* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: September 21, 2015

\+ W.P.(CRL) 666/2015 & CM APPL.4903/2015 &
CM APPL.6228/2015

VERHOEVEN, MARIE-EMMANUELLE ..... Petitioner
Through: Mr. Amarjit Singh Chandhiok, Senior Advocate, Mr. Vikas Pahwa, Senior Advocate with Ms. Rammi Taneja, Mr. Ritesh Kumar, Ms. Honey Kolwar, Mr. Chaitanya Kaushik, Ms. Arveena Sharma, Ms. Astha Sharma & Ms. Chitra Rentala, Advocates

versus

UNION OF INDIA THROUGH MINISTRY OF EXTERNAL AFFAIRS & ANR ..... Respondents
Through: Mr. Sanjay Jain, ASG, Mr. Rajesh Gogna, CGSC with Ms. Bani Dikshit, Ms. Rajul Jain, Ms. Shreshth Jain, & Ms. L. Gangmai, Advocates for UOI.
Mr. Manish Mohan, Advocate with Ms. Sidhi Arora, Advocate for R-UOI.
Ms. Rajdeepa Behura, Advocate with Ms. Sanskriti Jain, Advocate for R-2/CBI.

\+ W.P.(CRL) 1215/2015 & CM APPL.8814-8815/2015 &
CM APPL.9822-9823/2015

VERHOEVEN, MARIE-EMMANUELLE ..... Petitioner
Through: Mr. Amarjit Singh Chandhiok, Senior Advocate, Mr. Vikas Pahwa, Senior Advocate with Ms. Rammi Taneja, Mr. Ritesh Kumar, Ms. Honey Kolwar, Mr. Chaitanya Kaushik, Ms. Arveena Sharma, Ms. Astha Sharma & Ms. Chitra Rentala, Advocates

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr. Sanjay Jain, ASG, Mr. Rajesh Gogna, CGSC with Ms. Bani Dikshit, Ms. Rajul Jain, Ms. Shreshth Jain, & Ms. L. Gangmai, Advocates for UOI.

Mr. Manish Mohan, Advocate with Ms. Sidhi Arora, Advocate for R-UOI.

Ms. Rajdeepa Behura, Advocate with Ms. Sanskriti Jain, Advocate for R-2/CBI.

**CORAM:**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE JAYANT NATH**

**J U D G E M E N T**

**Ms.G.ROHINI, CHIEF JUSTICE**

1. The petitioner in these two petitions is a French National who was intercepted in Uttar Pradesh on 17.02.2015 on the basis of a Red Corner Notice issued by Interpol on the request of the Republic of Chile for her detention for the alleged offence committed in Chile. Subsequently, she was provisionally arrested vide order dated 24.02.2015 of the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi under Section 34-B of the Extradition Act, 1962. Thereafter, accepting the extradition request dated 24.03.2015 made by the Republic of Chile, by order dated 18.05.2015 the Union of India, Ministry of External Affairs directed inquiry under Section 5 of the Extradition Act, 1962 as to the extraditability of the offence committed by the petitioner.

2. The said action of the Union of India resulting in continuous detention of the petitioner from 17.02.2015 is under challenge in these two writ petitions.

3. While W.P. (Crl.) No.666/2015 has been filed with a prayer to quash the order dated 24.02.2015 passed by the Additional Chief Metropolitan Magistrate, Patiala House Courts (for short ' ACMM') directing provisional arrest under Section 34-B of the Extradition Act, 1962, the other petition being W.P.(Crl.) No.1215/2015 has been filed assailing the Notification dated 28.04.2015 issued under Section 3(3) of the Extradition Act, 1962 as well as the order dated 18.05.2015 passed by the Ministry of External Affairs, Union of India directing inquiry under Section 5 into the extradition request made by the Republic of Chile.

4. The principal question that arises for consideration is as to whether the provisional arrest and detention of the petitioner under Section 34-B of Extradition Act, 1962 followed by the Magisterial inquiry ordered by the Union of India, Ministry of External Affairs in terms of Section 5 of Extradition Act, 1962 as to extradition of the petitioners is legal and valid.

5. At the outset, we shall refer to the facts borne out of the record.

(i) The petitioner, a French National, was intercepted on 17.02.2015 in Uttar Pradesh on the basis of the Red Corner Notice dated 27.01.2014 issued by the Interpol at the request of the Republic of Chile. The Red Corner Notice reflects that the petitioner was required for prosecution by the Republic of Chile on the charge of conspiracy to commit a crime and terrorist attack on a public authority on 01.04.1992 resulting in his death and an arrest warrant was issued against the petitioner on 21.09.2010 by Court of Appeal of Santiago in Chile.

(ii) In pursuance of a transit remand issued by the Jurisdictional Magistrate of Uttar Pradesh, the petitioner was brought to Delhi and was produced on 21.02.2015 before the Chief Metropolitan Magistrate, Patiala House Courts, New Delhi which is the designated Special Court for Extradition Cases.

(iii) On the basis of the information received from Chilean Investigating Police, Interpol National Central Bureau about the detention of the petitioner in India on 17.02.2015, the Court of Appeals, Santiago passed an order dated 23.02.2015 to approach the Supreme Court of Chile in accordance with Section 635 of the Criminal Procedure Code so as to permit the Ministry of Foreign Affairs of Chile to seek extradition of the petitioner.

(iv) The Embassy of Republic of Chile vide Note Verbale No. 26/2015 dated 24.02.2015 made a request to the Ministry of External Affairs, Union of India to take steps for preventive detention of the petitioner stating that the Chilean Authorities are intending to make a request for extradition and that a request has already been made on 23.02.2015 by the Special Investigating Judge of the Santiago Court of Appeals, Chile to the Supreme Court of Justice, Chile to seek extradition of the petitioner.

(v) On the basis of the said Note Verbale dated 24.02.2015, the Ministry of External Affairs, Union of India filed an application before Chief Metropolitan Magistrate, Patiala House Court,

New Delhi to pass an order of provisional arrest under Section 34B of the Extradition Act.

(vi) The said application of the Ministry of External Affairs, Union of India was allowed by the Chief Metropolitan Magistrate by order dated 24.02.2015. As a result, the petitioner was provisionally arrested and sent to judicial custody.

(vii) On 24.02.2015 itself, an application was moved before the Chief Metropolitan Magistrate, Patiala House Courts, New Delhi for release of the petitioner on bail.

(viii) By order dated 05.03.2015, the bail application of the petitioner was dismissed by the Chief Metropolitan Magistrate, Patiala House Courts, New Delhi observing that *prima facie* the allegations against the petitioner are of serious nature and pose a threat to the sovereignty of country and that the inquiry is yet to commence and the petitioner will get ample opportunity to lead evidence in her favour to falsify the claim of the Government of Chile.

(ix) The Embassy of Chile issued Note Verbale No.43/2015 dated 24.03.2015 requesting extradition of the petitioner on the basis of the principles of International Law derived from the Multi-lateral Conventions and Bi-lateral Treaties on Extradition including the Extradition Treaty between the Republic of Chile and the United Kingdom of Great Britain and Ireland signed at

Santiago on 26.01.1897 which has been in force for both countries.

(x) The material enclosed to Note Verbale No.43/2015 dated 24.03.2015 reveals that the Special Investigating Judge, Court of Appeal, Santiago by order dated 23.02.2015 sent the report to the Supreme Court of Chile in terms of Section 635 of the Criminal Procedure Code requesting to decide whether to file a request of extradition of the petitioner under detention in India. Pursuant thereto, the Supreme Court of Chile passed an order dated 09.03.2015 holding that it was lawfully proper to request the Government of India to extradite the petitioner for her alleged liability as principal offender in the terrorist attack perpetuated in Santiago on 01.04.1991 and for fulfilment of the said decision, an official letter be sent to the Ministry of Foreign Affairs so as to carry out the necessary diplomatic formalities. It was observed in the said order that there is no treaty on extradition between Chile and India and therefore the General International Law principles must apply as prescribed in Section 637 of the Criminal Procedure Code.

