a whole, would constitute an extradition offence in India or in a foreign State, as the case may be;
>
> (b) "Conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "person accused" includes a person so convicted for contumacy;
>
> (c) "extradition offence" means—
>
> (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;
>
> (d) "extradition treaty" means a treaty, agreement or

arrangement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty, agreement or arrangement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India;

(e) "foreign State" means any State outside India and includes every constituent part, colony or dependency of such State;

(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;

(g) "magistrate" means a magistrate of the first class or a presidency magistrate;

(h) "notified order" means an order notified in the Official Gazette;

(i) "prescribed" means prescribed by rules made under this Act; and

(j) "treaty State" means a foreign State with which an extradition treaty is in operation."

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"**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 with 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 with in the local limits of his jurisdiction, directing him to enquire into the case.

6. Issue of warrant for arrest.—On receipt of an order of the Central Government under Section 5, the magistrate shall issue a warrant for the arrest of the fugitive criminal.

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.

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."

xxxx xxxx xxxx xxxx xxxx

"**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."

xxxx xxxx xxxx xxxx xxxx

"**31. Restrictions on surrender.—**(1) 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 a prosecution for the offence in respect of which his surrender is sought is according to the law of that State 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.

(2) For the purposes of sub-section (1), the offences 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."

21. From a reading of the above provisions, it is clear that under Section 4 of the said Act, which falls under Chapter II (which is the Chapter applicable in the present cases), a requisition for the surrender of a fugitive criminal by a foreign state may be made to the Central Government, *inter alia*, by a diplomatic representative of the foreign state at Delhi. This has been done in the present case by the issuance of the *note verbale* dated 29.01.2010 issued by the Embassy of the USA at New Delhi. When such a requisition is made, by virtue of Section 5 of the said Act, 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. It is obvious that under Section 5, it is open to the Central Government to either reject the requisition at the threshold itself or if it wants to honour its commitment under the International Treaty, it can proceed with the request for extradition by ordering a Magisterial Inquiry. When the Magistrate receives the order of the Central Government under Section 5, he is mandated to issue a warrant for the arrest of the fugitive criminal. This is provided in Section 6 of the said Act where the expression used is "shall issue a warrant" and is essentially for the purposes of bringing the fugitive criminal before the Magistrate so that he can proceed with the inquiry. The procedure that has to be followed by the Magistrate in the inquiry is indicated in Section 7 of the said Act. Section 7(1) requires the Magistrate to inquire into the case in the same manner and he shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the court of Sessions or the High Court. Sub-section (2) of Section 7 of the said Act begins with the words "without prejudice of the generality of the foregoing provisions". This is important as we shall point out shortly. Sub-section (2) of Section 7 of the said Act further

provides that 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 a political character or is not an extradition offence. While the Magistrate is directed to take evidence which tends to show that the offence is of a political character or is not an extradition offence, his power to take any evidence is not limited to these instances. This is clear from the words – "without prejudice to the generality of the foregoing provisions", "in particular" and "including" – used in Section 7(2) of the said Act.

22. If, after considering the evidence which may be produced in support of the requisition as also the evidence on behalf of the fugitive criminal, the Magistrate is of the opinion that a *prima facie* case is not made out in support of the requisition of the foreign state, he shall, in view of Section 7(3) of the said Act, discharge the fugitive criminal. On the other hand, if the Magistrate is of the opinion that a *prima facie* case is made out, he may commit the fugitive criminal to prison to await the orders of the Central Government and shall also report the result of his inquiry to the Central Government and he is also required to forward

together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government. This is in view of the clear provisions of Section 7(4) of the said Act. When a report is furnished under Section 7(4) of the said Act by the Magistrate, the Central Government is required to form an opinion by virtue of Section 8 of the said Act as to whether the fugitive criminal ought to be surrendered to the foreign state or not. If the Central Government is of the 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. It is obvious that at the stage of consideration as to whether the Central Government should or should not surrender the fugitive criminal to the foreign state, the Central Government would have to look at the restrictions on surrender stipulated in Section 31 of the said Act. This is the stage at which the Central Government is required to consider the restrictions on surrender. Because, even if the Magistrate is of the opinion that a *prima facie* case has been made out in support of the requisition of the foreign state, the Central Government cannot surrender the fugitive criminal to the foreign

state if any of the restrictions stipulated in Section 31 of the said Act are invoked.

