BHAVESH JAYANTI LAKHANI

v.

STATE OF MAHARASHTRA & ORS.

(Criminal Appeal No. 1452 of 2009)

AUGUST 7, 2009

[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Extradition Act, 1962 – s. 2(c), (d), (f), (j):

Red Corner Notice – Execution of, in India – Divorce and custody matters of Indian citizens in US courts – Husband taking minor child to India from USA in violation of custody order – Issuance of Red Corner Notice by INTERPOL in relation to husband in respect of arrest warrants and Yellow notice in relation to minor daughter – High Court refusing to stay Interpol notices – Sustainability of – Held: Not sustainable – Dispute between the parties being a matrimonial dispute, is a private dispute – No extraditable offence made out under the Act or under provisions of extradition treaty between USA and India – No request for extradition made to Executive Government of India by Government of USA – Red Corner Notice by itself cannot be a basis of arrest or transfer of Indian citizen to a foreign jurisdiction – Municipal laws of country reign supreme in matters of Extradition – Extradition Treaty is subject to the provisions of the Act – Husband being an Indian citizen is entitled to enforcement of his fundamental rights – CBI having regard to its limited powers, could not exercise its jurisdiction within the territories of a State without its consent – Constitution of India, 1950 – Articles 14, 19 and 21 – Extradition Treaty between India and USA entered into on 21.06.1999 – Article 1, 2, 4, 9 and 21.

Functioning of CBI vis-à-vis its role in terms of notices issued by Interpol – Explained.

A *Arrest of a person for extradition – Procedure to be followed – Before the arrest and after the arrest – Explained.*

International Criminal Police Organisation-INTERPOL:

Functions of – Issuance of Red Corner Notice and Yellow
B *Corner Notice – Procedure for – Binding nature of Interpol notices – Explained.*

Red Corner Notice/Yellow Corner Notice – Issuance of – Red Corner Notice is issued to seek provisional arrest of a
C *wanted person against whom a national or international court has issued warrant of arrest – It does not have the effect of warrant of arrest – It is a request of the issuing entity to provisionally or finally arrest the wanted person for extradition – Yellow notice is issued for finding a missing person or to*
D *identify people who are not capable of identifying themselves – It is issued specially to locate minors.*

Appellant and respondent no. 6 are citizens of India. They married in Mumbai and moved to California. A daughter was born out of the wedlock. However, there
E **was a marital discord between the parties and the respondent no. 6 was continuously harassed. The court of USA by an ex parte order granted temporary custody of the child, restraint and abuse prevention in favour of respondent no. 6. Appellant-husband allegedly forged**
F **the documents and took the child to India in violation of the custody order. Respondent no. 6 filed complaint before the police authorities that the appellant had abducted the child. The USA court passed a decree for divorce and the custody of the child. Thereafter,**
G **respondent no. 6 re-married and filed for custody before the Family Court, Mumbai. The court issued arrest warrants against the appellant and granted custody of the child to respondent no. 6. In appeal thereagainst order was stayed by Mumbai High Court. The police and the**
H **court of USA issued warrants of arrest against the**

appellant which was transmitted through INTERPOL to the Government of India. Appellant challenged the legality/validity of the order issuing warrant. He also sought direction to restrain the respondents or any other Central Government from arresting the appellant or taking any action pursuant to or in furtherance of the red corner notice issued by INTERPOL in respect of those arrest warrants. High Court dismissed the petition. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. In the instant case, appellant is sought to be apprehended for commission of an offence u/s. 363 IPC. The dispute between the appellant and respondent no.6 essentially being a matrimonial dispute, is a private dispute and no extraditable offence can be made out of the same, in the absence of a specific request for extradition. The Municipal Laws of a country reign supreme in matters of Extradition. It is for the State concerned to take a decision in regard to such Notices, keeping in view the Municipal Laws of the country. High Court committed a serious error insofar as it failed to take into consideration the provisions of the Extradition Act, 1962, in the absence of any request having being made by the Govt. of USA to the Executive Government of India or any authourization made by the latter on its behalf. It erred in holding that a Red Corner Notice should not be tinkered with. When a person complains of a violation of his fundamental right and/or otherwise of his fundamental right he is entitled to the right of judicial review. Appellant being an Indian citizen is entitled to enforcement of his fundamental rights. [Paras 39, 49, 53, 57, 128 and 129] [895-B; 897-F; 899-E-F; 900-D-E; 927-A-D]

2.1. CBI has an Indian Interpol Wing. It works as an interface between the Interpol Secretariat General, France, Interpol member countries and various law

A enforcement agencies of India. CBI for intent and purport exercises the power of National Control Bureau-NCB in terms of the Treaty and thus derive its authority from INTERPOL itself. C.B.I. is thus the designate of the INTERPOL in India and endorsing warrants is an B essential attribute of the procedure for the implementation of the Treaty. C.B.I. in its website maintains that it handles all procedures related to Extradition and Issuance of Interpol Notices. One of its functions is to circulate the Red Corner as also Yellow C Notices issued by Interpol Secretariat General at the behest of any member country within India. It is proceeded on the basis that the power of CBI and its delegated authority namely, the State police to keep a person under surveillance ; arrest him in terms of D warrant of arrest issued by a foreign country and Red Corner Notice is an absolute one. Similarly the power to find out a missing person in terms of the Yellow Notice is also absolute. [Paras 41, 59, 97, 100 and 101] [895-F-G; 901-B; 914-G; 915-C; 915-D-E]

E 2.2. The Red Corner Notice is issued to the border control authorities and others so as to enable them to effect an arrest along with details and papers including a warrant from the originating country. A Red Corner notice is issued to seek the provisional arrest of a wanted F person. However, it by itself does not have the effect of warrant of arrest. It is issued for persons, against whom a national or international court has issued a warrant of arrest. It is solely a request of the issuing entity to provisionally or finally arrest the wanted person for G extradition. An arrest may also be made under the Extradition Act, 1962. The Ministry of External Affairs works for the administrative watching of the Act. A Yellow notice is issued for finding a missing person or to identify people who are not capable of identifying themselves. It H is an "International Missing Person Notice". It is issued

specially to locate minors. [Paras 41 and 72] [895-G; 905-B-D] A

2.3. A Red Corner Notice has large number of consequences. They are: (i) The requesting country may make a deportation request. (ii) The law enforcement agency in India is required to *"take follow up action with regard to the arrest of a fugitive criminal"*. (iii) The information emanating from the red corner notice is required to be distributed all over the Interpol website. (iv) The requesting Embassy would instruct the CBI to carry out its instructions for surveillance, arrest and detention. (v) The requesting Embassy can even contact the Indian police directly. (vi) Thereafter, extradition proceedings may follow. Therefore, when a proceeding under the Act is initiated, the civil liberty of a person would be directly affected. The provisions of the Act, therefore, should be strictly construed. Any request for extradition therefore must undergo the strict scrutiny test. Extradition offence keeping in view its definition in s. 2(c) of the Act in relation to a treaty State must be one provided for the extradition treaty therewith. [Paras 42 and 43] [896-A-F] B C D E

