

ALLAHABAD HIGH COURT

Ram Babu Saksena

Vs.

Rex

Criminal Misc. Case No. 960 of 1949

(Harish Chandra, J.)

08.05.1949. 11.11.1949

JUDGMENT

Harish Chandra, J.

1. This is an application under Sections 491 and 561-A, Criminal Procedure Code. A warrant dated 8th May 1919, was issued by Shri. V.K.B. Pillai, Regional Commissioner (who now takes the place of the Political Agent) of the United State of Rajasthan, under Section 7, Extradition Act, 1903 (15 of 1903) for the arrest of the applicant, Dr. Ram Babu Saxena, and for his removal to the United State of Rajasthan to be delivered to the District Magistrate of Tonk for enquiry into certain offences against the laws of that State which he is said to have committed. The warrant was addressed to the District Magistrate of Naini Tal within whose jurisdiction the applicant resided at that time. The warrant authorized the District Magistrate of Naini Tal to release the applicant on bail if he furnished a bond in the sum of Rs. 10.000 with one surety in the like amount. The warrant was served upon the applicant at Naini Tal on 23rd May 1949 and he was, thereafter, released on bail and directed to present himself before the District Magistrate of Tonk as required by the said warrant, on 7th June 1949. The applicant presented this application to this Court on 3rd June 1949 accompanied by an affidavit alleging that the arrest of the applicant was illegal and praying that the proceedings pending before the District Magistrate of Naini Tal relating to his arrest pursuant to the said warrant be quashed and that he may be released from any obligation to surrender himself to the United State of Rajasthan. Although it is not stated in the warrant, it appears from the affidavit and other papers on the record that the offences with which the applicant has been charged are those under Sections 383 and 420, Penal Code. Although Section 561A, Criminal Procedure Code has also been mentioned in the application it is apparent that the application is one mainly under Section 491, Criminal Procedure Code.

2. The question arises whether the High Court has jurisdiction under Section 491, Criminal

Procedure Code in the case of a person who is not under detention but has been released on bail. A doubt was expressed by the Judicial Commissioner's Court at Sind in the case of *Jamna v. Emperor*¹, whether it was necessary for the Court to exercise its jurisdiction under Section 491, Criminal Procedure Code where the person detained was on bail. But the question was set at rest by the Allahabad High Court in the case of

¹ AIR 1926 Sind 126 : (27 Cr LJ 37)

*Sandal Singh v. District Magistrate, Dehra Dun*², and it was held, that where a person has been arrested consequent on a warrant of arrest the High Court could still interfere although he has been temporarily released on bail pending further enquiry.

3. The applicant is a member of the United Provinces Civil (Executive) Service of about thirty years' standing and is a resident of this province. In the year 1947 his services were placed at the disposal of the Government of India in the Ministry of Information and Broad-casting as Deputy Secretary. In January 1948, he was appointed Administrator of the Tonk State where a dispute had arisen in regard to the succession to the gaddi. On 11th February 1948 one of the claimants, Nawab Ismail Ali Khan, was recognised as Nawab and the applicant was then appointed as Dewan and vice-president of the State Council of which the Nawab was the President. Later, the Tonk State merged into the State of Rajasthan on 1st May 1948. Thereafter the applicant was appointed Chief Executive Officer under the Rajasthan Government at Tonk and he held this office till 31st July 1948. After that he was appointed Special Officer to the Rajasthan Government at Udaipur and continued to hold that appointment upto the end of the month. After that he reverted to the United Provinces Government and was granted leave for a period of four months by that Government with effect from 1st September 1948. The leave has been further extended from time to time on medical grounds.

4. The facts alleged against the applicant are that after his appointment as Dewan and Vice President of the State Council at Tonk the Nawab found himself in urgent need of money. His demand was for a sum of rupees fourteen lakhs out of the State Treasury. He approached the applicant who told him that he would help him in case he promised to give him a sum of three lakhs of rupees as his share. Thereafter the applicant helped the Nawab in obtaining the sanction of the State Ministry to the payment to him of the aforesaid amount. The first instalment amounting to a little over two and half lakhs of rupees was paid to the Nawab for the repayment of the debts which he had incurred during sahibzadgi, on 31st March 1948. A further sum of rupees five lakhs was paid to him on 21st April 1948 for the purchase of a house at Delhi. On receipt of this sum of rupees five lakhs by the Nawab on 21st April 1948, the applicant asked him to pay him his share of three lakhs. On that day the Nawab paid him a sum of rupees one and a half lakhs only. Two or three days later the applicant asked him to pay up the balance, The Nawab tried to put him off, but the applicant told him that he had received information that he was "the cause of the alleged early death of the late Nawab" that he was "in league with the Azad Kashmir forces etc." and that "he would find himself in deep waters if he did not pay up the balance." Thereupon the Nawab paid him a lakh more. After another week the applicant

approached the Nawab again and misrepresented to him that a number of complaints had been received against him and that the applicant "might find it difficult to protect him more particularly as the Nawab himself was not true to his promise". Thereupon the Nawab paid him the balance of Rs. 50,000. The matter became known to the Regional Commissioner in November 1948 and thereafter he called the applicant for an interview and subsequently managed to secure the return of the entire sum of rupees three lakhs by him to the Nawab. The charges under Sections 383 and 420, Penal Code are based on these facts.

