



Lex Article

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***INDIAN EXTRADITION LAW –
PROCESS FOR SEEKING
EXTRADITION OF PERSONS FROM
FOREIGN STATES***

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International and cross border crimes pose a unique challenge with regard to detection, arrest, extradition and trial. With the syndicated crimes including crimes by terrorist and drug cartels as well as individual criminal offences on the rise, it has become increasingly important for every country to define its rights and obligations in combating international crime and to lay down the due process of law in seeking arrest, interrogation, surrender and transfer of suspected individuals and eventual trial and conviction. Towards this goal, most countries have adopted extensive extradition framework. In the recent past India has also suffered setbacks with many fugitives leaving India to avoid criminal prosecution (Nirav Modi, Mehul Choksi, Vijay Mallya to name a few) and this article seeks to address the principles of Indian extradition laws with regard to arrest and transfer of fugitives from abroad.

A. Indian Law:

The Extradition Act, 1962 ("**Extradition Act**") is the Indian law governing extradition of fugitive criminals to and from India. This primary law is read along with the applicable extradition treaties, arrangements and conventions entered into by India with other countries, which are recognized under the Extradition Act for the purpose of seeking surrender. In the event of absence of an extradition treaty or arrangement with the concerned foreign State, the Indian 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.

Section 2(c) of the Extradition Act categorizes extradition offences as (a) offences specified in the extradition treaty with a foreign State, being a treaty State, and/or (b) offences punishable with imprisonment for a minimum term of one

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year under the laws of India or of a foreign State, including a composite offence in relation to the foreign State other than a treaty State. Section 2(d) of the Extradition Act defines an extradition treaty as a treaty, agreement or arrangement between India and a foreign State relating to extradition of fugitive criminals.

The Ministry of External Affairs (“**MEA**”) is the nodal ministry through which all extradition requests are sent by the Indian Government to other countries for extradition of fugitive criminals, in accordance with the procedure prescribed under the Extradition Act and the guidelines issued by MEA.

B. Extradition Treaties:

India has signed bilateral extradition treaties with as many as 42 countries and has extradition arrangements with 9 countries, for the purpose of extraditing fugitive criminals to and from its territory. Some of the requirements for and/or exemptions from extradition, which are common under most treaties, are discussed as under:

- (i) **Extradition of Nationals:** India allows extradition of nationals based on the principle of reciprocity between Indian and foreign States as agreed under the extradition treaties. Extradition treaties with countries such as USA, UK, Mauritius etc., permit surrender and transfer of fugitive nationals to the treaty State. However, extradition treaties between India and certain countries such as France, Germany, Spain, Bulgaria, Bahrain, do not permit extradition by India and the foreign States of its respective nationals. The exclusion applies to both cases, i.e. where extradition is sought (i) for facing criminal proceedings in the requesting country or (ii) for serving a sentence/punishment (or part thereof) in the requesting country following criminal proceedings in the requesting country where such national of the requested country has been convicted. In such a scenario, the requesting State can request for initiation of criminal proceedings against the nationals in the requested country for the offences they are accused of in the requesting country, provided such offences are extraditable offences which fulfill the requirement of dual criminality (as discussed below). The foreign State would eventually be obligated to initiate criminal proceedings against its national before a competent court, if any of the offences alleged to have been committed in India also amount to an offence under the laws of the foreign State. Nationals of third countries residing in either of the treaty nations can however be extradited to the requesting country as per the procedure prescribed under the respective extradition treaties.

By way of reference, the High Court of Madras has in one case (*Maria Stella Rene v. Inspector of Police, CBI/SCB*¹), disallowed release of passport of a French national (arrested in India) by the Indian Police on the ground that if she returned to France, she would not be extradited to India as the Indo-French extradition treaty barred extradition of “own nationals”. In another case (*Mohammed Jafeer v. The Government of India, rep. by the Assistant Director (I), CBI and Ors*²), the High Court of Madras upheld the decision of the Indian Government which disallowed request for extradition of an Indian national to Kuwait (though the treaty was signed but not in effect at the relevant time) on the

ground *inter alia* that the treaty bars extradition of own nationals. The court observed, “*Kuwait will not extradite its nationals to India*”. In this case, however, the criminal proceedings for the same offence(s) were commenced in India against the accused as the offences alleged were of theft and criminal breach of trust (which are also offences in India).

- (ii) **Dual Criminality of Extraditable Offences:** Extradition is applicable only with respect to those offences which are stipulated in the extradition treaty and the crime, for which extradition is sought to India, is recognized as a crime in the foreign State, punishable with imprisonment.

The requested country also has to be satisfied of there being a *prima facie* case made out against the fugitive criminal, the criminal must be proceeded against only for the offence for which his extradition is sought (international rule of specialty) and such criminal must be accorded a fair trial, are some of the other conditions for extradition.

