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May 19

THE STATE OF MADRAS

v.

C. G. MENON AND ANOTHER.

[MEHR CHAND MAHAJAN C.J., S. R. DAS, GHULAM HASAN, BHAGWATI and JAGANNADHADAS JJ.]

Constitution of India—India—Sovereign Democratic Republic —Fugitive Offenders Act, 1881 (44 Victoria Chapter 69), ss. 12 and 14—Whether applies to India after the coming into force of the Constitution—Indian Extradition Act (XV of 1903)—Adaptation under art. 372 of the Constitution—Effect of.

After the achievement of independence and the coming into force of the new Constitution India became a Sovereign Democratic Republic and could not be described as a British Possession or grouped by an Order-in-Council amongst those Possessions within the meaning of s. 12 of the Fugitive Offenders Act, 1881. It became a foreign country so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British Possessions could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate Legislation.

The Indian Extradition Act, 1903 (Act XV of 1903) has been adapted under the provisions of article 372 of the Constitution but this Act has not kept alive any of the provisions of the Fugitive Offenders Act, 1881, which was an act of the British Parliament and which has not been adapted and therefore section 12 and section 14 of the Fugitive Offenders Act, 1881, have no application to India.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 33 of 1953.

Appeal under article 132(1) of the Constitution of India from the Judgment and Order, dated the 20th February, 1953, of the High Court of Judicature at Madras in Criminal Revision Case No. 1034 of 1953 (Criminal Reference No. 51 of 1953).

C. K. Daphtary, Solicitor-General for India, V. K. T. Chari, Advocate-General for Madras (*Porus A. Mehta* and *P. G. Gokhale,* with them) for the appellant.

M. K. Nambiar, (*S. Subramanian,* with him) for the respondent.

C. K. Daphtary, Solicitor-General for India (*Porus A. Mehta* and *P. G. Gokhale* with him) for the Intervener (Union of India).

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1954. May 19. The Judgment of the Court was delivered by

MEHR CHAND MAHAJAN C. J.—This is an appeal on a certificate under article 132(1) of the Constitution against the judgment of the High Court of Judicature at Madras dated the 20th February, 1953, holding that section 14 of the Fugitive Offenders Act, 1881, is void as it offends against the provisions of the Constitution being discriminatory in its effect.

The respondents, husband and wife, were apprehended and produced before the Chief Presidency Magistrate, Egmore, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. Mr. Menon is a barrister-at-law, and was practising as an advocate and solicitor in the Colony of Singapore. Mrs. Menon is an advocate of the Madras High Court and was until recently a member of the Legislative Council of the Colony of Singapore. Both of them came to India some time after July, 1952. On the 22nd August, 1952, the Government of Madras forwarded to the Chief Presidency Magistrate, Madras, copies of communications that passed between the Government of India and the Colonial Secretary of Singapore requesting the assistance of the Government of India to arrest and return to the Colony of Singapore the Menons under warrants issued by the Third Police Magistrate of Singapore. Mr. Menon was charged on several counts of having committed criminal breach of trust and Mrs. Menon was charged with the abetment of these offences.

The Menons, when produced before the Presidency Magistrate, questioned the validity of their arrest. They pleaded their innocence and contended that being citizens of India, they could not be surrendered as the warrants related to matters of a civil nature and had been given the colour of criminal offences merely for the purpose of harassing them out of political animosity and with a view to prejudice the Court against them and were issued in bad faith. It was further urged that the provisions of the Fugitive Offenders Act under which action was sought to be taken against them were

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repugnant to the Constitution of India and were void and unenforceable.

The Presidency Magistrate expressed the view that by retaining the Indian Extradition Act, 1903, and with it Chapter IV, the President of India may have intended to give effect to the Fugitive Offenders Act, 1881, but by the omission to adapt or modify it suitably it had become impossible to give effect to that intention, the provisions of the Act, as they are, being inconsistent with and repugnant to the sovereign status of the Indian Republic. In view, however, of the provisions of section 432, Criminal Procedure Code, as amended by Act XXIV of 1951, he referred to the decision of the High Court the following questions of law :—

(1) Whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India became a Sovereign Democratic Republic ; and

(2) Whether, even if it applied, it or any of its provisions, particularly Part II thereof, is repugnant to the Constitution of India and is therefore void and or inoperative.