5. The applicant's contention is that he has been falsely implicated by the Nawab on

²⁵⁶ AIR 1934 All 148 : 35 Cr LJ 1296)

account of enmity and that the Regional Commissioner being his (Nawab's) "fast friend" has issued a warrant for his arrest under Section 7, Extradition Act. His case is that a sum of Rs. 3,00,000 was paid to him by the Nawab of his own accord so that he may take it to Delhi and deposit it there for his (Nawab's benefit). He says that thereafter he asked the Nawab several times orally before his departure from Tonk and subsequently in writing to take the money back from him, but that the Nawab did not send him any reply. He produces a photographic copy of a letter, dated 31st March 1948, written and signed by the Nawab himself in which he makes mention of some money paid by him to the applicant for "his (Nawab's) use in Delhi. He asked him to "keep it safely in Bank or otherwise" and told him that he would "be soon in Delhi". The applicant's contention is that this letter refers to the sum of Rs. 3,00,000 which he gave him on that date and which he subsequently placed in safe deposit in a Bank in Delhi according to the Nawab's instructions. The applicant's contention is that he committed no offence and that the warrant is a mala fide one and has been issued for an ulterior purpose and that this Court has the power to quash it in the exercise of its jurisdiction under Section 491, Criminal Procedure Code.

6. Various other objections have been taken on behalf of the applicant. It is said that the alleged offences are said to have been committed by him while he was acting or purporting to act in the discharge of his official duty and that, therefore, no action can be taken on the warrant without the sanction of the United Provinces Government under whom he is employed, in view of the provisions of Section 197, Criminal Procedure Code, and that the sanction of the Government of United States of Rajasthan is of no effect. It is further said that in view of Article 17 of the covenant entered into by the rulers of a number of States which joined to form the United State of Rajasthan, printed on p. 75 of Government of India's White Paper on Indian States, the sanction of the Rajpramukh of the United State of Rajasthan is also necessary before any action can be taken against the applicant on the said warrant. It is pointed out that the proceedings before the District Magistrate of Naini Tal which took place under Section 7, Extradition Act, are in the nature of judicial proceedings and that the said District Magistrate could not take cognizance of the matter and cause the applicant to be arrested by virtue of that warrant without the previous sanction of the United Provinces Government under Section 197, Criminal Procedure Code, and of the Rajpramukh of the United State of Rajasthan under Article 17 of the Covenant referred to above. It is further said that as the alleged offences are said to have been

committed in the State of Tonk the present case will be governed by the provisions of the Extradition Treaty between the British Government and Tonk State entered into on 28th January 1869 as modified by the Supplementary Agreement to the Treaty, dated 27th August 1887, and not by the Extradition Act, 1903. Reliance is placed upon Section 18 of the Act which says that nothing in Chap. 3, in which Section 7 occurs, shall 'derogate' from the provisions of any treaty for the extradition of offenders. It would appear that the list of offences mentioned in Article 5 of the Treaty does not include the offences of extortion and cheating although they are included in schedule to the Extradition Act. The contention is that as the provisions of the Treaty apply in preference to those contained in the Act, no extradition can take place in the present case. It is pointed out that although the Tonk State had formally merged in the State of Rajasthan and has now merged in the United State of Rajasthan, in view of the provisions contained in the Indian Independence Act, 1947, and certain agreements that were made subsequently to 15th August 1947, between the Indian Dominion and the State of Tonk and, later, the United State of Rajasthan, the provisions of the said Treaty have been kept alive and would, therefore, apply in preference to those contained in the Extradition Act, 1903. International Law has also been referred to for the purpose of interpreting the treaty as also for showing that the provisions of the treaty subsist even after the merger of the Tonk State into the United State of Rajasthan. Finally, it is said that the issue of an extradition warrant in the present case is a fraud upon the statute and abuse of the process of law and that this is a fit case in which this Court should interfere in exercise of its jurisdiction under Section 491, Criminal Procedure Code.

7. The jurisdiction of the High Court to enquire in a habeas corpus application whether a person has been legally arrested by the executive is undoubted. In the case of *The King v. Governor of Brixton Prison*³, in an application for a writ of habeas corpus Lord Reading, C.J., observed : "If we were of opinion that the powers were being misused, we should be able to deal with the matter." The case

"turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal who, it was suggested, was no danger to the State. The Court expressly held they had power to consider this question and resolved it against the applicant."

In the case of *Eshugbayi Eleko v. Nigerian Government*⁴, Lordships of the Judicial Committee followed the decision in this case and said :

"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. and it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

8. In a case arising out of extradition proceedings (*In re Rudolph Stallmann*⁵, the Calcutta High

Court expressed the same view. The following observations occur in the judgment of Woodroffe, J., in that case:

"The Government can only issue a warrant by virtue of the provisions of the Legislature authorizing it. and if those provisions have not been carried out, the warrant and the custody there under may be found to be illegal. We can then interfere notwithstanding that the warrant has been given in extradition proceedings with which, except as otherwise expressly provided, we are not directly concerned."