(xi) However, the Note Verbale dated 24.03.2015 was issued by the Embassy of Republic of Chile requesting extradition of the petitioner upon the principles of International Justice including the extradition treaty dated 26.01.1897 executed between Republic of Chile and United Kingdom of Great Britain and Ireland.

(xii) It is explained in the counter-affidavit filed on behalf of the Union of India that in the request for extradition vide Note Verbale dated 24.03.2015 the extradition was sought on the basis of the extradition treaty also since the Republic of Chile had subsequently discovered that there was an existing extradition treaty between the Republic of Chile and United Kingdom of Great Britain and Ireland, which was concluded and signed at Santiago on 26.01.1897.

(xiii) The Ministry of External Affairs, Union of India notified an order in exercise of the power conferred by Section 3(3) of the Extradition Act, 1962 vide GSR328(E) dated 28.04.2015 setting out the extradition treaty between Republic of Chile and United Kingdom of Great Britain and Ireland dated 26.01.1897 stating that the extradition treaty with United Kingdom of Great Britain and Ireland and the Republic of Chile was concluded and signed at Santiago on 26.01.1897 and the ratification exchanged at Santiago on 14.04.1898 are considered to be in force between the Republic of India and the Republic of Chile.

(xiv) By the said Notification, i.e., GSR328(E) dated 28.04.2015 issued by the Ministry of External Affairs, Government of India, it was further directed in exercise of powers conferred by Section 4(1) of the Indian Extradition Act, 1962, that the provisions of the said Act, other than Chapter III, shall apply to the Republic of Chile with effect from the date of publication of

the said Notification in respect of the offences specified in the said treaty.

(xv) Ministry of External Affairs, Government of India passed an order dated 18.05.2015 stating that on the basis of the extradition request submitted by the Republic of Chile through diplomatic channels and the materials submitted, the Government of India is satisfied that the warrant of arrest having been issued by the Special Investigating Judge of the Appellate Court of Santiago having lawful authority to issue the same, the Additional Chief Metropolitan Magistrate-01, Patiala House Court, New Delhi is requested under Section 5 of the Extradition Act, 1962 to inquire into the extradition request as to the extradibility of the offence involved by determining whether a *prima facie* case exists in terms of the Extradition Act, 1962 and the Extradition Treaty between the Republic of India and Republic of Chile and other applicable laws.

(xvi) In pursuance of the order of the Ministry of External Affairs, Union of India dated 18.05.2015, the Additional Chief Metropolitan Magistrate-01, Patiala House Court, New Delhi has taken up the inquiry under Section 5 of the Extradition Act, 1962 and the same is pending.

6. Before adverting to the contentions advanced by the petitioner, it is necessary to refer to the legal position with regard to extradition in India.

7. In 1903, the Indian Extradition Act No.15 of 1903 was enacted for the purpose of providing more convenient administration in British India of the Extradition Acts, 1870 and 1873 and the Fugitive Offenders Act, 1881. After India became a Republic, when Part B States (Laws) Act, 1951 was enacted, Indian Extradition Act, 1903 was not extended to Part B States. The result was that the major position relating to the surrender of fugitive criminals to 'Foreign States' and Commonwealth countries under the existing law from the erstwhile Part B States was somewhat doubtful. Further, the Supreme Court in the case of ***State of Madras v. C.G. Menon,* AIR 1954 SC 517** held that after India became a Republic, the Fugitive Offenders Act, 1881 has ceased to apply to India. That apart, the existing law relating to extradition was found to have contained certain lacunae on questions such as concurrent requests for the surrender of a fugitive criminal from more than one State. To remove all such anomalies and fill in the lacunae that existed in the law relating to extradition and to enact a consolidated and amended law for the extradition of fugitive criminals to all foreign States and Commonwealth countries, the Extradition Act, 1962 has been enacted and the said Act has come into force with effect from 05.01.1963. Section 37 of the Extradition Act, 1962 declare that the Indian Extradition Act, 1903 and any law corresponding thereto as well as the Extradition Acts, 1870 to 1932 and the Fugitive Offenders Act, 1881 stood repealed.

8. A careful analysis of the provisions of the Extradition Act, 1962 (for short 'the Act') shows that it consists of altogether 37 Sections, divided into five Chapters. Chapter I contains Sections 1 to 3. While Section 1 provides for short title, extent and commencement of the Act, Section 2 contains

definitions of certain expressions and Section 3 provides for application of the Act to 'Foreign States' and 'Treaty States'. Chapter II contains Sections 4 to 11 which deal with extradition of fugitive criminals to foreign states to which Chapter III does not apply. Chapter III which contains Sections 12 to 18 deals with return of fugitive criminals to foreign States with extradition arrangements. So far as Chapter IV and Chapter V are concerned, they deal with "Surrender or return of accused or convicted persons from foreign States" and "Miscellaneous Matters" respectively.

9. It may be mentioned that Section 1 (1) of the Extradition Act, 1962 states that the Act extends to the whole of India and as per Section 1(3), the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint. Such notification was issued by the Ministry of External Affairs on 05.01.1963 vide GSR 55 published in the Gazette of India (Extraordinary) Part-II Section 3(i) dated 05.01.1963 appointing the 5th day of January, 1963 as the date on which the Extradition Act, 1962 shall come into force. Thus, the Act has come into force in India with effect from 05.01.1963.

10. So far as the application of the Act to Foreign States is concerned, the same shall be in terms of Section 3 of the Extradition Act which reads as under:

> *"**3. Application of Act**. – (1) The Central Government may, by notified order, direct that the provisions of this Act, other than Chapter III, shall apply to such foreign State or part thereof as may be specified in the order.*
>
> *(2) The Central Government may, by the same notified order as is referred to in sub-section (1) or any subsequent notified order, restrict such application to fugitive criminals found, or*

*suspected to be, in such part of India as may be specified in the order.*

*(3) Where the notified order relates to a treaty State,-*

*(a) it shall set out in full the extradition treaty with that State;*

*(b) it shall not remain in force for any period longer than that treaty; and*

*(c) the Central Government may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State.*

*(4) Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention."*

11. A plain reading of the above provision shows that for the purpose of application of the Act to the Foreign States, a notification has to be issued by the Central Government as provided under sub-Section (1) of Section 3 specifying the Foreign State or part thereof to which the provisions of the Extradition Act, other than Chapter III, are made applicable. Sub-Section (3) of Section 3 makes it clear that if the notification under sub-Section 3(1) relates to a "treaty state" i.e. a foreign state with which an extradition treaty has been made by India and the same is in operation, such notification shall set out in full the extradition treaty with that State. As per sub-Section (4) of Section 3, in the absence of extradition treaty, any convention to which India and a foreign State are parties can be treated by the Central Government as

an extradition treaty by issuing a notified order to that effect. Apart from the foreign States with which an extradition treaty is in operation and the foreign States along with which the India is a party to a convention, the Extradition Act, 1962 also deals with the foreign States with which India has an extradition arrangement. Chapter III of the Extradition Act exclusively deals with return of fugitive criminals to such foreign States with which India has extradition arrangements. Section 11 of the Act makes it clear that nothing contained in Chapter II shall apply to fugitive criminals to which Chapter III applies. Section 3(1) also makes it clear that by virtue of the notification issued thereunder, the provisions of the Act other than Chapter III would only be made applicable to the foreign States as may be specified in the notified order.