23. Let us now examine the restrictions on surrender set out in Section 31(1) of the said Act. Clause (a) of Section 31(1) requires 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. He will also not be surrendered if the fugitive criminal proves to the satisfaction of the Magistrate or court before whom he may be produced, or to the satisfaction of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try and punish him for an offence of a political character. It is obvious that these considerations are built into Section 7(2) of the said Act insofar as the inquiry by the Magistrate is concerned. As regards the consideration by the Central Government, that would come upon at the stage the Magistrate submits his report under Section 7(4) and when the Central Government considers the case under Section 8 of the said Act as to whether the fugitive criminal ought to be surrendered to the foreign state or not. Clause (b) of Section 31(1) also stipulates that a fugitive criminal shall not be surrendered or returned to a foreign state if a prosecution for the offence in respect of his surrender is sought is,

according to the law of that state, barred by time. This consideration can also be done by the Magistrate during the inquiry under Section 7 of the said Act. The same is the case with clause (c) of Section 31(1).

24. We now come to the all important clause (d) of Section 31(1). It stipulates that a fugitive criminal shall not be surrendered or returned to a foreign state 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*". It is clear that the restriction on surrender stipulated in clause (d) of Section 31(1) is not absolute and it is only "until" the fugitive criminal has been discharged whether by acquittal or on expiration of his sentence or otherwise. It may also be noticed that in case the offence for which the fugitive criminal's surrender or return is sought is the same as the offence for which the fugitive criminal is accused in India, then this restriction would not apply. It was pointed out by Mr Amit Bansal that in paragraph 9 of the counter-affidavit filed on behalf of Union of India, it has been admitted that the offences for which the extradition has been sought are different to the offences for which the petitioners are accused in India. If that be the case, then, the petitioners cannot be surrendered

until after they have been discharged whether by acquittal or on expiration of their sentences or otherwise. That, however, does not preclude the ordering of a Magisterial Inquiry in the meantime inasmuch as it is only the surrender which would be postponed. This provision does not mean that because the surrender would be postponed, no Magisterial Inquiry can be held.

25. We shall now consider the last clause of Section 31(1) of the said Act and, that is, clause (e). It provides that a fugitive criminal shall not be surrendered or returned to a foreign state until after the expiration of 15 days from the date of his being committed to prison by the Magistrate. This clause, according to us, is a very important one inasmuch as it clearly stipulates that no fugitive criminal can be surrendered or returned to a foreign state within 15 days from the date of his being committed to the prison by the Magistrate. In other words, this would only apply after the Magistrate passes an order under Section 7(4) of the said Act, whereby the Magistrate commits the fugitive criminal to prison to await the orders of the Central Government. In other words, no fugitive criminal can be surrendered till 15 days have expired from the date of his being committed to prison by the Magistrate, which, in turn, means that no fugitive criminal can be surrendered unless and until there

is a Magisterial Inquiry which results in his committal to prison by the Magistrate under Section 7(4) of the said Act. This provision makes it clear that before a person can be extradited, a Magisterial Inquiry is a must. This is the plain and simple meaning of the provisions of the said Act.

26. Let us now examine the decisions of the courts. First of all, we shall consider the Constitution Bench decision of the Supreme Court in the case of ***Hans Muller*** *(supra)*. A question had been raised in that case as to whether there is any law in India vesting the executive Government with the power to expel a foreigner from this land as opposed to extraditing him. In that context, the Supreme Court considered the provisions of the Foreigners Act, 1946 and the Extradition Act, 1903. The Supreme Court observed that the two Acts were entirely distinct. In this connection, the Supreme Court examined the law of extradition and observed as under:-

> "37. The law of extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to ask that persons who are alleged to have committed certain specified offences in their territories, or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or punishment. But despite that the Government of India is not bound to comply

with the request and has an absolute and unfettered discretion to refuse.