9. This High Court has also taken the same view : (*Vide Sandal Singh v. District Magistrate Dehra Dun*⁶, But the jurisdiction exercisable by the High Court under Section 491, Criminal Procedure Code in such cases is strictly limited. In the case of *Harish Chander v. Emperor*⁷, this Court held that the High

³1916-2 KB 742: (86 LJKB 62)

⁵39 Cal 164: 12 IC 273)

⁴1931 AC 662 (AIR 1931 PC 248)

⁶56 All 409: (AIR 1934 All 148: 35 Cr LJ 1296)

⁷1943 ALJ 336: (AIR 1943 All 277 : 44 Cr LJ 722 FB)

Court could not act as a Court of appeal from the discretionary order passed by the Commissioner under Rule 26, Defense of India Rules and that the High Court cannot launch an enquiry for the determination of the question whether or not circumstances existed so as to justify the order of detention passed under that rule. It was, however, held that :

"in cases in which, even though the forms of law have been observed, the detention constitutes a clear fraud on an enactment or amounts to an abuse of the powers given to the executive by the Legislature it is the duty of this Court to step in and to order that the person detained be set at liberty."

In the case of *Jitendra Nath v. Chief Secretary to the Government, Bengal*⁸, the Calcutta High Court with reference to the word "improperly" occurring in Section 491 said that :

"it can only refer to cases in which, although the forms of law have been observed, there had been a fraud on an Act or an abuse of the powers given by the legislature."

In the case of *Bashesar Dayal v. Emperor*⁹, the Lahore High Court also took the same view and held that the High Court could interfere if there had been "an abuse of power and fraud upon the statute."

10. In the present case, it cannot be said on a perusal of the material on the record that there has in fact been an abuse of power or fraud upon the statute. I have already set out the circumstances under which an extradition warrant has been issued against the applicant. I have also set out briefly the case of the applicant. Great emphasis has been laid on the applicant's behalf on the

letter of the Nawab dated 31st March 1948 of which a photographic copy is on the record. But it is obvious that without a full and proper enquiry it cannot be determined what the real facts are and such an enquiry is outside the scope of the present application.

11. In the Sind case of *Jumma v. Emperor*¹⁰, it was said that all that the Court could do in such a case was to see that there was no present defect visible in the authority by which the person having custody of the applicant had detained him and that no further investigation was permissible.

12. It is said on behalf of the applicant that the Regional Commissioner who would be a witness in the case, is a fast friend of the Nawab and that he has issued the warrant mala fide. But there is no rule or law which prevents the Political Agent who is himself a witness in a case from exercising the powers given to him under the Extradition Act and issuing a warrant for the extradition of an offender. and an enquiry whether he had acted in good faith and had followed the proper procedure before issuing the warrant is not within the scope of the present enquiry. In the case of *C.P. Matthen v. District Magistrate of Trivandrum*¹¹, their Lordships of the Judicial Committee considered a somewhat similar question and the following is reproduced from their judgment

⁸60 Cal 364 : (AIR 1932 Cal 753 : 34

¹⁰(AIR 1926 Sind 126: 27 Cr LJ 37)

⁹ AIR 1946 Lahore 16: (47 Cr LJ 212)

¹¹1939 ALJ 836 : (AIR 1939 PC 213 : 40 Cr LJ 675)

"It only remains to deal with the applicant's contentions as to the warrants :

In the first place, they maintained that the Court is entitled to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made under Section 22 of the Act have been complied with and that the appellants were entitled to an opportunity to satisfy the Court (a) that the offences must have been committed in Madras and (b) that, in reality, the Travencore authorities desired to get the applicants into their jurisdiction in order to charge them with political offences, which would not be extraditable offences. It must be remembered that the warrants are issued by the Agent of the Government of India, and not by an Agent of the Travencore Stats, and this executive act is safeguarded in various ways by the Act and by the rules. For instance, Rule 4 provides that the Political Agent shall in all Cases before issuing a warrant under Section 7 of the Act, satisfy himself by preliminary enquiry or otherwise that there is, prima facie, case against the accused person. The appellants do not suggest that the resident did not so satisfy himself in the present case. But, if such a suggestion were to be made, their Lordships are of opinion that it would be properly the subject of enquiry by the Court, but should be stated to the Magistrate on an application to him to report to the Local Government under Section 8A of the Extradition Act. Their Lordships see no reason why the offences charged cannot have been committed in Travencore, and what they have stated above directly applies to the suggestion that the true object of the extradition is to enable the appellants to be charged with

the political offences. It may be added that a bogus trial of the offences, in respect of which the extradition is made, would appear to fall within Rule 7 and to make it the duty of the Political Agent, in such an event, to demand the restoration of the prisoners to his custody." In the case of *Israr Husain v. District Magistrate of Basti*¹², this Court declined to interfere merely on the allegation that the necessary procedure had not been followed by the Political Agent and that therefore the warrant was illegal. The suggestion that the real object of the authorities of the United State of Rajasthan is to harass the applicant and to try him for offences which are not in fact extraditable and that offences under Sections 383 and 420, Penal Code, have been mentioned with the mala fide object of securing the applicant's surrender to Rajasthan is, therefore, one which is beyond the scope of enquiry by this Court.

13. It is said that the facts as stated in paras. 16, 17 and 18 of the affidavit filed on behalf of the Crown do not in fact constitute offences under Section 383 and 420, Penal Code. I need not decide this matter which is one that will be properly considered by the Court that may be called upon to enquire into the matter. The contention made on behalf of the applicant that the warrant of arrest issued by the Regional Commissioner of the United State of Rajasthan is a mala fide one and that it is a fraud upon the statute and an abuse of the process of law, is in my view without force.