- (iii) **Provisional Arrest:** Firstly, the extradition can only be sought pursuant to a warrant of arrest issued by a court in India. The warrant of arrest can only be issued pursuant to the court in India taking cognizance against the fugitive person in a pending matter, either on its own or upon a charge sheet by the Police. Secondly, issuance of a warrant for arrest is only the first step in India in the detailed process of extradition of a person to India to face criminal proceedings (as also for the issuance of Interpol notices for surveillance and arrest of the accused person, once he/she is located).

The extradition process, commencing with arrest warrant, requires submission within India of various details by the Police/court taking cognizance of the offence against the accused person through bureaucratic channels to the MEA. The “Guidelines for Indian law enforcement agencies for extradition of fugitives from abroad” by the MEA³ also informally specify a series of formalities, process and documents for extradition. In addition to arrest warrant, extradition requests require statement of the facts of the case, description of offences committed, prima facie evidence, copy of legal provisions as also an undertaking that if the accused person is arrested, India would seek extradition etc.

Therefore, a request for provisional arrest is to be made prior to receipt of the extradition request. However, where there is absence of a possibility of extradition (such as prohibition of extradition of nationals) the provisional arrest request would also, arguably, be unfounded and liable to challenge. Such an arrest is generally valid for 60 to 90 days (differs from treaty to treaty) from the date of arrest of the fugitive criminal. However, if no request for extradition is received by the requested country from the requesting country (in this case, India) within such period, the arrested person would be released. Similar protection has been provided under the Extradition Act.

- (iv) **Local laws hold precedence:** The Supreme Court has, in the case of ***Bhavesh Jayanti Lakhani v. State of Maharashtra***⁴, clearly held that “*the municipal laws of a country reign supreme in matters of extradition. It is thus for the State concerned to take a decision in regard to such Notices, keeping in view the Municipal Laws of the country.*”

Going by the above principle, if for any reason, any other law of the requested State would prohibit extradition of any specific person to India, such extradition can be refused by the said State and/or its courts.

- (v) **Other conditions where extradition may be denied:** Some of the treaties expressly provide additional scenarios where extradition requests can be denied owing to legal and human considerations, few of which are as follows:
- a. If the person is already undergoing criminal proceedings or a judgment has been pronounced by a judicial authority of the requested country for offences for which the extradition is sought; or
 - b. If the requested country has substantial reasons to believe that the request for extradition was made to prosecute/punish the person on account of his/her race, religion, nationality, ethnic origin, political opinions, sex or status or that person has not received/would not receive the minimum guarantees in criminal proceedings as contained in international covenants; or
 - c. If the extradition would be unjust/oppressive due to the: (i) trivial nature of the offence of which he/she is accused/convicted; (ii) passage of time since he/she is alleged to have committed it or to have become unlawfully at large, as the case may be; or (iii) accusation against him/her was not made in good faith in the interests of justice; or
 - d. If the offence of which he/she is accused of is of a political character etc.

C. Issuance of Notices through Interpol:

The Interpol is the international organisation which assists and works in coordination with the police forces of its 192 member countries, by extending mutual assistance and cooperation in order to identify, capture and ensure the surrender/delivery of wanted fugitive criminals or missing persons. In India, the Central Bureau of Investigation (“**CBI**”) has been designated as the National Central Bureau of India.

The Interpol issues various types of notices to alert as well as seek important information from the police of its member countries. However, the notices relevant from the purpose of extradition are Red Notices and Blue Notices. For extradition purposes, Red Notices (also known as Red Corner Notices) contain a request for arrest of the fugitive criminal with a view to subsequently extradite him/her to the country where he/she is wanted. The primary objective of the Red Notice is to immobilize the fugitive criminal in the country where he/she is residing, whether permanently or temporarily, by ensuring his/her arrest by the local police, subsequent to which a formal request for his/her extradition

is made to the said country by the country seeking extradition therefrom. Sometimes, the police may use a Blue Notice to track the fugitive criminal till such time he/she is in a country with which India has favourable extradition treaty and good diplomatic relations, and thereupon it may seek issuance of a Red Notice followed by extradition request to such country.

The Supreme Court of India, in the case of ***Bhavesh Jayanti Lakhani v. State of Maharashtra***, has held Red Notices to be *de facto* international arrest warrants.

It is relevant to note that Red Notices can only be issued by Interpol after an arrest warrant has been issued by the court in the requesting country against the fugitive criminal named in the Notice. Furthermore, since Red Notices are precursors to a request for “extradition”, if an extradition request cannot eventually be successful, the Red Notice may become infructuous (as the objective of extradition request would be trial of the fugitive criminal in the requesting country in accordance with the treaty provisions). However, a defence can be raised by the police/court in favour of the Red Notice, if location of the fugitive criminal is unknown.