2.4. The application of the provisions of the Act, in a case of this nature must be held to be imperative in character. For the purpose of applying the provisions of the Act, existence of a treaty between the requesting State and the requested State plays an important role. It makes a distinction between an extraditable offence and other offences including political offences. Sections 4-18 provides for the mode and manner in which a request for extradition of a person is required to be made by the concerned country. The requirements are specific in nature and are required to be accompanied by a large number of documents. [Para 44] [896-F-H; 897-A-B] F G

2.5. No request for extradition has been received by the Government of India. It could act only when a request H

A is received. Red Corner Notice by itself cannot be a basis of arrest or transfer of an Indian citizen to a foreign jurisdiction. The Act cannot be bypassed in red corner cases concerning Indian citizens. Hence, the Extradition Treaty is subject to the provisions of the Act. [Paras 45 B and 49] [897-B, F, G]

2.6. A person cannot be arrested without any authority of law. Thus, the arrest of a person must be effected in terms of the provisions of the Act. A person C wanted for an offence in a foreign jurisdiction may be arrested on fulfillment of the following conditions: that the offence should be counted as one by Indian Law as well, and the person must be liable to be arrested in India- either under any law relating to extradition, or otherwise. [Para 50] [897-H; 898-A-C] D

2.7. Respondent no.6 herself accepts that she had pursued only civil remedies and the order of the custody Court was passed under civil remedies. [Para 52] [899-C-D]

E

2.8. India follows the doctrine of dualism and not monoism. The Act as also the treaties entered into by and between India and foreign countries are subject to the municipal law. Enforcement of a treaty is in the hands of F the Executive. But such enforcement must conform to the domestic law of the country. Whenever a conflict arises between a treaty and the domestic law or a municipal law, the latter shall prevail. [Paras 54 and 55] [899-F-H; 900-A-B]

G *M/s Entertainment Network (India) Ltd. vs. M/s Super Cassettee Industries Ltd.* 2008 (9) SCALE 69, relied on.

2.9. It is for the State concerned to take a decision in regard to such notices, keeping in view the Municipal H Laws. The steps to deal with the request contained in the

notices, thus, must abide by the domestic laws of the concerned country. Recognition of the request as the basis for an arrest operate an internationalization or tans-nationalization of a foreign administrative decision. The formal admission procedure by Interpol cannot be the single cause of internalization. It is just a precondition for the recognition by the other states. [Para 57] [900-D-E]

2.10. The appellant received a notice from Interpol dated 13.06.2007 being a Yellow or Watch notice as also a Notice dated 21.06.2007 being a Red or Detain and Arrest notice. Yellow notice was in relation to the child whereas the red notice was in relation to the Appellant. The Assistant Director of National Crime Bureau (NCB) forwarded a letter dated 4.01.2008 from the U.S. Embassy (Department of Justice) on or about 14.01.2009 to the Mumbai Police to locate the Appellant and his daughter. On 18.03.2008 notice of arrest warrant issued by INTERPOL was circulated against the Appellant on the Interpol Website. Mumbai police is said to have found the location of the Appellant and his daughter on 3.05.2008 which information was passed on to U.S. Embassy on 9.05.2008. [Para 58] [900-F-H; 901-A]

2.11. 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. 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

A 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 B 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. A number C of states recognizes 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. [Paras 77, 78 and 79] [906-E-H; 907-A-C]

D 2.12. The trans-nationalization takes place through the membership in the organization, through the supervision proviso of the General Secretariat and the recognition of the transnational effect of the information. A successful search does not result in Interpol's further E operative involvement, either. Concerned authorities or the public are supposed to contact the local police office, which then gets in touch with the issuing authority and initiates the necessary steps. Therefore, the member state usually gives the initiative for a Notice, and cooperates F with one or several other member states in order to find and arrest the wanted person. Existing information is just distributed through a special communication channel. Interpol's role is limited to that of a service agency. [Paras 80, 81 and 82] [907-C-F]

G *Bettina Schondorf-Haubold, The Administration of Information in International Administrative Law – The Example of Interpol, 9 German L.J.* 1719, referred to.

2.13. The provisions relating to issuance of the notice H by INTERPOL; warrant of arrest by foreign courts vis-à-

vis the power of NCB and the local police to act in terms thereof are contained not only in the Act but also in the provisions of the concerned Treaty, Cr.P.C. as also the various Notifications issued by the Central Government in that behalf. [Para 91] [912-A-D]

2.14. Power to apprehend or investigate a fugitive criminal, is conferred by s. 14 rw s.15. Section 14 prescribes the form of apprehension of a fugitive criminal under an endorsed warrant or a provisional warrant. Warrant can be issued by a foreign country to arrest a fugitive criminal who is yet to be tried and a person who has already been convicted. A fugitive criminal may be apprehended either under category: Endorsed Warrant; and Provisional Warrant. An Endorsed Warrant is one which is a warrant that has, at first been issued by the foreign country with which India has an Extradition Treaty and subsequently been endorsed by the Central Government. Hence once a warrant issued by the foreign country is endorsed by Central government, it becomes an Endorsed Warrant in terms whereof sufficient authority is conferred to apprehend a person and to bring him before any Magistrate in India. Power to apprehend includes the power to investigate. S. 15 uses the term 'apprehend' which is defined as 'the seizing or taking hold of a man; the act of arresting or seizing under the process of law'. [Paras 93 and 94] [912-G-H; 913-A-E]

2.15. The requirement to arrest a person for the purpose of his extradition is in two categories: the cases in which India has an Extradition Treaty with the concerned country and those in which no such extradition treaty exits. In the former category, the provisions of Chapter III of the Act shall apply. Arrest is made by the police authorities in terms of endorsed warrant; whereafter the procedure laid down in s. 17 is to be followed by reason whereof the fugitive criminal is

A to be brought by the Magistrate. Once the Magistrate satisfies that the fugitive criminal has been brought before him in terms of an endorsed warrant which is duly authenticated and that the offence is an extraditable one, the Magistrate shall commit the fugitive criminal to prison.
B A certificate of committal is thereafter sent to the Central Government. [Para 95] [914-A-D]

2.16. The power is exercised by the C.B.I. or a police officer to arrest a person, although no warrant is issued in terms of s. 41(1)(g) Cr.P.C. It pre-supposes satisfaction
C of a police officer to arrest a person, if he has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received in, any act committed at any place out of India which, if committed in India, would have been punishable
D as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in India. However, the CBI website states that in case an action is taken under s. 41(1)(g), the matter must be immediately referred to the Interpol Wing for
E onward transmission to the Government of India to take a decision or otherwise. In terms of the said provisions, sanction of the Central Government is contemplated. However, it is placed on record that strictly construed in a case involving extradition, s. 41(g) may not have any
F application. Section 41(g) clearly contemplates the power of the Police to arrest under 'any law relating to Extradition' thereby contemplating the exercise of powers subject to the provisions of the Extradition Act. Thus, the provisions of the Cr.P.C. are subject to those
G in the Act. [Paras 103 and 106] [916-A-B, E-F]