14. I shall next consider the question of sanction under Section 197, Criminal Procedure Code, and Art. XVII of the Covenant by which the United State of Rajasthan was created. Admittedly, no sanction of the Raj Pramukh as contemplated by Article XVII of the Covenant exists. The contention on behalf of the Crown is that the offences alleged to have been committed by the applicant are not such as might be said to have been committed by him while acting or purporting to act in the discharge of his official duty within the meaning of Section 197, Criminal Procedure Code or to have been in respect of

¹²1939 ALJ 895 : (AIR 1939 All 730 : 41 Cr LJ 152)

any act done or purporting to be done in the execution of his duty as a servant of the Tonk State, within the meaning of Article XVII of the Covenant. Reliance is placed upon the Privy Council case of *H.H.B Gill v. The King*¹³ It would appear that the language used in Section 270 Government of India Act, 1935, before it was deleted after 15th August 1947, is similar to the language used in Article XVII of the Covenant. Their Lordships of the Judicial Committee considered Section 270, Government of India Act, and compared it with Section 197 Criminal Procedure Code, and were of the view that they were not distinguishable. In the case before them, a public servant had been charged with bribery and the question was whether the previous sanction of the Government as contemplated by Section 197, Criminal Procedure Code, was necessary. It was held that a public servant charged with bribery could not justify his act, as an act done by him by virtue of the office that he held and that no such sanction was necessary.

15. In the case of *Suraj Prakash v. Emperor*¹⁴, the Federal Court held that an offence under Section 408 or 409, Penal Code was not one in respect of which the protection of Section 270,

Government of India Act could be claimed. The same question was also considered by their Lordships of the Judicial Committee in the case of *Phanindra Chandra Neoay v. The King*¹⁵ and it was held that there a person was charged under Section 161, Penal Code no sanction under Section 197 Criminal Procedure Code, was necessary. The reasons would appear from the following quotation from Gill's case. (1948 ALJ 256 : AIR 1948 PC 128 49 Cr LJ 503) reproduced in that judgment :

"A public servant can only be said to act or purport to act in the discharge of his official duty, if the act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a judge in receiving a bribe though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that what he does, he does in virtue of his office."

16. If no sanction under Section 197, Criminal Procedure Code, or Article XVII of the Covenant is necessary with respect to an offence under Section 161, Penal Code, obviously there is much less reason for such sanction with respect to the offences of extortion and cheating within the meaning of Section 388 and 420 respectively of the Indian Penal Code. The Crown had produced a copy of an order of sanction signed by the Chief Secretary to the Government of the United State of Rajasthan under Section 197, Criminal Procedure Code, as adapted by the Rajasthan Government and having regard to the adaptations made in Rajasthan, where the alleged offences were committed, in that section, such sanction would appear to be legal, were sanction under that section really necessary in the present case. But as I have just pointed out no such sanction is in fact necessary and the omission to obtain the sanction of the Raj Pramukh under Article XVII of the Covenant is of no consequence.

17. But even if such sanction were necessary it would appear from a perusal of Section 197, Criminal Procedure Code, and Article XVII of the Covenant that the necessity for

¹³1948 ALJ 256 : (AIR 1948 PC 128 : 49 Cr LJ 503)

¹⁵AIR (36), 1949 PC 117 : (50 Cr LJ 395)

¹⁴AIR 1945 FC 24 : (1945 FCR 90)

such sanction arises only when the Court takes cognizance of the offence or the proceedings are actually instituted in Court. This is clear from the plain words used in Section 197 and Article XVII and no sanction would appear to be necessary before the execution of a warrant of arrest under Section 7, Extradition Act. It is said that the term "cognizance" as used in Section 197 has not been defined and that the District Magistrate of Naini Tal while executing the warrant received by him from the Regional Commissioner would be deemed to have taken cognizance of the offence within the meaning of Section 197, Criminal Procedure Code.

18. It would appear that the proceedings before the District Magistrate of Naini Tal in pursuance to the extradition warrant received from Rajasthan were not in the nature of a judicial proceedings and this was the view taken in Sandal Singh's case, 56 All 409 : (AIR 1934 Allahabad 148 : 35 Cr LJ 1296), by this High Court which followed the view taken by the

Calcutta High Court in the case of *Gulli Sahu v. Emperor*¹⁶ and disagreed from the view taken by the Bombay High Court in the case of *Miss Mabel Ferris v. Emperor*¹⁷, The proceedings before the District Magistrate of Naini Tal being executive in character, he cannot, while acting upon a warrant received under Section 7 of the Extradition Act, be said to have taken cognizance of the offence which the applicant is alleged to have committed and Section 197, Criminal Procedure Code, will not apply. Similarly, by sending an extradition warrant to the District Magistrate of Naini Tal for execution, the Regional Commissioner cannot be said to have instituted criminal proceedings against the applicant before him and Article 17 of the Covenant will also not apply. It will be noted that in the case of *Nazir Ahmed v. Emperor*¹⁸, their Lordships of the Judicial Committee held that Section 197, Criminal Procedure Code, came into play only when a charge was preferred before a Court and the Court's function had begun.