12. The expressions 'extradition offence', 'extradition treaty', 'fugitive criminal' and 'treaty state' are defined under Section 2 of the Act and the same are reproduced hereunder for ready reference:

> *"2(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.*

*(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.*

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

13. It is also relevant to refer to Section 34-B of the Extradition Act, 1962 in terms of which the provisional arrest of the petitioner was ordered by the Additional Chief Metropolitan Magistrate on 24.02.2015.

"**34-B. Provisional arrest.**-(1) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.

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

14. As could be seen, the provisional arrest made under Section 34-B can be operative only for a period of 60 days from the date of arrest unless an extradition request is received within the said period of 60 days.

15. The provisional arrest of the petitioner under Section 34-B of the Act was ordered on 24.02.2015 and the request for extradition of the petitioner

was made by the Republic of Chile through its Embassy vide Note Verbale No.43/2015 dated 24.03.2015.

16. In pursuance thereof, the order dated 18.05.2015 has been passed by the Union of India, Ministry of External Affairs directing Magisterial inquiry under Section 5 of the Extradition Act, 1962.

17. The order of the provisional arrest dated 24.02.2015 under Section 34-B of the Extradition Act, the request of extradition made by the Republic of Chile dated 24.03.2015, the notification dated 28.04.2015 issued by the Union of India purportedly under Section 3(3) of the Extradition Act, 1962 and the subsequent order of Union of India dated 18.03.2015 under Section 5 of the Extradition Act, 1962 have been assailed in the present writ petitions contending that -

(a) the Notification dated 28.04.2015 is *void ab initio* since there is no material to show that the treaty between the Republic of Chile and United Kingdom of Great Britain and Ireland that was concluded and signed on 26.01.1897 was made applicable to India;

(b) the statement in the Notification dated 28.04.2015 that the treaty dated 26.01.1897 is considered to be in force has been falsified (i) in view of the admission in Note Verbale dated 24.02.2015 that there is no treaty between Republic of India and Republic of Chile and (ii) in the light of the order of the Supreme Court of Chile dated 09.03.2015 wherein it was categorically recorded that between Chile and India there is no treaty on extradition;

(c) since the right to extradition of a person overseas under the Chilean Law emanates from a judicial decision of its Court of Law as is evident from Chilean law i.e. Section 637 of the Criminal Procedure Code, the request of extradition made through Chilean Embassy cannot be contrary to the decision of the Supreme Court of Chile dated 09.03.2015 and therefore, the Union of India ought not to have accepted the request of extradition dated 24.03.2015 made on the basis of the extradition treaty dated 26.01.1897;

(d) since a treaty is a contract between two sovereign States and is a bilateral agreement and since the Republic of Chile which is a party to the alleged treaty denied the existence of any such treaty between Republic of India and Republic of Chile by way of judicial proceedings, the only conclusion that can be arrived at is there is no consensual treaty obligation between Republic of India and Republic of Chile and therefore the order dated 18.05.2015 passed by the Ministry of External Affairs, Union of India requesting the Additional Chief Metropolitan Magistrate to inquire into the extradition request is illegal and unsustainable;

(e) even the Union of India has never considered the extradition treaty dated 26.01.1897 to be in force between the Republic of India and Republic of Chile as is evident from the fact that the Extradition Treaty of 1897 between Republic of Chile and United Kingdom of Great Britain and Ireland was not shown in the list of treaties and arrangements in operation as on 20.11.2013 declared on the website of Ministry of External Affairs;

(f) since the Notification as required under Section 3(3) of the Extradition Act was issued only on 28.04.2015 and published in the Gazette of India (Extraordinary) dated 29.04.2015, which cannot have retrospective effect, the request of extradition made by the Republic of Chile vide Verbale Note dated 24.03.2015 on the basis of the extradition treaty dated 26.01.1897 is *void ab-initio;*

(g) Reference to GSR No.56 dated 05.01.1963 in the notification dated 28.04.2015 under Section 3(3) of the Extradition Act, 1962 is factually incorrect. GSR No.56 dated 05.01.1963 was, in fact, issued under Section 3(1) of the Extradition Act making the said Act applicable to only three countries, viz., Switzerland, Sweden and USSR and that the same has nothing to do with the Republic of Chile.

18. In the counter affidavit dated 15.07.2015 filed on behalf of the Ministry of External Affairs, Union of India, it is stated that the notification dated 28.04.2015 had inadvertently referred to GSR No.56 whereas the reference should have been made to GSR No.55, which was also notified on 05.01.1963 under Section 1(3) appointing the date 05.01.1963 as the date on which the Act shall come into force. It is further stated that there was also another inadvertent mistake in the last para of the impugned notification dated 28.04.2015 referring to Section 4(1) and that in fact the same should be Section 3(1) and that a corrigendum to that effect is under process. On merits of the case, it is contended that by virtue of Section 2(d) of the Extradition Act, which defines the term extradition treaty, the treaties relating to extradition of fugitive criminals made before 15.08.1947 are binding on India and therefore there is no substance in the contention of the

petitioner that the extradition treaty dated 26.01.1897 is not applicable to India after attaining Independence on 15.08.1947. In the alternative, it is contended that even in the absence of a treaty, the provisional arrest is permissible under Red Corner Notice and the same would be valid for a period of 60 days as provided under Section 34-B of Extradition Act, 1962. It is also contended that as per the scheme of the Act, a requisition for extradition can always be made by a foreign country but in the absence of a treaty arrangement, India has the unfettered right not to accede to the request for extradition.

19. We have heard Shri A.S. Chandhiok, the learned Senior Counsel for the petitioner and Shri Sanjay Jain, the learned ASG appearing for the respondents at length.

20. Shri A.S. Chandhiok, the learned Senior Counsel appearing for the petitioner contended that the provisions of the Extradition Act, 1962 are not applicable at all to the Republic of Chile since there is no notification under sub-Section (1) of Section 3 of the said Act. Therefore, according to the learned Senior Counsel the entire action taken under the Extradition Act, 1962 including the provisional arrest under Section 34-B, the request for extradition dated 24.03.2015 and the consequential order issued by the Union of India dated 18.05.2015 under Section 5 of the Extradition Act are liable to be declared as *null and void*.

21. With regard to the notification dated 28.04.2015 issued by the Union of India purportedly under Section 3(3) of the Extradition Act, 1962 setting out the Extradition Treaty signed between the United Kingdom of Great Britain and Ireland and the Republic of Chile on 26.01.1897, the contention

of the learned Senior Counsel is two-fold. Firstly, that the treaty dated 26.01.1897 was not made applicable to British India since there was no direction by Order in Council as required by the Extradition Acts, 1870 to 1895 and secondly, even assuming that the said Treaty was made applicable to British India, the same ceased to exist after India attained Independence.

22. Thus according to the learned Senior Counsel, no treaty is existing as claimed by the respondents and consequently, the question of issuing the notification under Section 3(3) of the Extradition Act, 1962 setting out the said treaty does not arise at all.

23. Pointing out that the request for extradition dated 24.03.2015 made through the Embassy of Chile on the basis of Extradition Treaty 26.01.1897 is contrary to the order of the Supreme Court of Chile dated 09.03.2015 and thus not a valid request, the learned Senior Counsel further contended that the Union of India ought not to have acted upon the said request for extradition.

24. Elaborating the said contention, the learned Senior Counsel submitted that the right to seek extradition under Chilean Law is derived from a judicial order and that as per Section 639 of the Criminal Procedure Code of the Republic of Chile, the decision to seek extradition shall be of Supreme Court only but not the Government and therefore it is not open to the Embassy of Chile to make a request for extradition of the petitioner on the basis of the Extradition Treaty dated 26.01.1897 since according to the Supreme Court of Chile no such treaty is in operation.