38. There are important differences between the two Acts. In the first place, the Extradition Act applies to everybody, citizen and foreigner alike, and to every class of foreigner, that is to say, even to foreigners who are not nationals of the country asking for extradition. But, as has been seen, because of article 19 no citizen can be expelled (as opposed to extradition) in the absence of a specific law to that effect; and there is none; also, the kind of law touching expulsion (as opposed to extradition) that could be made in the case of a citizen would have to be restricted in scope. That is not the case where a foreigner is concerned because article 19 does not apply. But a citizen who has committed certain kinds of offences abroad can be extradited if the formalities prescribed by the Extradition Act are observed. A foreigner has no such right and he can be expelled without any formality beyond the making of an order by the Central Government. But if he is extradited instead of being expelled, then the formalities of the Extradition Act must be complied with. The importance of the distinction will be realised from what follows; and that applies to citizen and foreigner alike.

39. The Extradition Act is really a special branch of the law of Criminal Procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences, or is suspected of that, may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or a summons must be issued; there must be a magisterial enquiry and when there is an arrest it is penal in character; and - and this is the most important distinction of all - when the person to be extradited leaves India he does not leave the country a free man. The police in India hand him over to the

police of the requisitioning State and he remains in custody throughout."

xxxx xxxx xxxx xxxx

"42. In a case of extradition, he does not leave a free man. He remains under arrest throughout and is merely handed over by one set of police to the next. But in that event, the formalities of the Extradition Act must be complied with. There must be a magisterial enquiry with a regular hearing and the person sought to be extradited must be afforded the right to submit a written statement to the Central Government and to ask, if he so chooses, for political asylum; also he has the right to defend himself and the right to consult, and to be defended by, a legal practitioner of his choice, (Article 22(1)). Of course, he can also make a representation against an order of expulsion and ask for political asylum apart from any Act but those are not matters of right as under the Extradition Act."

(underlining added)

27. In para 39, the Supreme Court was considering the Extradition Act of 1903. The provisions of Section 3 of the 1903 Act are similar to the provisions of Sections 4, 5, 6 and 7 of the said Act. For convenience, the provisions of Section 3 of the Extradition Act of 1903, to the extent relevant, are set out hereinbelow:-

"**3. Requisition for surrender**.—(1) Where a requisition is made to the Central Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in the States, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire

into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.

(2) Summons or warrant for arrest.—The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.

(3) Inquiry by Magistrate.—When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

(4) Committal.—If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Central Government.

(5) Bail.—If the Magistrate is of opinion that a *prima facie* case is not made in out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail.

(6) Magistrate's report.—The Magistrate 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 Government."

28. In the context of the said Section 3 of the Extradition Act, 1903, which we have already indicated as being virtually the same as the provisions of sections 4 to 7 of the said Act, the Supreme Court observed that under the Extradition Act, warrants must be issued; there must be a Magisterial Inquiry and when there is an arrest, it is penal in character. Again, in paragraph 42 of the said decision, the Supreme Court observed that before a person is extradited, the formalities of the Extradition Act must be complied with and there must be a Magisterial Inquiry with a regular hearing and the person sought to be extradited must be afforded a right to submit a written statement to the Central Government. He also has the right to defend himself and the right to consult and the right to be defended by a legal practitioner of his choice.

29. From this, it is clear that the Supreme Court was categorical that before a person could be extradited, the holding of a Magisterial Inquiry was a must. The Central Government could, of course, reject the request for extradition outright, but it had the option of examining the matter and if that were to be so, then a Magisterial Inquiry was a must.

30. We would also like to refer to another decision of the Supreme Court in the case of ***State of West Bengal v. Jugal Kishore More and Another*****: 1969 (1) SCC 440** which generally sets out the law with regard to extradition. In that case, the Supreme Court observed as under:-

> "6. Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the courts of the other State. Surrender of a person within the State to another State — Whether a citizen or an allien — is a political act done in pursuance of a treaty or an arrangement *ad hoc*. It is founded on the board principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the law has operation — national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law.
>
> 7. As observed in *Wheaten's International Law*, Vol. I, 6th Edn., p.213:
>
> > "The constitutional doctrine in England is that the Crown may make treaties with foreign States for the extradition of criminals, but those treaties can

only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him 10 a foreign power."

Sanction behind an order of extradition is, therefore, the international commitment of the State under which the Court functions, but courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The courts of the country which make a requisition for surrender deal with the prima facie proof of the offence and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Courts but of the State. A warrant issued by a Court for offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By making a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant or an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

> 8. The functions which the courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is prima facie evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the police authorities, and the courts of that country consider, according to their own laws, whether the offender should be surrendered — the enquiry is in the absence of express provisions to the contrary relating to the prima facie evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence."