The High Court held that section 14 of the Fugitive Offenders Act was inconsistent with the fundamental right of equal protection of the laws guaranteed by article 14 of the Constitution and was void to that extent and unenforceable against the petitioner. The second question referred having thus been answered in favour of the respondents, it was not thought necessary to return any answer to the first question. As above stated, a certificate under article 132(1) of the Constitution for leave to appeal to the Supreme Court against this decision was granted to the State of Madras. The Union of India was allowed to intervene at their request.

The learned Solicitor-General who argued the case on behalf of the Intervener as well as on behalf of the State of Madras conceded that the Fugitive Offenders Act, 1881, was not adapted by any specific order of the President, and that the Parliament in India had not enacted any Legislation on its lines. He, however, contended that the omission to adapt the impugned Act

in no way affected the question whether it was in force as the law in the territory of India after the commencement of the Constitution. Reliance was placed on article 372(1) of the Constitution which is in these terms :—

"Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

And it was said that the impugned Act was the law in force in the territory of India immediately before the commencement of the Constitution and continued in force under the provisions of this article after its commencement. It was also said that the adaptations made in the Indian Extradition Act, 1903, by implication kept alive the Fugitive Offenders Act, 1881, and its different provisions.

In order to decide whether Part II of the Fugitive Offenders Act, 1881, comprising sections 12 and 14 under the provisions of which the Menons are under arrest, has force after the coming into force of the Constitution, it is necessary to appreciate the relevant provisions of the Act. The Fugitive Offenders Act, 1881, as enacted by the British Parliament is sub-divided into four parts and is comprised of 41 sections. Part I of the Act concerns itself with offences mentioned in section 9. Section 5 of this part provides that a fugitive when apprehended shall be brought before a Magistrate who shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the fugitive was charged with an offence committed within his jurisdiction, and that if the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as according to the law ordinarily administered by the magistrate raises *a strong or probable presumption that the fugitive committed the offence* mentioned in the warrant, and that the offence is one to which this part of this Act

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applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British Possession to the Governor of that possession. Section 12 which is the first section in Part II of the Act is in these terms :—

"This part of this Act shall apply only to those *groups of British Possessions* to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by *Order in Council* to direct that this part of *this Act shall apply to the group of British possessions mentioned in the Order,* and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient."

Section 14 which is directly in point so far as the respondents are concerned provides as follows :

"The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British Possession in which the warrant was issued, and for that purpose to be delivered into the custody of the person to whom the warrant is addressed, or any or more of them, and to be held in custody and conveyed by sea or otherwise into the British Possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof."

A comparison between the provisions of Part I and Part II of the Act makes it clear that with regard to

offences relating to which Part I has application a fugitive when apprehended could not be committed to prison and surrendered unless the magistrate was satisfied that on the evidence produced before him there was a strong or probable case against him, while in regard to a fugitive governed by Part II of the Act it was not necessary to arrive at such a finding before surrendering him. There is thus a substantial and material difference in the procedure of surrendering fugitive offenders prescribed by the two parts of the Act.

The scheme of the Fugitive Offenders Act is that it classifies fugitive offenders in different categories and then prescribes a procedure for dealing with each class. Regarding persons committing offences in the United Kingdom and British Dominions and foreign countries in which the Crown exercises foreign jurisdiction, the procedure prescribed by Part I of the Act has to be followed before surrendering them and unless a *prima facie* case is established against them they cannot be extradited. Extradition with foreign States is, except in exceptional cases, governed by treaties or arrangements made *inter se*. Extradition of offenders between the United Kingdom and the Native States in India is governed by the Indian Extradition Act. Under the provisions of that Act no person apprehended could be surrendered unless a *prima facie* case was made out against him. Extraditions *inter se* between British possessions, however, were dealt with differently by the Act. They were grouped together according to their contiguity etc. by an Order in Council and treated as one territory and this grouping was subject to alterations and modifications by an Order in Council and conditions of extradition could also be prescribed by such an Order.