19. It is pointed out that the Rajasthan Government have themselves in their order of sanction dated 5th May 1949 stated that the applicant was being prosecuted under Sections 161, 388 and 420, Penal Code, "in respect of acts committed by the said Dr. Ram Babu Saksena while acting or purporting to act in the discharge of his official duties". But whatever may have been the view of the Rajasthan Government with respect to the nature of these offences, it is clear from what has been stated above that they cannot be said to relate to acts done by the applicant in the execution or in the discharge of his official duty. This contention of the applicant would also, therefore, appear to be groundless.

20. I shall next proceed to consider the Extradition Treaty entered into between the British Government and the Tonk State on 28th January 1869, as modified by the Supplementary Agreement dated 27th August 1887. The treaty and the agreement are reproduced on pages 247 and 250 respectively of Aitchison's Collection of Treaties, Engagements and Sanads, 1932 Edn., Vol. III. By the supplementary agreement, it was agreed that "the provisions of the treaty prescribing a procedure for the extradition of offenders" would

"no longer apply to cases of extradition from British India to the Tonk State; but that the procedure prescribed by the law, as to the extradition of offenders for the

¹⁶42 Cal 793: (AIR 1915 Cal 426 : 16 Cr LJ 31)

¹⁸ AIR 1945 PC 18 : (46 Cr LJ 413)

¹⁷53 Bom 149: (AIR 1929 Bom 81 : 30 Cr LJ 772)

time being in force in British India was to be followed in every such case."

The treaty deals with the extradition of persons committing 'heinous' offences. A list of offences to be deemed as coming within the category of 'heinous' offences is given in Article 5 of the Treaty, It is argued that the supplementary Agreement related only to the procedural part of the treaty and not to its substantive part which includes the Article defining 'heinous' offences. No doubt, the distinction between "substantive law" and the "law of procedure" is not always a very clear one and Salmond in his book on Jurisprudence (Edn. 10, Chap. XXII, Article 175, p. 475) admits that

"it is not an easy task to state with precision the exact nature of the distinction between

substantive law and the law of procedure. . ."

In the present case, however, it is obvious that the intention of the supplementary agreement was not to cancel the whole of the original treaty relating to extradition between British India and the Tonk State and there can be no doubt that the list of 'heinous' offences as given in Article 5 of the treaty was maintained and that only the procedure in regard to the actual extradition of offenders was altered by that agreement. It will be seen that the list does not mention the offences of extortion and cheating. The first question that has to be considered, however, is whether, in view of the altered political condition in the country, the treaty still subsists.

21. Learned counsel for the applicant, Shri Pathak, refers to Section 7, Indian Independence Act. Clause (b) of sub-sections (1) provides that :

"As from the appointed day . . . the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of the Act between His Majesty and the rulers of Indian States....."

In the proviso to that sub-section, however, it is provided that :

"Notwithstanding anything in paragraph (b) or paragraph (c) of this sub-section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relates to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced"

By the state concerned or the Dominion of India or are superseded by subsequent agreements. It is argued that extradition is a matter akin to customs, transit and communications and posts and telegraphs, and that the proviso had the effect of continuing all treaties relating to extradition entered into between His Majesty and the rulers of Indian States. In my view, the extradition of offenders cannot be placed on the same footing as customs, transit and communications and posts and telegraphs. The proviso seems to contemplate agreements relating to trade and commerce and communications. The extradition of offenders stands on an entirely different footing and although it is a matter of common concern to the Indian States and the Dominion of India it seems clear to me that it is not one of the matters falling within the purview of the said proviso.

22. No doubt the stand-still agreements that were entered into on the attainment of Independence, by the Indian Dominion with the Indian States do provide for the continuance "until new agreements in this behalf are made" of "all agreements and administrative arrangements" as to matters of common concern now existing between the Crown and any Indian State "in so far as may be appropriate." A schedule was added to these agreements specifying certain matters which were to be regarded as matters of common concern between the two Governments. Extradition was one such matter included in the schedule. The form in which these stand-still agreements

were entered into between the Dominion of India and the Indian States is printed at p. 54 of Government of India White Paper on Indian States.

23. There can thus be no doubt that the treaty relating to extradition between the Crown and the Tonk State was continued as between the Dominion of India and that State by virtue of this stand-still agreement. Thereafter Instruments of Accession were entered into between the Indian Dominion and various Indian States under Section 6, Government of India Act, 1935. The contention of Shri Kanhaiya Lal Misra on behalf of the Crown is that these Instruments of Accession are to be regarded as the "new agreements" contemplated by these stand-still agreements and that therefore the stand-still agreement will be deemed to have terminated with the execution of the Instrument of Accession by the Tonk State. The contention does not seem to be correct. Instruments of Accession were entered into by Indian States for a definite purpose under Section 6, Government of India Act, and cannot be regarded as "new agreements in this behalf" as contemplated by the stand-still agreements and in my view the stand-still agreement entered into between the Indian Dominion and the Tonk State was not terminated by the Instrument of Accession. The position, however, was subsequently, altered by the merger of the State of Tonk into Rajasthan. Thereafter the Tonk State ceased to exist and the question is whether the standstill agreement or the treaties which were continued thereby continue to exist after such merger.