2.17. Extradition of a fugitive criminal from India to any other foreign country, irrespective of the fact as to whether any treaty has been entered into or with that

H

country, is within the exclusive domain of the Central Government. The extradition of a person from India to any other foreign country is covered by the Parliament Act, namely the Act. Keeping in view the Constitution of INTERPOL vis-à-vis the Resolutions adopted by the C.B.I. from time to time, although a Red Corner Notice per se does not give status of a warrant of arrest by a competent court. It is merely a request of the issuing authority to keep surveillance on him and provisionally or finally arrest the wanted person for extradition. The provisions of the Act and the Treaty are required to be given effect to. Whenever a request is received from INTERPOL the authority must act on behalf of the Central Government. The INTERPOL provides constitution of NCBs by Member States. All Members are required to constitute NCBs which should be an authority within the meaning of the provisions of INTERPOL for coordination of the functioning within the Member States and/or the INTERPOL in case of any request received. Location of a missing person and or tracing the whereabouts of a fugitive criminal is not an easy task. The authority within the meaning of the words of the INTERPOL must act in cooperation with the State police. For the said purpose it may have to request more than one States. A missing person or a fugitive criminal may move from one State to another. In such a case it is not possible for one State to find out the missing person or fugitive criminal. Only when an investigation is carried out in relation to an offence which has been committed in a State and not in the Indian territory or within the territorial jurisdiction of the Central Government the consent of the State concerned is required to be obtained. [Paras 111 and 112] [919-G-H; 920-A-E; 920-H; 921-A]

2.18. Surveillance per se under the provisions of the Act may not violate individual or private rights including

A **the right to privacy. Right to privacy is not enumerated as a Fundamental Right either in terms of Article 21 of the Constitution of India or otherwise. However, it is held to be an essential ingredient of 'personal liberty'. In the instant case, except giving information in regard to**
B **whereabouts of the appellant and his daughter, no other action was taken. [Paras 117, 118 and 119] [921-H; 922-A; 923-C]**

Kharak Singh v. State of U.P. and others **(1964) 1 SCR**
C **332;** *Govind v. State of Madhya Pradesh* **(1975) 2 SCC 148;** *R. Rajagopal v. State of Tamil Nadu* **(1994) 6 SCC 632;** *People's Union for Civil Liberties (PUCL) v. Union of India* **(1997) 1 SCC 301;** *State of Maharashtra v. Madhukar Narayan Mardikar* **(1991) 1 SCC 57;** *Malak Singh v. State of P&H* **(1981) 1 SCC 420, referred to.**
D

2.19. The Central Government and in particular the Ministry of External Affairs, should frame appropriate guidelines in respect of surveillance conducted pursuant to a Red Corner or Yellow Corner Notice. In the instant
E **case, further action in terms of the Red Corner Notice has not been and could not be taken against the appellant. [Paras 122 and 123] [923-G-H; 924-A]**

2.20. The proceedings for extradition of a citizen could be initiated provided the conditions precedent laid
G **down in terms of the provisions of the Act. The Act prescribes a request made by a foreign country whether with it a treaty has been entered into or not. In the absence of any such request, no proceeding could be initiated. [Para 124] [924-B]**
H

2.21. CBI stated that the averments of the appellant that *prima facie* **the case arises out of a matrimonial dispute are all questions that are required to be gone into either by the Extradition Court appointed by the Central**
J **Government as per s. 5 of the Act or subsequent to the**

Extradition of the Petitioner to the country in question. In any event, there has been no arrest of the Petitioner as the CBI is awaiting the necessary papers from the American Government. The fact that India is not a party or signatory to the Hague Convention on the Civil Aspects of International Child Abduction does not make any difference. It is incorrect to say that the Petitioner is being treated like a commodity. A warrant of arrest by a competent court in United States has been issued against the Petitioner. Under International obligations, the CBI is required, when so requested to act on the red corner notice issued pursuant to the warrant of arrest. If fugitives are not apprehended pursuant to the warrant of arrest/ red corner notice, it would be very easy for such persons to escape punishment. The petitioner has rights under the Act as well as the judicial process in United States (if he is ultimately extradited). Till date the CBI has not received any request from the US authorities for the arrest and Extradition of the Petitioner. [Para 125] [925-C-H; 926-A-B]

2.22. The Ministry of External Affairs, Government of India, New Delhi by means of an affidavit admitted that it is the nodal agency for Extradition as per the Act and the Extradition Treaty between the Government of India and the United States of America. On receipt of a Red Corner Notice, it is not the invariable practice to arrest the person but efforts are made to trace him though the local police. The consideration of the question of arrest and Extradition would be within the framework of domestic law including Indian Extradition Act and the Extradition Treaty with the Requesting Country. Extradition of a person would only arise after request for extradition is formally received from the country. As per the prevalent practice, in cases pertaining to matrimonial affairs, the view taken is that such matters may not generally be held to satisfy the test of dual criminality. In any case, since

A the instant case is of domestic law, the view of the Ministry of Law would be called for and taken into consideration. It is, therefore, clear that intervention by the Ministry of External Affairs is crucial when a request is received by it from a foreign country. [Para 125] [925-
B C-H; 926-A-B]

2.23. A fundamental right of a citizen whenever infringes, the High Courts having regard to their extraordinary power under Article 226 of the Constitution of India as also keeping in view that access to justice is
C a human right would not turn them away only because a Red Corner Notice was issued. The Superior Courts in criminal cases, thus are entitled to go into the manner in which such Red Corner Notice, if any, is sought to be enforced and/or whether the local police is threatening a
D citizen of India with arrest although they are not entitled to do so except in terms of the provisions Act as and when applicable. Furthermore, if a violation of any order passed by a civil court is made the ground for issuance of a Red Corner Notice, the court will enquire as to
E whether the same has undergone the tests laid down under sections 13 and 44A C.P.C. [Paras 129 and 130] [927-A-F]

2.24. Although the family court at Bombay for all
F intent and purposes relying on or on the basis of the order passed by the Massachusetts Court directed custody of the girl in favour of her mother, the Bombay High Court stayed the operation thereof. Therefore, the appellant must be held to be in lawful custody of his
G daughter unless any other or further order is passed by a court of competent jurisdiction. [Para 131] [927-F-H]

2.25. The State did not seek for enforcement of the custody and/ or restrain order passed by the Probate and Family Court, Massachusetts in view of the rigours
H contained in ss. 13 and 44A C.P.C. Even the Family Court

did not deal with this aspect. In any event, as the matter is pending before the High Court, it alone will have a final say. [Para 132] [928-A-B]

Case Law Reference:

2008 (9) SCALE 69	**Relied on.**	**Para 53**
(1964) 1 SCR 332	**Referred to.**	**Para 118**
(1975) 2 SCC 148	**Referred to.**	**Para 118**
(1994) 6 SCC 632	**Referred to.**	**Para 118**
(1997) 1 SCC 301	**Referred to.**	**Para 118**
(1991) 1 SCC 57	**Referred to.**	**Para 118**
(1981) 1 SCC 420	**Referred to.**	**Para 120**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1452 of 2009.