25. It is also contended by the learned Senior Counsel that the arrest warrant dated 27.01.2014 issued by the Court of Appeal of Santiago was only for the purpose of the extradition from Germany and the same cannot form the basis for the request of he provisional arrest under Section 34-B of the Extradition Act, 1962 much less for the request for extradition.

26. Per contra, it is contended by Shri Sanjay Jain, the learned ASG that Extradition Act, 1962 applies even in the absence of a treaty and therefore, even if the extradition treaty dated 26.01.1897 between the United Kingdom of Great Britain and Ireland and the Republic of Chile as notified under Section 3(3) of the Extradition Act vide Notification dated 28.04.2014 is ignored, the Republic of Chile is entitled to make a request for extradition which the Union of India has to accept to meet the International obligations as held in ***Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and others,*** **AIR 1955 SC 367**. The learned ASG has also relied upon a decision of the Division Bench of this court in ***Ram K.Mahbubani v. Union of India & Anr.***, **(2008) 153 DLT 471 (DB).**

27. The further contention is that the Central Government is empowered to direct provisional arrest under Section 34-B on the basis of Interpol Red Corner Notice and therefore the provisional arrest of the petitioner ordered on 24.02.2015 cannot be held to be illegal on any ground whatsoever. In support of the said submission, the learned ASG relied upon ***Bhavesh Jayanti Lakhani vs. Maharashtra;*** **2009 (9) SCC 551** and ***Amit Mohan Singh vs. Union of India,*** **2012 VI AD (Delhi) 158**.

28. We have given our thoughtful consideration to the rival submissions made on behalf of both the parties.

**Application of the Provisions of the Extradition Act, 1962 to the Republic of Chile:**

29. Section 3 of the Extradition Act provides for two situations for application of the said Act to the Foreign States, namely, (i) application to a Foreign State with which no extradition treaty is existing and (ii) application to a Foreign State with which an existing treaty is in operation. The expression 'Foreign State' as defined in Section 2(e) means any state outside India. As per sub-section (1) of Section 3, the provisions of Extradition Act (other than Chapter III) are applicable only to such Foreign State as may be specified in the order notified by the Central Government to that effect. So far as the Foreign State with which an Extradition Treaty is in operation, sub-section (3) of Section 3 provides for an additional requirement, namely, that the notified order shall set out in full the Extradition Treaty with that Foreign State.

30. The specific case of the petitioner is that Republic of Chile is not a treaty State. In the absence of a treaty, though the provisions of the Extradition Act, 1962 could have been made applicable to the Republic of Chile by way of a notified order in terms of Section 3(1) of the said Act, since no such notification under Section 3(1) of the Act has been issued by the Union of India till date, the contention of the petitioner is that the provisions of the Extradition Act, 1962 are not applicable to the Republic of Chile and consequently the provisional arrest and detention of the petitioner in purported exercise of the powers conferred under the Act are illegal.

31. On the other hand, the contention of the respondents is that the Republic of Chile is a treaty State. The respondents relied upon the

Extradition Treaty entered into between United Kingdom of Great Britain and Ireland and Republic of Chile on 26.01.1897 and ratified on 14.04.1898 and claimed that the same is considered to be in force between the Republic of India and Republic of Chile and that in exercise of the power conferred by Section 3(3) of the Extradition Act, 1962, the Government of India issued the Notification dated 28.04.2015 directing the provisions of the Extradition Act applicable to the Republic of Chile by setting out in full the Extradition Treaty dated 26.01.1897. Therefore, according to the respondents, the provisions of the Extradition Act are applicable to the Republic of Chile and the provisional arrest and detention of the petitioner cannot be held to be illegal on any ground whatsoever.

32. As mentioned above, the contention on behalf of the petitioner is that in the absence of a direction by Order in Council, the Treaty in question was not applicable to British India. It is contended by the learned Senior Counsel appearing for the petitioner that since the respondents failed to produce any such direction by Order in Council, the only inference that can be drawn is that the Treaty dated 26.01.1897 was not made applicable to British India.

33. Rebutting the said contention, it is pointed out by the learned ASG that the Extradition Treaty dated 26.01.1897 was concluded between the United Kingdom of Great Britain and Ireland and Republic of Chile for the mutual extradition of fugitive criminals and that Article XVII of the said Treaty made it clear that the treaty shall be applicable to the Colonies and foreign possessions of Her Britannic Majesty, so far as the laws in such Colonies and foreign possessions respectively will allow. It is also brought

to our notice that the ratification of the said treaty was exchanged at Santiago on 14.04.1898 and thereafter on 09.08.1898, it was ordered by the United Kingdom of Great Britain & Ireland in exercise of the powers conferred under the Extradition Acts, 1870 to 1895 that from and after 22.08.1898, the said Acts shall apply in the case of Chile. The learned ASG submits that the said order dated 09.08.1898 was in terms of Extradition Acts, 1870 to 1895 which amongst other things enacted that where an arrangement has been made with any foreign State with respect to the surrender to such States of any fugitive criminals, Her Majesty by Order in Council directed that the said Act shall apply in the case of such foreign State. Thus the learned ASG would submit that the petitioner's contention that the Extradition Treaty dated 26.01.1897 was not made applicable to British India is without any substance.

34. Though we are prima facie satisfied with the submissions of the learned ASG regarding applicability of the Extradition Treaty dated 26.01.1897 to British India, since the issue involves complicated questions of political importance, it appears to us that the same cannot be decided conclusively on the basis of the limited material available before us.

35. However, as we are clearly of the opinion that the contentions of the respondents on the basis of the Extradition Treaty dated 26.01.1897 to justify the provisional arrest and detention of the petitioner must fail on other grounds which we would be explaining little later, we propose to proceed further assuming that the Extradition Treaty dated 26.01.1897 was made applicable to British India.

36. So far as the next question whether the Extradition Treaty dated 26.01.1897 exchanged between the United Kingdom of Great Britain and Ireland and the Republic of Chile is not binding on India after attaining the Independence on 15.08.1947 is concerned, Shri A.S. Chandhiok, the learned Senior Counsel placed much reliance upon the decision in ***C.G. Menon (supra)***.

37. Shri Sanjay Jain, the learned ASG sought to distinguish ***C.G. Menon (supra)*** on the basis of the later decision in ***Rosiline George vs. Union of India and Others,*** **(1994) 2 SCC 80.** The learned ASG has also relied upon Clause 4 of the Schedule to the Indian Independence (International Arrangements) Order, 1947 which was issued in exercise of the powers conferred upon the Governor General by Section 9 of the Indian Independence Act, 1947. The agreement set out in the Schedule to the above said Order of 1947 regarding the devolution of International rights and obligations upon the Dominions of India and Pakistan from 15th day of August, 1947 shows that the rights and obligations under all International Agreements to which India is a party immediately before the Appointed Day will devolve upon the Dominion of India and upon the Dominion of Pakistan and will, if necessary, be apportioned between the two Dominions.

38. It is also vehemently contended by the learned ASG that the provisions of Extradition Act, 1962 apply to foreign States irrespective of a treaty, agreement or an arrangement. Placing reliance upon the definition of 'extradition offence' under Section 2(c) and 'extradition treaty' under Section 2(d) of the Extradition Act, 1962, it is submitted by the learned ASG that on a constructive interpretation of the provisions of the Extradition Act,

1962 it is clear that the application of Chapter II of the Act is qua all foreign States from which a request for extradition is received irrespective of the fact whether an Extradition Treaty is existing or not whereas Chapter III is applicable to all foreign States with which there is any arrangement in the form of treaty or agreement. It is further submitted that in all cases where the extradition is requested by a country with which there is no treaty, the extradition process starts on the basis of assurance of reciprocity in terms of Chapter II of the Extradition Act, 1962. It is sought to be explained by the learned ASG that Chapter II and Chapter III of the Extradition Act, 1962 are independent of each other and self contained and therefore the provisions of the Act are applicable even in cases where there is no treaty arrangement or agreement.