24. Learned counsel for the applicant refers to Article VI of the Covenant of Merger (p. 75 of the White Paper). That Article runs as follows :

"The Ruler of each Covenanting State shall as soon as practicable and in any event not later than the first day of May 1948, make over the administration of his State to the Raj Pramukh." and thereupon

"(a) all rights, authority and jurisdiction belonging to the Ruler which appertain or are incidental to the "Government of the covenanting State shall vest in the United State and shall thereafter be exercisable only as provided by the Covenant or by the constitution to be framed thereunder.

(b) all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenanting States shall devolve on the United State and shall be discharged by it; and

(c) all the assets and liabilities of the Covenanting State shall be the assets and liabilities of the United State."

The argument is that this provision in the Covenant had the effect of continuing all the agreements between British India and the Tonk State which had been continued by the stand-still agreement as between the Indian Dominion and that State. I find it difficult to follow this argument. If the intention was that all such agreements were to be continued even after the merger there is no reason why the fact should not have been specifically mentioned in the Covenants. Obviously it was quite impossible after the merger to continue all the agreements that

had been continued by the stand-still agreement as between the Dominion of India and the Covenanting States and each an interpretation of Art. VI of the Covenant would lead to absurd results. It can only refer to such 'rights, authority and jurisdiction' and such 'duties and obligations' as were capable of surviving after the merger.

25. International Law recognizes the voluntary merger of smaller international units to form a larger unit and in such a case the question arises what rights and duties of the predecessors devolve upon the successor. Oppenheim on p. 152 of his book on International Law (Edn VI Vol. I) while dealing with the succession of international persons says that it has never been maintained that

"On the successor devolve all the rights and duties of his predecessors" and further that :
"The practice of State shows that no general succession takes place according to the law of Nations."

He, however, points out that

"It is equally wrong to maintain that no succession whatever occurs".

He then goes on to consider rights and duties with respect to which succession occurs and rights and duties with respect to which succession does not occur. In regard to 'purely political treaties' no succession takes place For instance 'treaties of alliance or of arbitration or of neutrality or of any other Political nature' are extinguished 'with the extinction of the State which concluded them. They are personal treaties and they naturally legally and necessarily presuppose the existence of the contracting State'. In regard to such international rights and duties of the extinct State 'as are locally connected with its land, rivers, main roads, railways, and the like', he points out that a genuine succession takes place. In regard to 'treaties of commerce, extradition and the like made by the extinct State he says that it is controversial whether they remain valid, but, according to him, 'the majority of writers - correctly, it is believed - answer the question in the negative, because such treaties, although they are non-political in a sense, possess some prominent political features.'

26. McNair also on p. 389 of his book entitled The Law of Treaties (1938 Edn. Chap. 35), says :

"The view of the United Kingdom Government, which is also believed to be the general view, is that upon the complete annexation of the territory of a State and the merger of its existence in the annexing State the treaties affecting the extinct State and its territory lapse and lose their force (a) in the absence of any other treaty obligation resting upon the acquiring State which requires it to maintain the treaties in force, and (b) apart from certain obligations falling within the rule *retransit cum sue owners*....." Again in Chap. XXXVIII on p. 469 he says that "treaty obligations.....cease to apply to territory which

has passed out of the sovereignty (whether by cession or otherwise) of a contracting party".

He, however, points out that

"an exception exists in favor of those obligations which are of a purely local or real character affecting some particular piece of territory such as a right of transit, the navigation of a river, etc., and that these obligations continue to benefit and burden the same territory under a new sovereignty".

It may be useful at this stage to reproduce some of the Articles of the Treaty in question :

Article 1 : That any person, whether a British or Foreign subject, committing a heinous offence in British territory, and seeking shelter within the limits of the Tonk State, shall be apprehended and delivered up by latter Government to the former on requisition in the usual manner.

Article 2 : That any person, being a subject of Tonk, committing a heinous offence within the limits of the Tonk State, and seeking asylum in British territory, shall be apprehended and delivered up by the latter Government to the former on requisition in the usual manner.

Article 3 : That any person, other than a Tonk subject, committing a heinous offence within the limits of the Tonk State and seeking asylum in British territory shall be apprehended and the case investigated by such Court as the British Government may direct. As a general rule such cases will be tried by the Court of the Political Officer in whom the political supervision of Tonk may at the same time be vested

Article 4 : That in no case shall either Government be bound to surrender any person accused of a heinous offence, except on requisition duly made by, or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality as according to the laws of the country, in which the person accused shall be found, would justify his apprehension and sustain the charge if the offence had been there committed.

It would appear from a perusal of the above conditions contained in the treaty that it has become void and impossible of execution after the extinction of the Tonk State consequent on the merger. The treaty refers to subjects of the Tonk State. After the merger, the Tonk State does not exist and there can be no subjects of that State. It further refers to the commission of heinous offences within the limits of the Tonk State. The Tonk State having ceased to exist its territory has disappeared. It is said that the treaty would continue to apply to subjects of the United State of Rajasthan living within the territory which was formerly administered by the Tonk State and to offences committed within the same geographical limits. This argument is without force. The treaty was applicable to the territories administered by the Tonk State. If the geographical limits