From the Judgment & Order dated 11.08.2008 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 676 of 2008.

Dr. Rajeev Dhawan, (A.C.), Shekhar Naphade, Vinay Navare, Abha R.Sharma for the Appellants.

G.E. Vahanvati, A. G., K. Radhakrishnan, Tufail A. Khan, Devadat Kamat, D.S. Mahra, B. Krishna Prasad, Nitya Ramakrishnan, Sarim Naved, Trideep Pais, Nikhil Nayyar, Ravindra Keshvrao Adsure, for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

INTRODUCTION

2. Interpretation of the roles and responsibilities of the Central Bureau of Investigation (CBI) vis-à-vis the provisions of

A the Extradition Act, 1962 (hereinafter referred to as "the Act") is involved in this appeal. It arises out of a judgment and order dated 11.08.2008 passed by a Division Bench of the High Court of Bombay in Criminal Writ Petition No.676 of 2008 whereby and whereunder the appellant's application
B questioning the validity and/ or legality of an order issuing a warrant against the appellant by the Magistrate Court, Clayton County, Georgia in case No. 2006/CW/06369 and Case No. 2006/CW/06370 in USA in respect of a complaint filed by the respondent No. 6 herein, was dismissed. The appellant in that
C application had also sought for a direction restraining the respondents or any other Central Government machinery from arresting the appellant or taking any action pursuant to or in furtherance of the Red Corner Notice issued by INTERPOL in respect of those arrest warrants.

D **BACKGROUND FACTS**

3. Appellant and the respondent No. 6 are citizens of India. He went to Michigan to pursue his studies in M.S. (Computer Engineering) between August, 1998 and May, 2000. He also
E worked as a Software Engineer at California in a company named Broadbase Software upto 2001. He was later on employed as a Technical Lead in a Government Contract Firm at California known as Ancore Corporation between 2001 and 2003.

F 4. Appellant married the respondent No. 6 on 6.04.2002 at Mumbai. They moved to California on 19.04.2002 and stayed there till 2005. Out of the said wedlock, a daughter Eesha was born on 26.04.2003. Marital life of the Appellant and the Respondent No. 6 was however not happy. According to the
G respondent No. 6, she was continuously being harassed. She applied for grant of permanent asylum on 1.07.2003 allegedly under coercion from the appellant. Later on the respondent No. 6 allegedly moved to her sister's house at Sharon Massachusetts, USA.

H

PROCEEDINGS IN USA

5. She filed a complaint with the Sharon Police Department on 26.04.2005. On or about 09.05.2005 an application before the Probate and Family Court of Massachusetts for grant of divorce was filed by her. In the said proceeding, she also sought for orders of custody of her daughter.

6. The Probate and Family Court, Massachusetts passed an order of temporary custody of the child, restraint and abuse prevention ex parte in favour of the respondent No.6 and against the appellant on 10.05.2005. Service of the said order is said to have been effected on the appellant on 20.05.2005. Allegedly, he neither appeared before the Court contesting the said interim custody order nor sought for any modification thereof. Respondent No.6 took up a job and continued to live with her child in Massachusetts. She contends that her Indian Passport was stolen by the appellant from the premises which was being occupied by her.

7. Admittedly, the appellant came to India with the child on 15.04.2006 in violation of the court custody orders.

8. The contention of the appellant is that despite the initial marital discord, the parties started living together. It was decided that he should return to India with the child wherefor even a written consent was given by the respondent No. 6 by affirming an affidavit before a Notary on or about 14.04.2006, stating:

> "I, Hetal G. Thakker ...authorize my child Eesha B. Lakhani to travel with my husband and her father, Bhavesh Lakhani to India.
>
> They will be leaving the United States of America on or about April 14, 2006 and returning on or about (Undecided)..."

9. Respondent No. 6, however, contends that the appellant

A travelled out of the United States of America with the child by creating false and fabricated documents including the said affidavit as would also appear from the fact that the child already had a passport. On the premise that the child was abducted by the appellant, warrants of arrest were issued against him on B the basis of a complaint made by the respondent No. 6 before the police authorities. A decree for divorce as also the custody of the child was passed by the Norfolk Country Probate and Family Court, Canton, Massachusetts on 2.5.2006.

C **PROCEEDINGS BEFORE THE FAMILY COURT**

10. Respondent No. 6 thereafter married one Ashwin Matta. Indisputably, she filed an application for custody of the child before the Family Court at Mumbai on 11.05.2007. By an order dated 15.05.2007, the Family Court directed the appellant D to remain present in the Court with Eesha. Pursuant to the said notice of the Family Court, his father appeared before the court on 15.05.2007 and stated that the appellant had gone out of Mumbai along with Eesha. The matter, therefore, was adjourned to 18.05.2007. On that day the appellant's father E again appeared and informed the Court that the appellant could not be contacted. The Family Court, thus issued a warrant of arrest against the appellant and directed grant of custody of the child to the Respondent No. 6.

11. Appellant indisputably preferred an appeal before the F High Court which was marked as Family Court Appeal (Stamp) No. 11724 of 2007. An order of stay was granted by the High Court of Bombay in the matter, which is still operative.

PROCEEDINGS BEFORE THE HIGH COURT

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12. The Atlanta City Police and the American Court in the meanwhile issued a warrant of arrest against the Appellant which was transmitted through INTERPOL to the Government of India. Appellant filed a writ petition questioning the legality H and/ or validity of the said warrant, which by reason of the

impugned judgment dated 11.08.2008 has been dismissed.

13. The High Court posed unto itself a question as to whether the Red Corner Notice could be stayed by it.

14. Referring to the provisions of the Act it was opined :-

(i) While dealing with a fugitive criminal wanted in a State with which India has no treaty, the Magistrate can enquire into the case in the same manner as if the case was triable by Court of Sessions or High Court.

(ii) However, while dealing with a fugitive criminal wanted in a treaty State, such inquiry and such a trial is not open.

(iii) The Magistrate neither has the power to take evidence nor can he discharge a fugitive criminal. In the event, if two conditions, namely, (1) whether the warrant is duly authenticated; and (2) whether the fugitive criminal is concerned with an extradition offence are satisfied, the Magistrate is required to commit the fugitive criminal to prison.

(iv) Only the Central Government in exercise of its power under Section 29 of the Act can discharge a fugitive criminal.

(v) The Magistrate cannot make a roving inquiry into the facts.

(vi) Extradition treaty implies mutual obligations.

(vii) The Act recognizes the sanctity of an extradition treaty.

(viii) The provisions of Section 105A of the Code of Criminal Procedure would not apply in a case of this nature.

(ix) The High Court cannot tinker with the Red Corner Notice.

(x) The High Court should not set a precedent which could be used to hamper investigation of crimes which have global dimensions and for the investigation of which, Red Corner Notices are critical tool.