39. At the cost of repetition, it may be reiterated that Section 3 of the Extradition Act, 1962 provides in clear terms that the provisions of the said Act shall apply to a foreign State only by way of a notified order by the Central Government under sub-Section (1) of Section 3. 'Foreign State' as defined under Section 2(d) means any State outside India. Thus, it is clear that sub-Section (1) of Section 3 does not make any distinction between a State with which an Extradition Treaty is in operation and a State with which no such treaty is in operation. However, sub-Section (3) of Section 3 mandates that in case of a treaty State i.e. the foreign State with which an Extradition Treaty is in operation, the notified order under Section 3(1) shall set out in full the Extradition Treaty with that State. In other words, setting out in full the Extradition Treaty in the notified order in terms of Section 3(1) is an additional requirement so far as the treaty States are concerned.

40. It may also be added that by virtue of the notified order under Section 3(1), all the provisions of the Extradition Act, except Chapter III, would be made applicable to foreign States. Chapter III which deals with the foreign States with extradition arrangements (not being Extradition Treaty/convention) which are referred to in sub-sections (3) and (4) of Section 3 contains a different set of provisions for return of fugitive criminals. As per Section 12, even the application of Chapter III shall be by a notified order by the Central Government.

41. In the light of the above noticed unambiguous provisions of the Extradition Act, 1962, though we agree with the learned ASG that the provisions of Extradition Act, 1962 are applicable to a foreign State irrespective of a treaty, agreement or an arrangement, we make it clear that such application can be made only by making a notified order in terms of Section 3(1) of the Extradition Act.

42. It may be added that entering into treaty and implementing the same are two different subjects. Entering into a treaty and its performance are two different stages covered by two different wings of Government. Entering into a treaty is the executive act performed by the head of the State whereas its implementation is the legislative function. Thus there is a distinction between (i) formation and (ii) performance of obligation. The first is an executive act, whereas the second is a legal act required by law. No doubt, the treaties created by executive action bind the controlling parties, however, their implementation has to be in terms of the appropriate legislation.

43. So far as India is concerned, the International commitments under an extradition treaty can be implemented through the provisions of the

Extradition Act, 1962. However, the provisions of the said Act can be made applicable to foreign States only by making a notified order in terms of Section 3 of the Act. In other words, the notification as provided under Section 3(1) of the Act is a pre-requisite to the applicability of the Extradition Act to a foreign state.

44. In ***Rosiline George v. Union of India and Others (supra)*** having considered an identical issue relating to the applicability of the Extradition Treaty concluded between England and the United States of America in the year 1931, the Supreme Court negatived the contention that any treaty signed on behalf of India prior to 26.01.1950 automatically ceased to exist after India achieved sovereignty. Observing that there is no rule of Public International Law under which the existing treaty obligations of a State automatically lapse on there being an external change of sovereignty over its territory and that India after achieving Independence specifically agreed to honour its obligations under the International Agreements, it was held that grant of independence in the year 1947 and thereafter the status of Sovereign Republic could not have put an end to the treaties entered into by the British Government prior to August 15, 1947 on behalf of India.

45. The decision in ***C.G. Menon (supra)*** was also distinguished by the Supreme Court in ***Rosiline George (supra)*** observing that the Fugitive Offenders Act, 1881 which was held to be not applicable to India after the achievement of independence, was an internal statute which could not be made applicable to India after its independence because of the peculiar provisions of the said Act and that the said decision has no relevance to the facts of the case.

46. In ***Rosiline George (supra)***, the Supreme Court was dealing with the case of an Indian National by name George Kutty Kuncheria who was wanted in the United States of America to stand trial for violation of Federal Fraud Statutes and related offences. He was alleged to have defrauded and embezzled from the Chase Manhattan Bank in New York more than one million dollars which he transferred to United Arab Emirates. The Embassy of the United States of America in New Delhi sent a letter of request dated September 20, 1988 to the Ministry of External Affairs, Government of India, for the extradition of George to the United States. The Ministry of External Affairs, Union of India, in exercise of its powers under Section 5 of the Extradition Act, 1962 passed an order dated December 5, 1988 requesting the Additional Chief Metropolitan Magistrate, Patiala House Court, New Delhi, to conduct an inquiry into the matter under the Act. Rosiline, wife of George, challenged the extradition proceedings by way of a writ petition before the Delhi High Court. The writ petition was dismissed by a Division Bench of the Delhi High Court by its judgment dated December 14, 1990. The two appeals by way of special leave were filed by Rosiline and George against the said judgment. The writ petition under Article 32 of the Constitution of India was filed by George challenging the extradition proceedings on various grounds. While deciding all the matters together, the Supreme Court had analyzed the Extradition Law in India in detail as under:

> "**16.** The term 'extradition' denotes the process whereby under a concluded treaty one State surrenders to any other State at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Though extradition is granted in

implementation of the international commitment 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 of the land. Extradition is founded on the broad principle that it is in the interest of civilised communities that criminals 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. J.G. Starke in his book, *Introduction to International Law* (10th Edn.) gives the following rational considerations which have conditioned the law and practice as to extradition.

*(a)* The general desire of all States is to ensure that serious crimes do not go unpunished. Frequently a State in whose territory a criminal has taken refuge cannot prosecute or punish him purely because of some technical rule of criminal law or for lack of jurisdiction. Therefore to close the net around such fugitive offenders, international law applies the maxim, *aut punire aut dedere* i.e. the offender must be punished by the State of refuge or surrendered to the State which can and will punish him.

*(b)* The State on whose territory the crime has been committed is best able to try the offender because the evidence is more freely available there, and that State has the greatest interest in the punishment of the offender, and the greatest facilities for ascertaining the truth. It follows that it is only right and proper that to the territorial State should be surrendered such criminals as have taken refuge abroad."

**17.** With the tremendous increase in the facility of international transport and communication, extradition has assumed prominence since the advent of the present century. Because of the negative attitude of the customary international law on the subject, extradition is by and large dealt with by bilateral treaties. These treaties, inasmuch as they affected, the rights of private citizens, required in their turn alterations in the laws and statutes of the States which had concluded them. The established principle requires that without formal authority either by treaty or by statute, fugitive criminals would not be surrendered nor would their surrender be requested.

**18.** We may consider the first contention raised by learned counsel for the appellant. The precise argument raised by Mr R.K. Garg is that there is no valid extradition treaty in existence between India and the United States of America and as such the extradition proceedings against the appellant are without jurisdiction. According to him, the 1931 treaty as extended to India by the 1942 Order automatically ceased to be operative after January 26, 1950 when India became a sovereign republic.

**19.** To appreciate the argument it is necessary to examine the international law on the subject of treaty-succession. There is no general rule that all treaty rights and obligations lapse upon external changes of sovereignty over territory nor is there any generally accepted principle favouring the continuity of treaty relations. Treaties may be affected when one State succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors including the precise form and origin of the succession and the type of treaty concerned. The emancipated territories on becoming independent States may prefer to give general notice that they were beginning with a "clean slate" so far as their future treaty relations were concerned, or may give so-called "pick and choose" notifications as to treaties as were formally applicable to it before achieving independence. The "clean slate" doctrine was ultimately adopted in the relevant provisions of the Vienna Convention of 1978. The sound general working rule which emerges is to look at the text of the relevant treaty and other arrangements accompanying change of sovereignty and then ascertain as to what was the intention of the State concerned as to the continuance or passing of any rights or obligations under the treaty concerned. The question whether a State is in a position to perform its treaty obligations is essentially a political question which has to be determined keeping in view the circumstances prevailing and accompanying the change of sovereignty.