of that State had increased by acquisition of territory, it is obvious that the treaty would have applied to that larger territory which would thereafter have been subject to the State of Tonk. Similarly, if the Tonk State had ceded certain territories to other states or to the Dominion of India the treaty would have applied to such reduced territory as was thereafter administered by the State of Tonk. It could not possibly be applied to territories which had formerly formed part of the State but were no longer administered by it. The State of Tonk having merged into Rajasthan and become extinct the treaty is now impossible of execution and thus void. As Oppenheim says (p. 850) "a treaty, although it has neither expired, nor been dissolved, may nevertheless lose its binding force by becoming void on the ground of the "extinction of one of the two contracting parties," or "impossibility of execution" etc. The treaty cannot thus be regarded as one relating to purely local rights and duties. It obviously deals with the political rights and duties of the contracting states and is political in nature and no succession can take place with respect to it. To say that the rights and duties of the Tonk State under it have now devolved upon the United State of Rajasthan is, in my view, meaningless. For it admittedly cannot apply to the whole of Rajasthan and I have already pointed out the difficulty in confining it to the territories which were at the time of the coming into being of the United State of Rajasthan subject to the administration of the Tonk State. The contention, therefore, that the treaty still subsists is incorrect.

27. But even if it be assumed that the treaty still subsists as between the Indian Dominion and the United State of Rajasthan, the question that remains to be considered is the extent to which it is affected by the provisions of the Indian Extradition Act.

28. International law cannot override municipal law and in applying the treaty we have to be guided by the provisions of the Indian Extradition Act. Oppenheim on pp. 35, 36 and 37 of his book refers to what is called the dualistic view and points out that, according to that view, "if it happens that a rule of municipal law is in indubitable conflict with a rule of the law of nations, municipal Courts must apply the former." According to the monistic doctrine, International law and municipal law are to be regarded as manifestations of a single conception of 'law.' But even, according to that view, it 'is admitted that municipal Courts may be bound by the law of their states to enforce statutes which are contrary to international law.' It follows, therefore, that a treaty cannot override municipal law As p. 830 Oppenheim points out that :

'If treaties contain stipulation with regard to rights and duties of the subjects of the contracting states, their Courts, officials, and the like these states must take such steps as are necessary, according to their municipal law to make these stipulations binding upon their subjects, Courts, officials and the like.' George W. Keeton in his book entitled, 'The Elementary Principles of Jurisprudence' (Edn. 2 1949) at p. 256 says : "A rule of international law which conflicts with a British statute is of no effect in English Courts."

And again,

"Thus, if a rule of international law conflicts with a national statute, the national Court must apply the national statute."

29. The law of England with regard to extradition it will be seen, depends upon statute. The following is reproduced from Halabury's Laws of England, Edn. 2. Volume 14, p. 522 :

"Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, His Majesty may by order in council direct that the Extradition Act shall apply in the case of such foreign state. The order or any subsequent order may be limited in operation and may be restricted to fugitive criminals who are in, or suspected of being in, the part of His Majesty's dominions specified in the order and its operation may be subject to conditions, exceptions and qualifications. The order must recite or embody the terms of the arrangement and must not remain in force for a longer period than the arrangement. Every order must be laid before both Houses of Parliament within six weeks after it is made, or if Parliament is not then sitting, within six weeks after the next meeting of Parliament. It must also be published in the London Gazette."

The United States too have made statutory provisions for the recognition of treaties or conventions for extradition between the Government of the United States and any foreign government. (See Hachworth's Digest of International Law, Volume IV, Chap. XII, p. 12).

30. It will thus be seen that the provisions of the treaty will apply only in so far as they are not affected by the provisions of the Indian Extradition Act.

31. In an earlier part of the judgment, I have reproduced the four main articles of the treaty. The contention of learned counsel for the applicant is that in interpreting the treaty the doctrine of *expressio unius exclusio alterius* (the express mention of one thing implies the exclusion of another) must be applied. This maxim is often applied to agreements and is also not inapplicable to treaties between two International States (see McNair's Law of Treaties, 1938 Edition, Chap. XVIII, p. 199) but the doctrine has its limitations and we find the following in Broom's Legal Maxims (Edn. 9, 1924, p. 421) :

"2. Great caution is necessary in dealing with the maxim *expressio unius est exclusio alterius* for as Lord Campbell observed in *Saunders v. Evans*¹⁹, it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction. . . ."

The argument is that the Treaty by providing for extradition in the case of certain specified offences between British India and the State of Tonk implies that there was to be no extradition between the two States in the case of other offences. But upon a proper interpretation of the Treaty this contention does not appear to be correct. Article 4 of the Treaty gives some indication

as to the intention of the contracting parties. In that Article it is provided :

"That in no case shall either Government be bound to surrender any person accused of a heinous offence except on requisition etc."

It, therefore, seems to me that the real intention of the Treaty is that the two Governments would be bound to surrender in the case of certain offences described as "heinous" offences but that there would be no obligation on their part to surrender in the case of other offences. It is further pointed out that in the interpretation of treaties it is sometimes

¹⁹(1853-61) 8 HLC 721 at p. 729 : (31 LJ Ch 233)

necessary to imply a term or condition (McNair's Law of Treaties, 1938, Chap. XXIII p. 233), and that it would be reasonable in the case of the present Treaty to hold that it implies a condition that there shall be no extradition in the case of offences other than "heinous" offences. But for the reasons given above, my view is that such a course would not be permissible.