CONTENTIONS ADVANCED BY THE PARTIES:

15. Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the appellant would contend:

(i) The purported decree for divorce and custody of the child granted by the Probate and Family Court, Massachusetts being wholly without jurisdiction and, thus, being a nullity; the same is not admissible in any Court in India.

(ii) Respondent No. 6 having prevaricated her stand from stage to stage, no credence thereto could have been placed by the Courts of India for the purpose of acting thereupon.

(iii) The purported order of custody in respect of the child passed by the American Courts being in conflict with the order of custody passed by the High Court of Bombay, the appellant could not have been directed to be extradited.

(iv) The order passed by the American Court having been obtained upon committing a fraud on the court, the said judgments cannot be executed in India having regard to the provisions contained in Section 44A of the Code of Civil Procedure, 1908. .

(v) Respondent No. 6 having moved the Family Court for custody of the child by invoking the provisions

contained in Section 13 of the Code of Civil Procedure, it could not have acted, relying on or on the basis of the orders passed by the Probate and Family Court, Massachusetts and directed grant of custody of the child on the basis thereof.

16. So far s the judgment of the Bombay High Court is concerned, it was urged:

(i) It ought to have considered that the so–called offence for which the petitioner is charged by the American Court is not an extraditable offence either within the meaning of the said Act or under the provisions of the Extradition Treaty entered into by and between the United States of America and India.

(ii) It ought to have been considered that the rights of an Indian citizen guaranteed under Article 19 and Article 21 cannot be compromised for enforcing any of the provisions contained in the Act.

(iii) It ought to have been considered that India is not a party or signatory to the Hague Convention on the Civil Aspects of International Child Abduction.

(iv) It ought to have considered that the dispute between the petitioner and the Respondent – wife was essentially of a civil nature pertaining to the custody of the minor child.

(v) The refusal of the High Court to stay the INTERPOL notices under Article 226 of the Constitution of India is patently erroneous, thus, leading to the miscarriage of justice.

(vi) It ought to have been considered that the petitioner who is having his own standing and reputation in the society cannot be treated like a commodity for

A the sake of any treaty between India and the United States.

(vii) It ought to have considered that before touching the petitioner on the basis of a warrant issued by the American Courts proper investigation into the allegations against the petitioner was a must.

(viii) It ought to have considered that the provisions of the Constitution of India conferring fundamental rights to its citizens are superior and, thus, prevail over the provisions of the said Act or the Extradition Treaty executed between the Government of India and the United States.

(ix) That the entire approach of the High Court was legalistic as the High Court failed to examine the core constitutional issues involved in the matter.

17. Ms. Nitya Ramakrishnan, learned counsel appearing on behalf of Respondent No.6 on the other hand urged :-

(i) Keeping in view the Scheme of the Act especially as the question whether the appellant should be extradited or not was not an issue before the High Court, this Court should not interfere with the impugned order at this stage, particularly in view of the fact that no request for extradition has yet been made by the authorities of U.S.A.

(ii) Taking away the child out of the country in violation of an order passed by a competent court of law would amount to abduction and in that view of the matter the appellant must be held to have committed an extraditable offence.

(iii) Contention of the learned counsel for the Appellant that he had not been served with the notice of the Matrimonial Court is factually incorrect as the

records of the case demonstratively establish that, not only a notice but also the order of the Court granting custody in favour of respondent No.6. was served on the appellant on 20th May, 2005 which was extended till 24th May, 2005.

(iv) Although the appellant appeared before the Court on 8th July, 2005 he neither sought any modification of the order nor the custody of the child.

(v) Appellant having forged documents to take the child out of United States of America as the American Passport was with the respondent No.6 and in that view the appellant must be held to have committed an extraditable offence.

(vi) Keeping in view the provisions of Section 13 read with Section 29 of the Act, the writ petition before the High Court must be held to be entirely pre-mature as all the contentions raised by the Appellant herein can be raised before the Magistrate in the event the Central Government thinks fit to issue a request to any Magistrate to hold an enquiry in terms of Section 5 of the Act.

(vii) Appellant even having not appeared before the Family Court at Mumbai, the impugned judgment should not be interfered with.

18. Mr. Radhakrishnan, learned senior counsel appearing on behalf of Union of India submitted :-

(i) Having regard to the prayers made in the writ petition by the appellant before the High Court, the High Court had no jurisdiction to interfere with the red corner notice or the yellow notice ;

(ii) Despite the fact that the CBI was informed that fugitive criminal was in Mumbai, he had not been

A detained.

(iii) Keeping in view the provisions contained in Chapter III of the Act in terms whereof before passing an order of extradition the Magistrate is required to be satisfied whether the Appellant is a fugitive criminal and furthermore in view of Section 29 thereof empowers the Central Government i.e. Respondent to discharge any fugitive criminal if it appears to it to be a case of trivial nature.

C (iv) The C.B.I. despite having informed the U.S. authorities as regards the whereabouts of the appellant, no request for extradition having been received by the Central Government, the writ petition must held to be pre-mature.

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19. Dr. Rajiv Dhavan, learned senior counsel, who was requested to assist us in the matter raised the following contentions:

E (i). The Central Bureau of Investigation does not have any authority to deal with Red Corner Notices issued by the Interpol Secretarial General at the behest of any member country.

(ii). No red corner notice can be issued in violation of F civil liberties of an Indian and particularly in a matrimonial case, the effect whereof may result in -

(a) detention ;

(b) arrest ;

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(c) circulation of name on website ; and

(d) surveillance

which would amount to gross violations of law as the

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appellant's personal liberty, as contained in Articles 19 and 21 of the Constitution of India, would have been interfered with, without any authority of law. As no law operates in the field, the actions of the State and in particular the Central Bureau of Investigation are unconstitutional and invalid, being violative of the civil liberties of the citizens of India.

(iii). The executive power is coterminous with the legislative power but the legislative power wherever exists, should not be permitted to be used so as to interfere with the right of an individual and in particular private rights of the citizens.

(iv). Any executive or departmental instructions framed for the guidance of the police officers being not a law no executive power can be exercised to curtail the fundamental right of a citizen in terms thereof

(v). Central Bureau of Investigation having been constituted in terms of the provisions of Delhi Special Police Establishment Act, 1946 (hereinafter referred to as the "DSPE Act"), and having regard to the limitations of its powers contained therein, it could not exercise its jurisdiction within the territories of a State without its consent.

(vi). C.B.I. had no jurisdiction of surveillance in terms of the Red Corner Notice or Yellow Corner Notice issued by the Interpol or otherwise.

(vii). C.B.I. being a creature of the statute must be held to be bound by the provisions of the DSPE Act and cannot act in a sui generis capacity.

(viii). C.B.I. having a limited territorial jurisdiction, its services cannot be used outside its territorial framework.