An Order in Council dated the 2nd January, 1918, grouped together the following British Possessions and Protected States with British India for the purposes of Part II of the Act :—Ceylon, Hongkong, the Straits Settlements, the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Trengannu, Brunei, North Borneo and Sarawak. The Order is these terms :—

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"Whereas by an order of Her Majesty Queen Victoria in Council bearing date the 12th day of December, 1885, it was ordered that Part II of the Fugitive Offenders Act, 1881, should apply to the *group of British Possessions therein mentioned,* that is to say, Her Majesty's East Indian Territories, Ceylon and the Straits Settlements ;

And whereas by the Straits Settlements and Protected States Fugitive Offenders Order in Council, 1916, as amended by the Straits Settlements and Protected States Fugitive Offenders Order in Council, 1917, it is ordered that the Fugitive Offenders Act, 1881, shall apply as if the Protected States named in the schedule to the first mentioned order were British Possessions ;

And whereas by reason of *their contiguity or the frequent intercommunication between them* it seems expedient to His Majesty and conducive to the better administration of justice therein to apply Part II of the Fugitive Offenders Act, 1881, to the abovenamed *British Possessions and Protected States* and such *application has been requested by the Rulers of the said States* ;

Now therefore, His Majesty, by virtue of the powers in this behalf by the Fugitive Offenders Acts, 1881, and 1915, and otherwise in His Majesty vested is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows :—

On and after the first day of February, 1918, the hereinbefore recited Order in Council of the 12th day of December, 1885, shall be revoked, without prejudice to anything lawfully done thereunder or to any proceedings commenced before the said date, and Part II of the Fugitive Offenders Act, 1881, shall apply to the *group of British Possessions and Protected States hereunder mentioned,* that is to say, British India, Ceylon, Hongkong, Straits Settlements, the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Trengannu, Brunei, North Borneo and Sarawak."

By another Order in Council dated the 29th July, 1937, Burma which ceased to be part of British India was also included in the group of British Possessions and Protected States mentioned in the earlier Order in Council.

It is plain from the above provisions of the Act as well as from the Order in Council that British Possessions which were contiguous to one another and between whom there was frequent inter-communication were treated for purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted or the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a *prima facie* case was made against him was dispensed with. Under the Indian Extradition Act, 1903, also a similar requirement is insisted upon before a person can be extradited.

The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament has not so far enacted any law on the subject and it was not suggested that any arrangement has been arrived at between these two Governments. The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone. The provisions of that Act could only be made applicable to

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India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines, it seems difficult to hold that section 12 or section 14 of the Fugitive Offenders Act has force in India by reason of the provisions of article 372 of the Constitution. The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone; India is no longer a British Possession and no Order in Council can be made to group it with other British Possessions. Those of the countries which still form part of British Possessions and which along with British India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding article 372 of our Constitution India was no longer a British Possession and therefore the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India. Indeed some of the other members of this group have also achieved independence. Under section 12 of the Act it is not possible for His Majesty from time to time by Order in Council to alter the character of this group or its composition or to take any action as prescribed by that section. Article 372 of the Constitution cannot save this law because the grouping is repugnant to the conception of a sovereign democratic republic. The political background and shape of things when Part II of the Fugitive Offenders Act, 1881, was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions. That being so, in our opinion, the tentative view expressed by the Presidency Magistrate was right and though the High Court did not return the answer to the first question referred to it, in our judgment, the case can be shortly disposed of on that ground.

The contention of the learned Solicitor-General that by reason of the adaptations made in the Indian Extradition Act, 1903, and references made therein to

the Fugitive Offenders Act, it should be held that the whole of the Fugitive Offenders Act including Part II had been adapted by the President does not seem to be well founded. The scheme of the Indian Extradition Act which was founded on the English Act is quite different. It does not specifically keep alive any of the provisions of Part II of the Fugitive Offenders Act, 1881, and there is no adaptation of the Fugitive Offenders Act, 1881, within the four corners of the Indian Extradition Act, 1903. In these circumstances it is not possible to work out the sections of the Fugitive Offenders Act and apply them to the situation that has arisen after the coming into force of the Constitution of India. Moreover clause 28 of the Adaptation of Laws Order, 1950, can have no application to such a case. We do not think that it is necessary in the present case to enter into a discussion of the question whether British Possessions with which India was grouped under Part II of the Fugitive Offenders Act, 1881, should now be treated as foreign States *qua* India and that offenders apprehended can be surrendered under the Indian Extradition Act or any other law, provided a *prima facie* case is made against them as the proceedings taken against the respondents were specifically taken under section 14 of the Fugitive Offenders Act, 1881, and it is not the practice of this Court to decide questions which are not properly raised before it or which do not arise directly for decision.

For the reasons given above we uphold the decision of the High Court, though on a ground different from that on which that Court decided, in favour of the respondents. The appeal therefore fails and is dismissed.

Appeal dismissed.