32. It would thus appear that if the Extradition Act allows extradition in the case of certain offences which are not "heinous" offences as described in the Treaty, the action of the authorities in the Dominion of India in extraditing offenders with respect to such offences cannot be regarded as illegal. It may be mentioned that the provision of the Treaty which applies to the present case in Article 3, which deals with the case of a person other than a Tonk subject, such as the applicant, committing a 'heinous' offence within the limits of the Tonk State and seeking asylum in 'British' territory. In such a case, according to that Article (it is unnecessary for our present purpose to consider how exactly the provisions of Article 3 are affected by the Supplementary Agreement) the 'British' Government was not bound to surrender the offender but was only bound to apprehend him and to have the case investigated by such Court as it may direct. There is nothing in the Treaty prohibiting such surrender and by surrendering such person to the State in accordance with the provisions of the Extradition Act the Indian Dominion cannot be said to be doing an act in 'derogation' of the Treaty.

33. The above view is supported by the ruling in the Bombay case of *Re Murlidhar Bhagwandas*, 43 Bom 310 : (AIR 1918 Bombay 70 : 20 Cr LJ 34). A similar question arose in that case with respect to an extradition warrant received from the Hyderabad State. One of the questions referred to the High Court was :

"Whether in view of Section 18, Extradition Act (15 of 1903), the offence of cheating is an extradition offence, so far as British India and Hyderabad State are concerned notwithstanding its omission from Art. IV of the Treaty, dated 8th May 1867, between the British Government and Hyderabad State?"

34. The High Court considered the effect of Section 18, Extradition Act upon the Treaty. The section runs as follows :

"Nothing in this Chapter shall derogate, from the provisions of any treaty for the extradition of offenders and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly."

Heaton, J., in his judgment says :

"I cannot think that it is implied in the treaty that there cannot be extradition for offences not mentioned in the treaty"

and, as he points out, there is no express provision in the Treaty to that effect. He, therefore, held that extraditing under the Extradition Act for an offence not mentioned in the Treaty did not derogate from the provisions of that Treaty. The word "derogate" has a special meaning and Section 18, only prohibits the doing of an act which has the effect of derogating from the provisions of a treaty. The word "derogate", as Hayward, J., points out in his judgment in the same case, is not the same thing as "modify" and, as he says, if the intention of the Legislature had been "to exclude the addition of any offence", other than the offences mentioned in a Treaty, 'then the word "derogate" or "take away from" could hardly have been used.' The same question of interpretation was considered by the Patna High Court in the case of *Moonga Lal v. Emperor*²⁰, James, J., with whom Agarwala, J., agreed observes :

"It appears to be clear that the provisions that neither Government shall be bound is to be read in its ordinary sense, as implying that each Government retains a right to exercise its discretion in the matter of the surrender of its own subjects."

The same question was considered in the Sind case of *Jumna v. Emperor*²¹, and it was held that : "there is no derogation of the rights of the parties to the treaty of Jasalmere by allowing one Government, with the consent of the other, to obtain extradition of a criminal who has committed an offence not mentioned in the treaty."

It is further said in the judgment :

"A Government or a State is entitled, if it so wish, to hand over persona subject to the law of another State at the request of that State. There is here no derogation to the Sovereign rights of either power. All that the section provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations. There is thus no ground for saying that under Section 18, Extradition Act the warrant is invalid. It would, no doubt, be otherwise if the offence under which the warrant is issued had not been an extraditable offence."

In the case of *Jaipal Bhagat v. Emperor*²², while considering Section 18, Extradition Act, Jwala Prasad, J., says :

"If the Treaty prohibits extradition for offences not specified therein such prohibition overrides the provisions of the Schedule by virtue of Section 18, but there is no such prohibition in the Treaty and therefore Section 9, does not, in any way, derogate from the provisions of the Treaty."

35. Under ordinary law, if two persons are bound by a contract, one of the contracting parties cannot compel the other contracting party to do some thing which he is not bound to do under the contract. But if that other person does some thing which is according to law and which he is not bound to do under the contract at the request of the other contracting party, the law will not prevent him from, doing so.

36. In the present case, the Indian Dominion is not bound under the Treaty to surrender the applicant, but if it does so in pursuance to the provisions of the Indian Extradition Act, its action cannot be regarded as illegal and the High Court will not interfere. There is also some force in the argument advanced on behalf of the Crown that even if it were to be

²⁰12 Pat 347 : AIR 1933 Pat 295 : 34 Cr LJ 932

²²1 Pat 57: (AIR 1922 Pat 442)

²¹ AIR 1926 Sind 126 : (27 Cr LJ 37)

assumed that the Treaty subsists in the sense that the rights and duties arising therefrom continue between the Indian Dominion and the State of Rajasthan by virtue of the covenant, it cannot be said that there is a treaty between the two Governments for the extradition of offenders within the meaning of Section 18, Extradition Act and that section will not apply. The section refers to : "the provisions of any treaty for the extradition of offenders" and it is argued that, unless there is an express treaty between the two Governments, the section will not apply.

37. For the reasons given above I dismiss the application. The order staying the operation of the extradition warrant is discharged.

38. I have been asked to consider the possibility of granting a certificate in this case under Section 205, Government of India Act. There is practically no question of interpretation of the Government of India Act involved in this case and the point raised in regard to the interpretation of Section 7, Indian Independence Act, 1947, is as would appear from the judgment, of no substance.

39. The certificate is, therefore, refused.

Application dismissed.