A (ix). The High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration the relevant provisions of the Code of Criminal Procedure enacted in terms of Code of Criminal Procedure (Amendment) Act, B 1993

(x). In terms of inserted Section 105A to 105L of the Code of Criminal Procedure, the C.B.I. could not have acted except in terms of specific order of the court passed in that regard. C

(xi). A matrimonial dispute between spouses and in particular in regard to the custody of a child being essentially a dispute of civil nature, the provisions of the Act could not have been put to service. D

(xii). In any event the provisions of the Act cannot be pressed in red corner notice cases and the deportation provisions under the Foreigners Act should not be misused thereby.

E (xiii). The High Court committed a serious error in passing the impugned judgment both in regard to the conclusion as well as directions in so far as it utterly failed to take into consideration the civil liberties aspect as also the provisions of the F Criminal Procedure Code.

20. Mr. G.E. Vahanvati, learned Attorney General for India, who was also requested to assist us in the matter upon taking appropriate instructions from the Ministry of External Affairs, as G would appear from our order dated 24th March, 2009, would also contend that the High Court judgment is unsustainable as it failed to take into consideration:

(a) There is nothing on record to show that the appellant had committed an extraditable offence within the H

meaning of the provisions of the Extradition Treaty entered into by and between India and the United States of America ;

(b) A matrimonial dispute would not ordinarily come within the purview of the Act;

(c) The provisions of the Act as also enforcement of the Extradition Treaty would arise only when a person is a fugitive criminal and he has committed an extraditable offence and not otherwise.

THE EXTRADITION TREATY

21. The Extradition Treaty between the Government of Republic of India and the Government of the United States of America entered into on 21st July, 1999. It was published in the Official Gazette dated 14th September, 1999. By reason of Article 1 thereof the Contracting States agreed to extradite to each other, pursuant to the provisions thereof, persons who, by the authorities in the requesting State are formally accused of, charged with or convicted of an extraditable offence, whether such offence was committed before or after the entering into force of the Treaty.

22. Article 2 defines extraditable offence to mean an offence punishable under the laws in both the Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

23. An offence shall also be an extraditable one if it consists of an attempt or a conspiracy to commit, aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, any offence described in paragraph 1.

24. Article 4 defines political offenses. Clause (2) of Article 4 inter alia provides that offences related to illegal drugs, shall

A not be treated to be political offence.

25. Article 9 provides for extradition procedures and required documents, the relevant portion whereof reads as under:

B "Article 9 – Extradition Procedures and Required Documents :-

1. All requests for extradition shall be submitted through the diplomatic channel.

C 2. All requests for extradition shall be supported by :

(a) documents, statements, or other types of information which describe the identity and probable location of the persons sought ;

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(b) information describing the facts of the offense and the procedural history of the case ;

(c) a statement of the provisions of the law E describing the essential elements of the offense for which extradition is requested ;

(d) a statement of the provisions of the law describing the punishment for the offense ; F and

(e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.

G 3. A request for extradition of a person who is sought for prosecution shall alsc be supported by :

(a) a copy of the warrant or order of arrest, issued by a judge or other competent authority ;

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(b) a copy of the charging document, if any, and

(c) such information as would justify the committal for trial of the person if the offense had been committed in the Requested State."

26. Article 10 provides that the documents accompanying an extradition request shall be received and admitted as evidence in extradition proceedings if in the case of a request from the United States, they are certified by the principal diplomatic or principal consular officer of the Republic of India resident in the United States or they are certified or authenticated in any other manner accepted by the laws in the Requested State.

27. Article 12 of the Treaty reads as under:

" *Provisional Arrest*

1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may be used to transmit such a request.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offense;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of a warrant of arrest or a finding of guilt or judgment of conviction

A against the person sought; and

(f) a statement that a request for extradition for the person sought will follow.

3. The Requesting State shall be notified without delay of
B the disposition of its application and the reasons for any denial.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60)
C days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 9.

5. The fact that the person sought has been discharged
D from custody pursuant to paragraph (4) of this Article shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date."

E 28. Article 17 provides that a person extradited under the Treaty may not be detained, tried or punished in the requesting State except for the offenses enumerated therein.

29. Lastly, it is also imperative to note the provisions of
F Article 21 which read as under:

"Article 21 - Consultation

The competent authorities of the United States and the Republic of India may consult with each other directly
G or through the facilities of Interpol in connection with the processing of individual cases and in furtherance of maintaining and improving procedures for the implementation of the Treaty."

30. Furthermore it ought to be noted that India has entered
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into two treaties with the United States of America. The first treaty has been entered into in 1999 and the second in 2001. The 2001 Treaty however deals with rendering of mutual legal assistance by one country to another is not fairly applicable in the instant case.

THE ACT

31. The Act was enacted to consolidate and amend the law relating to extradition of fugitive criminals and to provide for the matters connected therewith or incidental thereto.

It is a special statute.

Section 2(c) of the Act defines an "Extradition Offence" in the following words:

"(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;"

32. Section 2(d) defines "Extradition Treaty" to mean a treaty, agreement or arrangement made by India with a foreign State Relating to the extradition of fugitive criminals, and includes a 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;

33. A "fugitive criminal" is defined under Section 2 (f) of the Act to mean a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and

A 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.

34. A "treaty State" is defined under Section 2 (j) of the Act to mean a foreign State with which an extradition treaty is in operation.

35. Chapter II of the Act deals with extradition of fugitive criminals to foreign States to which Chapter III does not apply. Chapter III of the Act deals with return of fugitive criminals to foreign States which have Extradition Agreements.

CODE OF CRIMINAL PROCEDURE:

36. In 1994, Parliament added Chapter VIIA titled: "Reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property" to the Criminal Procedure Code, 1973. This Chapter was introduced to facilitate the agreement between the Government of United Kingdom of Great Britain and Northern Ireland. This was to facilitate cooperation in investigation of crime, secure, evidence, documents and witnesses.

37. It primarily deals with the question of attachment of property (Section 105C to J and Section 105A(b) to (e)). It also contains provisions for "Assistance in securing the transfer of persons" (Section 105B). We are concerned with the latter provisions relating to arrest and transfer.

38. The following threshold requirements are that these reciprocal procedures are:

(i) Applicable only in respect of contracting States. Section 105A contains the interpretation Clause. Some of the relevant provisions are as under:

"In this Chapter, unless the context otherwise requires,–

(a) "contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;"

(ii) The statutory procedures and the institutions put in place for processing these arrangements have been statutorily prescribed. Section 105B which is relevant for our purpose reads as under:

"105B - Assistance in securing transfer of persons.—

(3) Where a Court in India, in relation to a criminal matter, has received a warrant for arrest of any person requiring him to attend or attend and produce a document or other thing in that Court or before any other investigating agency, issued by a Court, Judge or Magistrate in a contracting State, the same shall be executed as if it is the warrant received by it from another Court in India for execution within its local limits.

(4) Where a person transferred to a contracting State pursuant to sub-section (3) is a prisoner in India, the Court in India or the Central Government may impose such conditions as that Court or Government deems fit."