**20.** We have plenty of evidence to show that India, after achieving independence, has unequivocally committed itself to honour the international obligations arising out of the 1931 treaty. We have reproduced above the International Arrangements Order wherein India agreed to honour all the international agreements entered into before August 15, 1947 and agreed to fulfil the rights and obligations arising

from the said agreements. The Parliament made its intention further clear when under Section 2(d) (quoted above) of the Act it gave inclusive definition to the expression "extradition treaty" by including, the treaties made or entered into prior to August 15, 1947 in the said definition. The most important document in this respect is the notification dated April 1, 1966 issued by the Government of India under Section 3 of the Act, directing that the provisions of the said Act, other than Chapter III thereof, would apply to the United States of America with effect from April 1, 1966. The opening paragraph of the said notification is as under:

> "G.S.R. 493.— Whereas the Extradition Treaty between the United States of America and Great Britain and Northern Ireland of December 22, 1931, which was acceded to by India on 9th March 1942, is in force in India from 9th March 1942 and which treaty provides as follows:…."

**21.** The full text of 1931 treaty was thereafter reproduced in the notification. It is thus obvious that the Government of India has, in clear terms, accepted that the 1931 treaty is operative between India and the United States of America. We have reproduced in the earlier part of the judgment the exchange of diplomatic notes between the two countries reiterating that the 1931 treaty is considered a "good subsisting and binding convention between the United States and India as of this date". It was further stated that after India became a Republic on January 26, 1950, the change had not affected any agreements in their application between the United States and India. We have, therefore, no hesitation in holding that the 1931 treaty as extended to India by the 1942 Order is operative between the two countries."

47. In the light of the legal position noticed above, it is clear that the Extradition Treaty executed on behalf of India prior to 15.08.1947 cannot be held to have automatically ceased to exist after India achieved sovereignty. Though it is sought to be contended by Shri A.S. Chandhiok, the learned Senior Counsel appearing for the petitioner that as is evident from the order

of the Supreme Court of Chile dated 09.03.2015, the Republic of Chile never recognized their obligations under the Extradition Treaty dated 26.01.1897 and therefore the Union of India unilaterally cannot treat the said treaty to be in force, we are unable to agree. According to us, the observation of the Supreme Court of Chile in the order dated 09.03.2015 by itself does not nullify the extradition treaty dated 26.01.1897.

48. Therefore, we are of the view that the International commitments under the treaty dated 26.01.1897 did not come to an end even after India became a Republic and that the provisions of the Extradition Act, 1962 can be made applicable to Republic of Chile on the basis of the Treaty dated 26.01.1897 by issuing a notified order in terms of Section 3(1) of the Act.

**Notification dated 28.04.2015 issued under Section 3 (1) and 3(3) of the Extradition Act, 1962.**

49. Since the respondents are relying upon the Extradition Treaty dated 26.01.1897 signed with the Republic of Chile as already explained, the provisions of the Extradition Act, 1962 can be made applicable to the Republic of Chile only by notifying an order in terms of Section 3(1) read with Section 3(3) of the said Act. According to the respondents, such notification was issued on 28.04.2015 setting out in full the Extradition Treaty dated 26.01.1897.

50. However, the petitioner contends that the said notification dated 28.04.2015 is not valid since the same is not in conformity with the requirements of Section 3 of the Extradition Act. It is contended by the petitioner that GSR No.56 dated 05.01.1963 referred to in the notification

whereunder the provisions of the Extradition Act were made applicable to Switzerland, Sweden and USSR has no relevance at all for the purpose of the applicability of the Act to the Republic of Chile. It is further pointed out that the contents of the said notification are self-contradictory inasmuch as Para 3 traces the source of power for issuance of the notification as sub-section (3) of Section 3, whereas the last paragraph refers to sub-section (1) of Section 4. For better appreciation, the notification dated 28.04.2015, to the extent necessary, may be extracted hereunder:

> **"MINISTRY OF EXTERNAL AFFAIRS**
> **ORDER**
> **New Delhi, the 28th April, 2015**
>
> **EXTRADITION TREATY BETWEEN THE REPUBLIC OF INDIA AND THE REPUBLIC OF CHILE**
>
> **G.S.R.328(E).**-Whereas the Extradition Treaty between the United Kingdom of Great Britain and Ireland, and the Republic of Chile was concluded and signed at Santiago on the January 26, 1897 and the Ratification exchanged at Santiago on the April 14, 1898 are considered to be in force between the Republic of India and the Republic of Chile:
>
> And whereas the Central Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Extradition Act, 1962 (34 of 1962) had directed by an order number G.S.R. 56, dated January 5, 1963 that the provisions of the said Act, other than Chapter III shall apply to the Republic of Chile:
>
> Now, therefore, in exercise of the power conferred by sub-section (3) of section 3 of the Extradition Act, 1962 (34 of 1962), the Central Government hereby sets out the aforesaid Treaty as under:-
>
> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and his Excellency the President of the

> Republic of Chile, having determined, by common consent, to conclude a Treaty for the extradition of criminals, have accordingly named as their Plenipotentiaries:-
>
> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, John G. Kennedy, Esq., Minister Resident of Great Britain in Chile; and
>
> His Excellency the President of the Republic of Chile, Senor Don Carlos Morla Vicuna, Minister of Foreign Affairs;
>
> Who, after having exhibited to each other their respective full powers, and found them in good and due form, have agreed upon the following Articles:-
>
> .....
>
> .....
>
> Now therefore, in the exercise of the power conferred by sub-section (1) of Section 4 of the Indian Extradition Act, 1962 (34 of 1962), the Central Government hereby direct that the provision of the said Act, other than Chapter III, shall apply to the Republic of Chile with effect from the date of publication of this notification in respect of the offences specified in the above Treaty.
>
> [F. No.T-413/44/2008]
> P.KUMARAN, Jt. Secy.(CPV)"

51. Though the discrepancies pointed out by the petitioner could not be disputed by the respondents, in the additional counter affidavit filed by the Under Secretary (Extradition), Ministry of External Affairs it is sought to be explained that certain mistakes had crept in the notification dated 28.04.2015 by inadvertence. Accordingly, the Union of India issued a corrigendum vide notification dated 11.08.2015 as under:

"(i) in the second paragraph, **for** "had directed by an Order number G.S.R. 56, dated January 5, 1963" **read** "directs;

(ii) in the last paragraph, **for** "sub-section (1) of section 4", **read** "sub-section (1) of section 3."

52. By virtue of the said Corrigendum, para 2 of the notification dated 28.04.2015 now reads "and whereas the Central Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Extradition Act, 1962 (34 of 1962) directs that the provisions of the said Act other than Chapter III shall apply to the Republic of Chile." Similarly, the last paragraph of the notification reads "now therefore, in exercise of the power conferred by sub-section (1) of Section 3 of the Indian Extradition Act, 1962 (34 of 1962) the Central Government hereby direct that the provisions of the said Act, other than Chapter III, shall apply to the Republic of Chile with effect from the date of publication of this notification in respect of the offences specified in the above treaty."

53. It is contended by Shri A.S. Chandhiok, the learned Senior Counsel appearing for the petitioner that even in terms of the Corrigendum dated 11.08.2015, the notification dated 28.04.2015 is not valid since Paragraphs 2 and 3 are mutually contradictory. It is further contended by the learned Senior Counsel that the corrigendum can, at the most, correct the clerical errors but it cannot change the very basis of the notification.