D. Mutual Legal Assistance Treaties:

Section 105 of the Code of Criminal Procedure, 1973 requires the Central Government to make reciprocal arrangements with foreign governments relating to service of summons, warrants and judicial processes. Pursuant to the aforesaid provision, the Ministry of Home Affairs, the nodal ministry for seeking and providing mutual legal assistance in criminal law matters, has executed bilateral mutual legal assistance treaties on criminal matters (“**MLATs**”) with as many as 39 countries for the purpose of serving such documents. Most of these MLATs expressly specify that assistance thereunder would not include extradition or detention of persons with a view to extradite that person, transfer of proceedings in criminal matters, etc. The requesting country can only seek assistance of the requested country for service of summons (including summons for giving evidence, testimony of a witness to assist in investigations or criminal proceedings in the requesting country) onto a person residing in the requested country and to transmit such testimony to the court of the requesting country, for use in a pending legal contest or action. The requested country is then required to provide a proof of service, and in case such service is not possible then the reasons for failure to effect such service. However, in terms of most MLATs, no person present in the requested country can be compelled to assist in any investigation or to appear as a witness in the proceedings in the requesting country, except with voluntary consent of such person.

E. UN Conventions:

Certain conventions of the United Nations (“**UN**”) also include provisions for extradition (for facing criminal prosecution as also for serving sentence), which are recognized by India as it is a signatory to such conventions. These conventions are multilateral treaties entered into by several countries primarily to promote cooperation between such countries in order to curb trading of illicit drugs, terrorism, money laundering and trafficking. Increasingly, there is a tendency of investigation agencies to invoke the provisions of these conventions, in the absence of a treaty or where the extradition treaties are not likely to yield productive result.

An example of UN conventions to which India is a signatory, is the UN Convention Against Corruption (“**UNCOC**”), which deals with offences of and relating to corruption, and the UN Convention against Transnational Organised Crime (“**UNCTOC**”), which deals with offences of and relating to transnational organised crimes like trafficking. Article 44(2) of the UNCOC prescribes extradition of persons even if the offences alleged to have been committed in the requesting country are not offences in the requested country and *vice versa* (i.e. a person can be extradited even without meeting the condition of dual criminality, which is a prerequisite in most of the extradition treaties). Furthermore, Article 44(13) of the UNCOC stipulates that if extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider enforcement of the sentence imposed under the domestic law of the requesting State or the remainder thereof.

F. Fugitive Economic Offenders Ordinance:

India has recently promulgated the Fugitive Economic Offenders Ordinance, 2018 (“**Ordinance**”) on April 21, 2018, which allows initiation of various actions against “fugitive economic offender”, who flees the country after defaulting on multi-crore bank loans and similar instances of fraud. “Fugitive economic offender” is an individual against whom an arrest warrant relating to a scheduled offence has been issued by any court in India, who have left India so as to avoid criminal prosecution, or being abroad, refuse to return to India to face criminal prosecution. Schedule offence means an offence specified under the schedule to the Ordinance, if the total value involved in such offence(s) is Rs. 100 crores or more. Under the Ordinance, certain authorized officers can file an application in the special court for declaring such persons as fugitive economic offenders. The aforesaid officer can also, with the permission of the special court, provisionally order attachment of such persons’ properties, even prior to filing aforesaid application provided the same is filed within 30 days from the attachment date. Such authorized officers have also been empowered to conduct survey and inspection, search and seizure of the offender’s properties. Once the accused are declared as fugitive economic offenders, the special court has the power to order confiscation of their proceeds of crimes and properties in India as well as abroad by the Indian Government.

Taking advantage of the wide ambit of powers conferred under the Ordinance, the Indian Enforcement Directorate is reportedly considering to take action against Vijay Mallya, Nirav Modi and Mehul Choksi including to confiscate their assets.

Conclusion:

Despite the extensive statutory framework and working machinery in place to extradite persons from abroad into India, only 65 fugitives have been extradited to India since the year 2002⁵ and it is evident that the surrender process is quite cumbersome and tedious, often taking years to complete and, in some cases, they even remain unsuccessful. Needless to say, it enables the fugitive criminals accused of offences in India, to evade arrest and prosecution for years on end. The Ordinance is a step in the right direction but the long term benefits of the Ordinance and its ability to encourage the foreign States to extend cooperation to India to expedite the extradition process remains to be seen.

Endnotes

¹ CrI. R.C. No. 602 of 2016, decided on: 13.06.2016.

² Habeas Corpus Petition No. 1243 of 2005, decided on: 26.04.2006.

³ Guidelines are available at <http://www.mea.gov.in/extraditionguidelinesabroad.htm>.

⁴ (2009) 9 SCC 551.

⁵ As reported at <http://www.mea.gov.in/toindia.htm>.

Feedback

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