In any reciprocal arrangement:

(a) the Court, Judge or Magistrate to whom such a request can be made shall be specified by the Central Government (Section 105B (1) and (2).

(b) the form in which such a request can be made shall be specified by the Central Government (Section 105B(1)).

(c) After due application of mind, a transfer of a person out of India would be on the basis that "the Court in India or Central Government may impose such conditions as

A that Court or Government thinks fit" (Section 105B(4)"

Section 41(g) of the Code of Criminal Procedure also assumes relevance here. It reads as under:-

B *"41. When police may arrest without warrant.*—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) .....

C .....

.....

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible D information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be E apprehended or detained in custody in India;"

ISSUES:

In view of the rival contentions of the parties, the following F questions which arise for our consideration are:

(i) Whether having regard to the concept of sovereignty the Executive Government of India can enforce a warrant passed by the Probate and Family Court, Massachusetts? G

(ii) Having regard to the provisions contained in Sections 44A and 13 of the Code of Civil Procedure, is the foreign judgment enforceable in India?

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(iii) Whether the CBI established under the DPSE Act has the authority to deal with INTERPOL notices?

MATRIMONIAL DISPUTE AND THE COURT'S POWER OF REVIEW:

39. The dispute between the appellant and the respondent No.6 essentially being a matrimonial dispute, is a private dispute. Criminal offences, if any, are sought to be made out relate to the violation of the Order of the Court which speaks of commission of an offence of forgery as well.

40. A 'Yellow Corner Notice' is evidently used to trace missing minors. The Interpol issued a yellow or watch notice on 13.6.2007 in respect of Eesha, minor daughter of the respondent No. 6. It, however, issued a red or detain and arrest notice on 21.6.2007 to locate and arrest the Appellant. Pursuant thereto or in furtherance thereof, the Assistant Director, National Crimes Bureau (NCB) forwarded a letter dated 4.1.2008 received from the U.S. Embassy (Department of Justice) to the Mumbai Police to locate the appellant and his daughter on 14.01.2008. Appellant was located by Mumbai Police on 3.5.2008 and the said information was passed on to the U.S. Embassy on 9.5.2008.

41. The CBI has also filed its counter affidavit before this Court stating that the Indian Interpol Wing works as an interface between the Interpol Secretariat General, France, Interpol member countries and various law enforcement agencies of India. One of its functions is to circulate the Red Corner Notice as also Yellow Corner Notices issued by the Interpol Secretariat General at the behest of any member country within India. The Red Corner Notice is issued to the border control authorities and others so as to enable them to effect an arrest along with details and papers including a warrant from the originating country. An arrest may also be made under the said Act. The Ministry of External Affairs works for the administrative watching of the Act.

A 42. A Red Corner Notice has large number of consequences, some of which are:

(i) The requesting country may make a deportation request.

B (ii) The law enforcement agency in India is required to *"take follow up action with regard to the arrest of a fugitive criminal".*

(iii) The information emanating from the red corner C notice is required to be distributed all over the Interpol website.

(iv) The requesting Embassy would instruct the CBI to carry out its instructions for surveillance, arrest and detention.

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(v) The requesting Embassy can even contact the Indian police directly.

(vi) Thereafter extradition proceedings may follow.

E 43. Indisputably, therefore, when a proceeding under the Act is initiated, the civil liberty of a person would be directly affected. The provisions of the Act, therefore, should be strictly construed. Any request for extradition therefore must undergo the strict scrutiny test. Extradition offence keeping in view its F definition in Section 2(c) of the Act in relation to a treaty State must be one provided for the extradition treaty therewith.

44. Application of the provisions of the Act, thus, in a case of this nature must be held to be imperative in character. We G have noticed hereinbefore that for the purpose of applying the provisions of the Act, existence of a treaty between the requesting State and the requested State plays an important role. It makes a distinction between an extraditable offence and other offences including political offences subject of course to

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the condition that offences relating to illegal tax are not to be treated to be a political offence. Sections 4-18 provides for the mode and manner in which a request for extradition of a person is required to be made by the concerned country. The requirements are specific in nature and are required to be accompanied by a large number of documents.

45. It is accepted at the Bar that no request has yet been made to the Executive Government of the Government of India for extradition of the Appellant upon compliance of the provisions of Section 2-18 or otherwise.

46. It is but imperative to note the provisions of the Treaty here vis-a vis the implementation of a Red/ Yellow Corner Notice.

47. Article 1 of the Treaty provides that the Contracting States agree to extradite to each other, persons who are accused of, charged with or convicted of an extraditable offence.

48. Article 2 provides for the extraditable office. Article 4 provides for political offences which are outside the purview of the Treaty. Article 9 provides for the extradition procedures and required documents.

49. It is beyond any doubt or dispute that no request for extradition has been received by the Government of India. It could act only when a request is received. It is accepted at the Bar that Red Corner Notice by itself cannot be a basis of arrest or transfer of an Indian citizen to a foreign jurisdiction. There is furthermore no dispute that the Act cannot be bypassed in red corner cases concerning Indian citizens. Hence the Extradition Treaty is subject to the provisions of the Act. It also stands admitted that the Appellant being an Indian citizen is entitled to enforcement of his fundamental rights.

50. The legal position that a person cannot be arrested

A without any authority of law again is not denied or disputed. Thus, the arrest of a person must be effected in terms of the provisions of the Act. A person wanted for an offence in a foreign jurisdiction may be arrested on fulfillment of the following conditions:

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(i) That the offence should be counted as one by Indian Law as well, and

(ii) The person must be liable to be arrested in India – either under any law relating to extradition, or

C otherwise.

51. Such an arrest can be effected only pursuant to a warrant issued by the Magistrate in view of Sections 6, 16 and 34B of the Act or an arrest warrant issued by a foreign country

D and endorsed by the Central Government under Section 15 of the Act. It is also not in doubt or dispute that in a case where there is no treaty, it is only the Magistrate who issues the warrant for arrest subject of course to the condition that the Central Government had ordered a Magisterial Inquiry in terms

E of Section 5 of the Act. Such an order of arrest, emanating from a Treaty –State, is also permissible under a 'Provisional Warrant' issued by a Magistrate in exercise of its power under Section 16 of the Act, upon information that the fugitive should be apprehended subject to the condition that the detention thereunder may continue only for the time requisite for obtaining

F an endorsed warrant from the Central Government. All arrested persons are required to be immediately produced before a Magistrate whereupon it would have power to grant bail. Section 34B provides that the person so arrested would have to be released on bail after a period of 60 days. If actual request for

G extradition is required within the said period having regard to Section 41(g) of the Code of Criminal Procedure, the Central Government cannot direct or effect an urgent arrest in anticipation of an extradition request without obtaining a warrant issued by a Magistrate. Article 12 provides that provisions of

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provisional arrest according to which in a case of urgency, the Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. It also provides that the facilities of International Criminal Police Organization (Interpol) may be used to transmit such a request.