31. From the above extract, it is apparent that by making a requisition for extradition, the requesting state is merely seeking the assistance of the requested state for securing the presence of the offender. If the requested state has to lend its aid to arrest the fugitive criminal, the arrest is made by the issuance of a warrant. By doing so, the requested country only signifies its willingness to lend its assistance in the implementation of the International Treaty and to secure the arrest of the offender. Thereafter, the offender, who is arrested pursuant to the warrant, is brought before the court of the requested state and that the court holds an inquiry to determine whether the offender may be

extradited or not. Importantly, the Supreme Court observed that the international commitments would be effective only if the court of the requested state, after inquiry, is of the view that the offender should be surrendered.

32. It would also be instructive to refer to a Division Bench decision of this court which was rendered much prior to the decision in ***Pragnesh Desai*** *(supra)* which has been strongly relied upon by the learned counsel for the petitioners. The decision that we are talking about is the one rendered by a Division Bench in the case of ***Rosline George v. Union of India and Others*****: 1991 ILR Delhi 308** (Criminal Writ Appeal No.692/1989, decided on 14.12.1990). In that case, one of the questions was with regard to the constitutionality of the Extradition Act, 1962. The submission that was made was that since Section 31(1)(e) of the said Act stipulated that the fugitive criminal could be surrendered to the foreign state at any time after 15 days from the date of the order of committal to prison by the Magistrate, the fugitive criminal does not get sufficient time to move the court against an improper exercise of the decision by the Central Government and this was violative of Articles 14 and 21 of the Constitution of India. In this context, the Division Bench observed as under:-

"76. We are not inclined to accept this contention. Extradition proceedings are by their very nature partly judicial and partly administrative. The judicial part, i.e. the inquiry before the Magistrate is sandwiched between the two administrative actions. The entertainment of the request received by the foreign State and the consideration thereof as to whether to issue an order to a Magistrate to inquire into the offence is an administrative decision of the Government of India. Thereafter, it is the Magistrate who issues or endorses the warrant for the arrest of the fugitive criminal. When the fugitive is brought before the Magistrate, he holds the inquiry and if he is of the opinion that no prima facie case is made out, he can discharge the fugitive criminal; on the other hand, if he is of the view that a prima facie case is made out, then he will make a report and forward the same with the written statement, if any; of the fugitive criminal to the Central Government for its consideration. After the report etc. is received, it is again a matter pertaining to the political will of the State, whether to pass the order of extradition. This is again an administrative act. The fugitive criminal is certainly entitled to a proper judicial inquiry and this is provided for in section 7 of the Act. An impartial scrutiny is his right, but once this takes place, the decision whether to pass an order of extradition depends on the Government of India. It is hardly legitimate to say that the discretion vested in the Government of India will be examined "with an evil eye and an unequal hand". If the decision is patently arbitrary or malafide, then the fugitive criminal has recourse to law.

77. It is well settled that the possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The validity of a statute is not to be determined by its application to particular cases. It will have to be determined on the basis of its provisions and the ambit of its operation as reasonably construed. (See : The Collector of Customs, Madras and others v.

Nathella Sampathu Chetty and another: AIR 1962 SC 316 (6)"

33. It was noticed in the above decision that extradition proceedings are by their very nature partly judicial and partly administrative. The judicial part, that is, the inquiry by the Magistrate is sandwiched between the two administrative actions. The first being the entertainment of the request received by the foreign state and the consideration thereof as to whether to issue an order to a Magistrate to inquire into the offence is the administrative decision of the Government of India. Thereafter, the judicial part is taken care of by the Magisterial Inquiry. After the inquiry, the Central Government again considers the matter. It has been noticed in this decision that the fugitive criminal is entitled to a proper judicial inquiry and that is provided for in Section 7 of the Act.

34. It appears that the whole purpose of the extradition proceedings seems to give an opportunity to the fugitive criminal to be considered impartially by a Magistrate before the Central Government is required to consider whether to surrender the fugitive criminal or not. It is also clear that if the Magistrate is of the view that a *prima facie* case for extradition is not made out, the matter ends there and then and the

fugitive criminal is discharged. Even if the Central Government wants to surrender the fugitive criminal, it cannot do so. On the other hand, even if the Magistrate is of the view that a *prima facie case* for extradition has been made out, it is still open to the Central Government to take a decision not to surrender the fugitive criminal.

