

RAJASTHAN HIGH COURT

Birma

Vs.

State (Rajasthan)

Habeas Corpus Appln., 00
(Ranawat and Mehta, JJ.)

17.03.1950

JUDGMENT

Ranawat, J.

1. This appln. has been filed under Section 491, Criminal P. C., on behalf of Birma Nai who was arrested on 7-1-1950, under orders of the Dist. Mag. Dholpur.
2. It is alleged on behalf of the petitioner that at the request of the U.P. Govt. forwarding prima facie evidence against him the Legal Remembrance of the Govt. of the United States of Matsya ordered the Dist. Mag., Dholpur to surrender him to the Dist. Mag. Agra to stand his trial in a case under Section 395, Penal Code pending in his Court. The Dist. Mag. at first after having scrutinized the prima facie evidence had declined to surrender Birma to the U.P. Govt., but when he received an order from the Legal Remembrancer to the United States of Matsya he caused Birma to be arrested on 9-1-1950, for being surrendered to the U.P. Govt.
3. It has been argued by the advocate of the petitioner that there is no law in force in the area of the Dholpur State relating to the extradition of fugitive criminals. The Dist. Mag, Dholpur, had therefore, no authority to order his arrest or surrender.
4. It is further alleged that there was a treaty entered into between the British Govt. and the authorities of the Dholpur State regarding extradition of the fugitive criminals but it was not incorporated in any law and that treaty cannot, therefore, be deemed to be law within the meaning of S. 21, Const. Ind.

5. The Govt. Advocate has conceded that there is no law in force in the area of the then Dholpur State on the subject of the extradition of fugitive criminals, except a treaty between the British Govt. and the Dholpur State. He has argued that the provisions of the Treaty which was entered into between the British Govt. and the Dholpur State should be regarded as having the force of law and the arrest and detention of the petitioner should be deemed legal under the provisions of that treaty.

6. The question therefore, arises whether a treaty can be regarded as having the force of law and whether in view of the provisions relating to the fundamental rights in the Const. Ind. the arrest and detention of the petitioner can be considered legal.

7. In Vol. 6 part V at paras 678 and 679 of the Halsbury's Laws of England, it is laid down as follows :

"678. Treaties -Treaties or contracts between nation and nation, which are also known under the name of conventions, declarations, protocols, or general acts, are usually agreed upon by agents appointed by the treaty making authority in either State, the English agents for such purposes being appointed by the Crown.

Where plenipotentiaries, or agents invested with full and unlimited powers, are appointed, the terms of the treaty as agreed upon by such agents are invariably (though not necessarily, it seems) reduced into writing and signed and sealed by them, when the treaty becomes binding in general, though subsequent ratification by the sovereign power is usual. Where the agents are acting under a limited authority, the agreements come to are usually termed sponsions, and must be either tacitly or explicitly ratified by the sovereign power in the respective States. The Great Seal of the United Kingdom is to be used for sealing all treaties with foreign princes and States. 679. Parliamentary Sanction to Treaties -Treaties thus concluded are in general binding upon the subject without express parliamentary sanction; but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases. Thus, though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory. And where

taxation is imposed or a grant from the public funds rendered necessary, or where the existing laws of trade and navigation are affected, or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown. But where the treaty is made to put an end to war or, possibly to prevent war, on public grounds and for the public safety, it is doubtful whether the sanction of the Parliament would be always required. In all cases, however, the Cts. are competent to inquire into matters involving the construction of treaties and other acts of state; and the plea of an act of state, or that the matter involves the construction of treaties affords no valid defense to an action against officers of the Crown for interference with the private rights of a British subject.

8. In the *Parlement Belge*, (1879) 4 P.D. 129, a question arose regarding validity of the treaty involving interference with the private rights. The question in this case was whether the Crown had power by treaty to confer upon in Belgian packet boats the status of ships of war when in British ports and thus render them immune from actions brought by a British subject. Sir R. Phillimore held that the making of such a treaty was

"a user of the treaty-making power of the Crown without precedent, and in principle contrary to the laws of the constitution" (*ibid.*, at p. 154).

The judgment in this case was subsequently *revsd.*, by the Ct. of Appeal, but upon other grounds. In *Walker v. Baird*,¹ an action was brought against an officer of the Crown for acts of interference with the *pltf's*. lobster fishery, and the principle involved in the defense was that the Crown could bind its subjects by treaty (at any rate when made to put an end to war or to prevent war), that it is an offence by the common law to disobey the provisions of a public treaty or *modus vivendi*, of the kind in question and that acts of the executive in enforcing obedience to such a treaty do not give a cause of action (see *ibid* at p. 492) The P. C. did not give any decision as to the powers of the Crown in such cases, but held that the *deft's* acts could not be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into by the Crown and a foreign power (*ibid*, at pp. 496, 497).

9. It would appear from the extracts quoted above that in England under common law a treaty requires the sanction of the Parliament to make it enforceable by the officers of the Crown and binding upon the nation in cases where it interferes with the private rights of a subject.