54. We do not find any substance in the said contention. As noticed above, it is conceded by the respondents that the reference to GSR No.56 dated 05.01.1963 in para 2 of the notification dated 28.04.2015 is factually incorrect and to rectify the same, the Corrigendum dated 11.08.2015 has

been issued. The said errors in our opinion are mere errors of inadvertence and do not affect the substance of the notification in any manner whatsoever. Since the errors have now been rectified and since the notification is a composite notification as required under Section 3(1) read with Section 3(3) of the Extradition Act, we are unable to hold that the said notification suffered from any infirmity.

**Whether the provisional arrest of the petitioner dated 24.02.2015 under Section 34-B of the Extradition Act, 1962 is valid.**

55. The notification dated 28.04.2015 itself made it clear that "the provisions of the Extradition Act, 1962, other than Chapter III, shall apply to the Republic of Chile with effect from the date of publication of the notification in respect of the offences specified in the above treaty."

56. Admittedly, the Treaty was published in the Gazette of India dated 29.04.2015. Thus, the provisions of the Extradition Act, other than Chapter III, are applicable to the Republic of Chile with effect from 29.04.2015 only. That being so the question that would follow is whether the order of provisional arrest dated 24.02.2015 in purported exercise of powers conferred under Section 34-B (which falls under Chapter V of the Act) is valid.

57. While it is contended by the learned Senior Counsel appearing for the petitioner that the Union of India can invoke the provisions of Extradition Act in respect of Republic of Chile, including Section 34-B for the purpose of the provisional arrest of the petitioner only after 24.03.2015 and not earlier, it is contended by the learned ASG that the proceedings for

provisional arrest under Section 34-B are independent of the proceedings for extradition. It is sought to be contended by the learned ASG that the notification under Section 3(1) is only for the purpose of pressing into service the implementation mechanism for the extradition proceedings and that the same has nothing to do with the provisional arrest. According to the learned ASG, the provisional arrest being a step towards a possible extradition can pre-date the notification under Section 3.

58. We have already expressed that entering into a treaty is the executive act performed by the Head of the State whereas its implementation is a legislative function. In other words, the treaties created by the executive action can be implemented only in terms of the appropriate legislation. Therefore, the obligation under the Extradition Treaty dated 26.01.1897 can be performed only through the provisions of the Extradition Act, 1962 and in the manner provided thereunder.

59. So far as the interception of the petitioner under the Red Corner Notice is concerned, we agree with the learned ASG that the authorities are bound to act on behalf of the Central Government pursuant to the request received from Interpol. In ***Bhavesh Jayanti Lakhani vs. State of Maharashtra & Others*** **(2009) 9 SCC 551**, the binding nature of the Interpol Notices has been explained as under:

> "63. The notices issued by Interpol are not considered as administrative decisions on individual cases with transnational effect. They are not construed as an *"international administrative act"*. They lack a character of regulation. They do not constitute an international arrest warrant and they are not in any other form binding the individuals concerned legally.

> They, however, gain de facto with special relevance to the human rights through multiplication of its recipients.
>
> 64. In fact, Interpol's "red notices" often function as de facto international arrest warrants and countries issue warrants immediately upon receipt of such a notice. However, they do so with the understanding that a request for extradition with supporting evidence will follow the red notice, without delay. The suspect must then go through the standard extradition process. The bottom line is that "warrants to arrest suspects must have legal authority in the jurisdiction where the suspect is found" and Interpol red notices do not have such authority. They are primarily a means of facilitating communication between police agencies and the success of the Interpol system still depends entirely upon voluntary cooperation. They, however, do not entirely lack external effects.
>
> 65. A number of States recognise the red notices as an official request for the arrest of a person. However, such a request does not require the action of national police authorities and does not provide a legal basis thereto. The transnationalisation takes place through the membership in the organisation, through the supervision proviso of the General Secretariat and the recognition of the transnational effect of the information."

60. Therefore, the interception of the petitioner on the basis of the red corner notice issued by the Interpol cannot be held to be illegal. However, the question is whether before affecting the provisional arrest under Section 34-B of the Extradition Act, 1962, the notification in terms of Section 3 is mandatory so as to make applicable the provisions of the said Act to the foreign country in question.

61. The legislative intent is clear that the provisions of the Extradition Act, 1962 can be made applicable to a foreign state only by way of a

notified order issued by the Central Government either under Section 3(1) or under Section 12(1) of the Act. It may be added that Chapter-III of the Act specifically deals with return of fugitive criminals to foreign States with which India has entered into extradition arrangement, whereas Chapter-II deals with extradition of fugitive criminals to foreign States to which Chapter-III does not apply. Section 3(1) of the Extradition Act makes it clear that a notified order by the Central Government is a pre-requisite to apply the provisions of the Act, other than Chapter-III, to a foreign State. Regarding the application of Chapter-III, a notified order under Section 12(2) by the Central Government is mandatory.

62. So far as the present case is concerned, it is not in dispute that Chapter II of the Act alone is attracted and therefore, the notification under Section 3(1) of the Act is mandatory to make the provisions of the Act applicable to Republic of Chile. Admittedly, such notification was issued by the Central Government on 28.04.2015 and it was published in the Gazette of India (Extraordinary) dated 29.04.2015. Thus the provisions of the Act are made applicable to the Republic of Chile with effect from 29.04.2015 only. Section 34-B being a part of the Act, the same has also been made applicable to Republic of Chile with effect from 29.04.2015 only.

63. The contentions of the learned ASG that the proceedings for provisional arrest under Section 34-B are independent of the proceedings for extradition and therefore, the same can be invoked even in the absence of a notification under Section 3(1) of the Act is without any substance and cannot be accepted. The law is well-settled that a provision in a statute cannot be made operative when the statute is yet to come into force on a

notification issued by the executive. It may be reiterated that the language of Section 3 is clear and unambiguous to show that the provisions of the Act would be applicable to the foreign States only by way of a notified order by the Central Government. In the absence of any provision which either expressly or by necessary implication saves Section 34-B from the rigour of Section 3(1) of the Act, we are unable to agree with the submission of the learned ASG that Section 34-B is an independent provision which can be taken recourse to at the instance of a treaty State even in the absence of a notification as required under Section 3(1) of the Act. The reliance upon the decision of the Division Bench in ***Ram K.Mahbubani (supra)*** in which the attention of this court was not drawn to Section 3(1) of the Act may not be of any assistance to substantiate the contention of the respondents. Similarly, ***Amit Mohan Singh (supra)*** also has no relevance whatsoever to the facts of the present case since the court in the said case did not consider the question as to the validity of the provisional arrest under Section 34-B in the absence of a notified order under Section 3(1) making the provisions of the Act applicable to the foreign State concerned.

64. It may also be added that a request for provisional arrest of a fugitive criminal under Section 34-B of the Extradition Act cannot be made by the Union of India on its own but the same can be made only on a request from a foreign State for the immediate arrest of a fugitive criminal. Therefore, unless and until the provisions of the Extradition Act are made applicable to the foreign State concerned, the question of Union of India acting upon the request of the foreign State does not arise. In this context, the following observations of the Division Bench of this Court in ***Flemming Lunding***

***Larsen v. Union of India***, **(1998) 72 DLT 80 (DB)** may be usefully referred to:

> 8. Under the Scheme of the Act, a fugitive criminal can be put under arrest under three circumstances: firstly when an order is issued by the Central Government under Section 4 of the Act to the Magistrate for making an enquiry into the offence, on receipt of such an order of the Central Government the Magistrate is empowered to issue warrants for the arrest of fugitive criminal and thereafter to proceed to make necessary enquiry as per the procedure laid down in Section 7 of the Act; the second eventuality under which arrest of a fugitive criminal can be made is under Section 9 of the Act when it appears to any Magistrate that a person within the local limits of his jurisdiction is a fugitive criminal of a foreign State, he may issue a warrant for his arrest. The Magistrate thereafter is required to report to the Central Government the fact of issuance of warrants. Such a person cannot be detained for more than 90 days unless within the said period the Magistrate receives from the Central Government an order made with reference to such a person under Section 5 of the Act; the third category is the provisional arrest as provided in Section 34-B of the Act, which is made on the basis of an urgent request from a foreign State for immediate arrest of a fugitive criminal. On receipt of such a request the Central Government may request the Magistrate of competent jurisdiction to issue provisional warrant for the arrest of such fugitive criminal. Discharge of such fugitive criminal on expiry of the period of sixty days is mandatory under Sub-section (2) of Section 34-B, if no request is made for his surrender or return within the said period.....”