35. We now come to the decision in the case of ***Pragnesh Desai*** *(supra)*. We may point out that the Division Bench was primarily concerned with Section 34-B of the said Act which dealt with provisional arrest. As pointed out in paragraph 9 of the said decision, the core questions for consideration of the court were:-

> "(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 under Section 34 B (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, under Section 5 of the Act ?; and
>
> (ii) Whether 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 therefrom is illegal in terms of Sub-section (2) of Section 34-B of the Act?"

36. So, it is clear that the Division Bench was essentially concerned with the provisions of Section 34-B of the said Act and not

with the issues which have arisen in the present petitions. The Division Bench, however, made certain observations in paragraph 13, which are to the following effect:-

> "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 under Section 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."

37. The observation that is sought to be relied upon by the petitioners is the indirect statement that 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, it would neither be prudent nor proper for the court to interfere in exercise

of the powers under Article 226 or 227 of the Constitution. According to the petitioners, this means that at the stage prior to the ordering of a Magisterial Inquiry, the Central Government is duty bound to consider as to whether the request for surrender does not fall within the ambit of Section 31 of the Act. In our view, this is not the ratio of the said decision. It is just a passing observation without examining the provisions of Section 31 in detail and, in particular, Section 31(1)(d) and Section 31(1)(e). We are in agreement with the submission made by Mr Chandhiok that this decision would not, in any event, enable us to detract from the legal position clearly set forth in ***Hans Muller*** *(supra)* and other decisions. The decision in ***Hans Muller*** *(supra)*, being a Supreme Court decision, would override any contrary view by the High Court.

38. At this juncture, it would be appropriate to point out that the restriction on surrender stipulated in Section 31(1)(d) of the said Act is not an absolute restriction and it is only that the surrender is deferred until the fugitive criminal is discharged of an offence in India, whether by acquittal or on expiration of his sentence or otherwise. Once that happens, the restriction under Section 31(1)(d) lifts and it would be open to the Central Government to surrender the fugitive criminal. It is obvious that the Central Government cannot surrender the fugitive

criminal without having a Magisterial Inquiry. What the petitioners want us to do is to postpone the Magisterial Inquiry till the petitioners are discharged in the three cases pending at Delhi, Jaipur and Agra, whether by acquittal or on expiration of their sentences or otherwise. We are afraid that there is no provision which would support such postponement. It is only the surrender which is postponed under Section 31(1)(d) of the said Act and not the Magisterial Inquiry. We may also point out that in the case of Mr Himanshu Kulshrestha, Section 31(1)(d) would, in any event, not apply inasmuch as he is not an accused in India and there is no case pending against him in India.

39. The decision in ***Mohd. Jafeer*** *(supra)* of the Madras High Court is also not relevant inasmuch as that pertains to Section 24 of the Extradition Act, 1962, which is not in issue here.

40. In ***Bhavesh Jayanti Lakhani v. State of Maharashtra & Others*****: 2009 (9) SCC 551**, the Supreme Court observed as under:-

> "46. The Act as also the treaties entered into by and between India and foreign countries are admittedly subject to our municipal law. Enforcement of a treaty is in the hands of the Executive. But such enforcement must conform to the domestic law of the country. Whenever, it is well known, a conflict arises between a treaty and the domestic law or a municipal law, the

latter shall prevail."

41. Although this decision was cited by the learned counsel for the petitioners, we do not see as to how this decision advances their case. In any event, in ***Bhavesh Jayanti Lakhani*** *(supra)*, as noticed in para 110 of the said decision, no formal request for extradition had been received from the foreign state. Therefore, that decision would be of no help to the petitioners.

42. In view of the foregoing discussion, we are clear that no fault can be found with the Central Government ordering a Magisterial Inquiry under Section 5 of the said Act. It is the learned ACMM, who has to conduct the inquiry in the terms indicated in Section 7 and arrive at an opinion. As such, the writ petitions do not have any merit and the same are dismissed. The interim orders stand vacated. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

December 21, 2012
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