10. A similar question arose in the case of *Mangilal v. Sarkar* in the Ct. of the Final Appeal, Udaipur, regarding validity of an extradition treaty between the States of Udaipur and Gwalior which was not enacted into a law. The following extract from the judgment of the Ct. of Final Appeal is reproduced below as it throws much light on the question involved in this case:

"A treaty was entered into between the Mewar State, and the Gwalior State relating to extradition in the year 1915.

Pursuant to the treaty, however, no extradition law appears to have been passed by Shriji though executive orders to dist. officers appear to have been passed on 3-2-1915. It is unfortunate that in a matter like extradition there should have been no law expressly brought into force in Mewar. The law of extradition was stated by Lord Russel, C.J. in *Re; Arton* (1896) 1 QB (No. I) 108 : (65 LJMC 23) at p. 111.2.

"The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice. But in the application of this principle in certain matters, such as the conditions upon which, and the class of crimes in respect of which, extradition is to be granted and the formalities to be observed upon an application for extradition are primarily matters for two political powers concerned to arrange in the first instance by treaty; having arranged them by treaty, the next step is by legislative enactment to give them the form of law and to express in an Act of Parliament the conditions and the limitations imposed upon the grant of extradition and the class of crimes to which extradition is to apply. It is to the expression of the legislature in Acts of Parliament and to that alone that judicial tribunals can refer" per Lord Russel, C.J. in *Re. Arton* (1896) 1 QB 101, p. 111-2, (65 LJMC 23).

Mere execution of treaty for extradition cannot by itself be treated as equivalent to enacting law carrying it into effect. Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature. Oppenheim, International Law Vol. 1 p. 88. The same is the position under the Govt. of India Act, 1935 Implementing of treaties and extradition, Schedule VII, list I, item 3 are both matters for which there must be legislation before action can be taken. The Mewar Govt. appears to have proceeded throughout on the basis that merely signing of the treaty and issue of executive orders to dist officials was sufficient to make its stipulations binding upon its subjects, the Cts. and officials. But the official publication of a treaty by the Govt. under international law will be sufficient only if the Municipal law of that State justified it. It appears that the Mewar Govt. have been acting for many years on the footing that the treaty and the orders of Shriji operate as Municipal law. Even the treaty with the British Govt. made on 18-12-1868 and found in Aitcheson's Treaties. Vol. III p. 36 does not appear to have been brought into operation by legislative enactment. Under Art. XXIV Clause 4(1) of the Constitution all laws in force on the date of its promulgation have been continued as such after its promulgation, but in our opinion a practice of the kind aforesaid cannot be deemed to be a law which is continued by the Constitution."

11. It may be noted that the treaty between the British Govt. and the Dholpur State after it was signed was not given the form of law by means of a legislative enactment. But it was being acted upon by the Dholpur State authorities up to the time the State was merged into the United States of Matsya as if it was good law. Perhaps nobody may have questioned its legality. All laws that were in force in the then Dholpur State and subsequently in the United States of Matsya continued to be the laws in force in the area of the former Dholpur State, firstly under the provisions of the Ordinance No. 1 of the United States of Rajasthan and subsequently by virtue of S. 372, Const. Ind. Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority. In the present case the treaty remained a treaty only a no action was taken to incorporate it into a law. That treaty cannot, therefore, be regarded as a part of the Municipal law of the then Dholpur State.

and the practice of surrendering fugitive criminals, which was being followed by the former Dholpur State cannot be deemed to be a law that could be continued under Section 372, Const. Ind. S. 21, Const. Ind. lays down :

"that no person shall be deprived of his life or personal liberty except according to procedure established by law."

When the extradition treaty of the Dholpur State is, as discussed above, held not to possess the force of law the liberty of a citizen of India cannot be taken away under it. The detention of the petitioner under the provisions of this treaty cannot, therefore, be held valid, because it cannot be said to be according to procedure established by law.

12. The other argument of the learned counsel of the petitioner might also be not without force that even supposing that the extradition treaty was good law the detention of the petnr cannot be justified under its terms, because under the terms of treaty only non-Dholpur State subjects could be surrendered if they took shelter within the territories of the Dhalpur State after hiving committed an offence in the British territories, and there is no provision whatsoever in the treaty of surrender of a Dholpur State subject. The petitioner was a subject of the Dholpur State and is now a citizen of the State of Rajasthan. In view of the foregoing discussion of the legal position of the treaty, it is not very necessary here to go into the interpretation of the terms of that treaty.

13. In conclusion it may be observed that the detention of the petitioner being not in accordance with the procedure established by law an order under Section 491 to set him free should be made. This petn. is accepted and it is ordered that Birma Nai be set at liberty forthwith.

Mehta, J. :- I agree.

Petition allowed.

Cases Referred.

1. (1894 AC 49: 61 LJPC 92)