65. For the reasons stated above, the only conclusion that can be reached is that no provisional arrest can be ordered under Section 34-B of the Act in the absence of a notified order under Section 3(1) of the Act making applicable the provisions of the Act to the foreign State concerned.

Consequently, we hold that the provisional arrest of the petitioner on 24.02.2015 in purported exercise of the powers conferred under Section 34-B of the Act was without jurisdiction.

66. It may also be added that on a perusal of the application made by the Union of India before the ACMM, Patiala House Court seeking provisional arrest of the petitioner under Section 34-B of the Act, it appears to us that the said application was made by the Union of India on its own. The application did not refer to any urgent request as such from the Republic of Chile. Even the order dated 24.02.2015 passed by the ACMM directing provisional arrest of the petitioner did not refer to any such request from the Republic of Chile. Therefore, the provisional arrest of the petitioner is liable to be declared as illegal on that ground also.

67. It is also necessary to mention that the provisional arrest under Section 34-B of the Act can be valid only for a period of 60 days from the date of arrest if no request of his surrender is received within the said period. The petitioner was provisionally arrested on 24.02.2015 and thus the period of 60 days expired on 24.04.2015. Though the extradition request was made by the Republic of Chile on 24.03.2015, by that date, the provisions of the Act were not made applicable to the Republic of Chile. Hence, in our considered opinion, the extradition request dated 24.03.2015 cannot be treated as a valid request for surrender in terms of Section 4 of the Act. In the absence of a valid request for surrender of the petitioner before the expiration of 60 days from 24.02.2015, the petitioner is entitled for discharge on 24.04.2015 i.e. on expiry of 60 days. On that ground also, therefore, the petitioner's detention after 24.04.2015 is clearly illegal.

**Whether the order of Union of India dated 18.05.2015 directing Magisterial Inquiry under Section 5 of the Extradition Act, 1962 is valid.**

68. The Notification in terms of Section 3(1) read with Section 3(3) of the Extradition Act setting in full the Extradition Treaty with the Republic of Chile was issued by the Union of India on 28.04.2015. Thereafter, the order dated 18.05.2015 came to be issued by the Union of India directing Magisterial Inquiry under Section 5 of the Act. The said order may be reproduced hereunder for ready reference:-

> "**T-413/18/2015** **May 18, 2015**
>
> **ORDER**
>
> Whereas the fugitive criminal Ms.Marie Emmanuelle Verhoeven, is wanted by the Government of the Republic of Chile for prosecution in respect of certain criminal offences.
>
> 2. Whereas the extradition request has been made pursuant to the Extradition Treaty between Republic of India and the Republic of Chile, currently in force.
>
> 3. Whereas the Government of Republic of Chile has submitted the extradition request, through diplomatic channels, for the extradition of the said fugitive criminal to the Republic of Chile, and
>
> 4. Whereas the offences alleged to have been committed by the fugitive criminal Ms.Marie Emmanuelle Verhoeven, are stated in the Chilean request to be extraditable in terms of Article II of the Extradition Treaty between the Republic of India and the Republic of Chile and which has been declared applicable to the Republic of India vide order GSR 328 (E) dated April 28, 2015.

> 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 Republic of Chile and that the warrant of arrest was issued by the Special Investigating Judge of the Appellate Court of Santiago, 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-01, Patiala House Courts, New Delhi, to inquire into the extradition whether a prima facie case exists in terms of the Extradition Act, 1962 (34 of 1962) and the Extradition Treaty between the Republic of India and the Republic of Chile and other applicable laws."

69. It is vehemently contended by the learned Senior Counsel appearing for the petitioner that the extradition request dated 24.03.2015 received from the Republic of Chile through its Embassy being contrary to the order of the Supreme Court of Chile dated 09.03.2015, the same cannot form the basis for the order dated 18.05.2015 under Section 5 of the Act.

70. The Extradition Act, 1962 which is a complete code by itself contains specific provisions regarding the requisition from the foreign State for surrender of the fugitive criminal and the order to be passed thereupon by the Union of India for Magisterial Inquiry. The relevant provisions for the said purpose are Sections 4 and 5 of the Act which read as under:-

> "**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 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 within the local limits of his jurisdiction, directing him to inquire into the case.**"**

71. On a combined reading of Sections 4 and 5 of the Act, it is clear that the order of the Central Government for Magisterial Inquiry into the extraditability of the offence committed by the fugitive criminal would follow upon a request for extradition received from the foreign State concerned. Thus, the proceedings for extradition would be set in motion with a request made by the foreign State concerned under Section 4 of the Act.

72. In the present case, such extradition request under Section 4 of the Act was made by the Republic of Chile through its Embassy on 24.03.2015. However, the fact remains that by that date the provisions of the Extradition Act were not made applicable to the Republic of Chile since the notification under sub-Section (1) read with sub-Section (3) of Section 3 came to be published only on 29.04.2015. We have already held that by virtue of the

said notification dated 28.04.2015 published in the Gazette of India dated 29.04.2015, the provisions of the Act are made applicable to the Republic of Chile w.e.f. 29.04.2015 only. That being so, we are of the view that the extradition request dated 24.03.2015 cannot be treated as a requisition for surrender in terms of Section 4 of the Act. In other words, a request made on or after 29.04.2015 can only be acted upon for directing Magisterial Inquiry into the extraditability of the alleged offence committed by the petitioner in Chile. Therefore, we are of the view that the first respondent had erred in passing the order dated 18.05.2015 directing Magisterial Inquiry accepting the extradition request dated 24.03.2015 of the Republic of Chile. The fact that the provisions of the Act are made applicable subsequently to the Republic of Chile by notification dated 28.04.2015 published in terms of Section 3(1) of the Act, in our considered opinion, is of no consequence. The extradition request dated 24.03.2015 cannot be held to have been validated by virtue of the subsequent notification dated 28.04.2015.

73. For the aforesaid reasons, we are of the view that the order of the respondent No.1 dated 18.05.2015 under Section 5 of the Act was passed without there being any valid request for extradition from the Republic of Chile. Therefore, on that ground itself the order dated 18.05.2015 is liable to be declared as illegal.

74. In view of the findings recorded above, we declare that the provisional arrest of the petitioner under Section 34-B of the Act vide order of the ACMM, Patiala House Courts dated 24.02.2015 was without jurisdiction and illegal. Similarly, the order of the Union of India dated

18.05.2015 under Section 5 of the Act directing Magisterial Inquiry is also hereby declared as illegal. Accordingly, both the said orders dated 24.02.2015 and 18.05.2015 shall stand set aside.

75. Consequently, the detention of the petitioner in pursuance of the order of provisional arrest dated 24.02.2015 is hereby declared illegal.

76. However, we make it clear that this shall not preclude the Respondents to initiate appropriate steps afresh for extradition of Petitioner following due process of law.

77. Since the detention of the petitioner itself is declared illegal, we need not go into the correctness of the order dated 05.03.2015 passed by the ACMM dismissing the petitioner's bail application.

Both the writ petitions are accordingly disposed of. There shall be no order as to costs.

**CHIEF JUSTICE**

**JAYANT NATH, J.**

**SEPTEMBER 21, 2015**
**kks**