52. However, when a request for provisional arrest in terms of Article 12 is communicated, it must satisfy the requirement of Section 34B of the Act. Such request from a foreign country must be accompanied by the requisite documents and not a communication from INTERPOL alone. It will bear repetition to state that an arrest can be effected at the instance of the Central Government only when such a request is made by the foreign country and not otherwise. Respondent No.6 herself accepts that she had pursued only civil remedies and the order of the custody Court was passed under civil remedies. Section 29 of the Act as indicated hereinbefore provides for power of Central Government to discharge any fugitive criminal. If it has arrived at a conclusion that it is unjust or inexpedient to surrender or return the fugitive criminal.

53. The High Court, therefore, in our opinion, committed a serious error insofar as it failed to take into consideration the provisions of the Act, in the absence of any request having been made by the Government of United States of America to the Executive Government of the Union of India or any authorization made by the latter in this behalf.

54. India follows the doctrine of dualism and not monoism. We may, however, hasten to add that this Court, however, at times for the purpose of interpretation of statute has taken into consideration not only the treaties in which India is a party but also declarations, covenants and resolutions passed in different International Conferences. {See *M/s Entertainment Network (India) Ltd. vs. M/s Super Cassettee Industries Ltd.* [2008 (9) SCALE 69]

A 55. The Act as also the treaties entered into by and between India and foreign countries are admittedly subject to our municipal law. Enforcement of a treaty is in the hands of the Executive. But such enforcement must conform to the domestic law of the country. Whenever, it is well known, a conflict B arises between a treaty and the domestic law or a municipal law, the latter shall prevail.

56. It furthermore stands admitted that matrimonial dispute as such does not constitute an extraditable offence and, thus, no effect could be given thereto. However, whether this case C concerns an extraditable offence or not has to be determined by the Magistrate under the Act.

57. We have noticed hereinbefore that the Treaty itself provides that the same is subject to any Municipal Laws of the D country. It is thus for the State concerned to take a decision in regard to such notices, keeping in view the Municipal Laws. The steps to deal with the request contained in the notices, thus, must abide by the domestic laws of the concerned country. Recognition of the request as the basis for an arrest operate E an internationalization or tans-nationalization of a foreign administrative decision. The formal admission procedure by Interpol cannot be the single cause of internalization. It is just a precondition for the recognition by the other states.

58. We may however add that, indisputably the appellant F received a notice from Interpol dated 13th June, 2007 being a Yellow or Watch notice as also a Notice dated 21st June, 2007 being a Red or Detain and Arrest notice. Yellow notice was in relation to the child whereas the red notice was in relation to the Appellant. The Assistant Director of National Crime Bureau G (NCB) forwarded a letter dated 4th January, 2008 from the U.S. Embassy (Department of Justice) on or about 14th January, 2009 to the Mumbai Police to locate the Appellant and his daughter. On 18th March, 2008 notice of arrest warrant issued by INTERPOL was circulated against the Appellant on the

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Interpol Website. Mumbai police is said to have found the location of the Appellant and his daughter on 3rd May, 2008 which information was passed on to U.S. Embassy on 9th May, 2008.

59. It is also not in dispute that the CBI has an Interpol Wing as is evident from its counter-affidavit and that the U.S. Embassy was in touch with it as also of the Mumbai Police in respect of locating the Appellant.

60. Before, however, we advert to the functioning of CBI vis-à-vis its role in terms of notices issued by Interpol, it would be appropriate to place on record the constitution of Interpol.

APPLICABILITY OF CHAPTER VIIA OF THE CODE OF CRIMINAL PROCEDURE

61. For the purposes of effectively implementing the treaty providing for mutual assistance between the Government of United Kingdom of Great Britain and Northern Ireland, Chapter VIIA of the Code of Criminal Procedure was enacted as is also provided in the Statement and Objects thereof. The said provisions were laid down by the Parliament so as to consider implementation of the provisions of the reciprocal arrangements for assistance in certain matters and procedure for attachment.

62. The provisions contained in Section 105A onwards of the Code of Criminal Procedure are subject to additions, exceptions or qualifications as may be specified in the Notification issued by the Central Government.

63. Indisputably where there exists any reciprocal arrangement, the following are required to be complied with:

(i) The Court, Judge or Magistrate is required to be specified by the Central Government to whom a request can be made.

(ii) The form in which such a request is to be made is

A again required to be specified by the Central Government.

(iii) A transfer of a person out of India must precede upon due application of mind on the part of the Magistrate subject again to the condition that either the Court or the Central Government may impose such conditions as they may seem fit and proper.

64. It is submitted by the learned counsel that with regard to dispute of the provisions of international comity

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(a) any transfer of a human being to another country goes to the root of fundamentally protected civil liberties.

(b) Chapter VIIA of the Code of Criminal Procedure is hedged in with limitations requiring the intervention of the Court and Central Government with due application of mind.

(c) No mechanical transfer can be made simply at the instance of government or the CBI which in any case has no role to play.

(d) The application of the Act is not ousted and cannot be by passed.

(e) The Court may examining equitable and other factors. This is implied from the condition imposing power.

(f) To that extent, the provisions of Chapter VIIA shall be read up to bring it in conformity with Articles 14 and 21 of the Constitution.

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65. In our opinion, however, the submissions are a clear misreading of Chapter VIIA of the Code of Criminal Procedure which does not apply in situations of Extradition.

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INTERPOL ((The International Criminal Police Organisation).

66. The INTERPOL is the world's largest international police organization with 187 countries as its members. It was created in 1923. The object of establishing the INTERPOL was 'to ensure and promote the widest possible mutual assistance between all criminal police authorities'. It facilitates cross – border police cooperation and supports as well as assists all organizations, authorities and services whose mission is to prevent or combat international crime. Even in a case where the country concerned inter se do not have any diplomatic relation, the INTERPOL aims to facilitate international police cooperation. Action is taken by it, having regard to the provisions contained in the Universal Declaration of Human Rights and keeping in view the limitation of existing municipal laws of the country concerned.

It has six departments, namely –

(i) The General Assembly ;

(ii) Executive Committee ;

(iii) General Secretariat ;

(iv) National Control Bureaus

(v) Advisers ; and

(vi) Commission for the Control of Interpol Files.

67. We are concerned here only with the National Central Bureaus. Each INTERPOL member country maintains a National Control Bureau (NCB) staffed by national law enforcement officers. The NCB is the designated contact point for the General Secretariat, Regional Officers and other member countries requiring assistance with overseas investigations and the location of fugitives. It serves as

A operational center and liking platforms between the national and the international level.

68. It is not in dispute that in terms of Article 32 of the INTERPOL Constitution each member country is to have a NCB
B responsible for exchanging information and data for coordination the functioning within its own country, with other member countries as also with the General Secretariat of the INTERPOL.

69. The INTERPOL Constitution prohibits any intervention
C or activities of a political, military, religious or racial character. The International policing ultimately depends on coordinated action on the part of the Member State's police forces so as to obtain the required information or services as and when any occasion arises therefor.

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70. We may furthermore place on record that the Constitution of the Interpol was adopted by a Resolution of the General Assembly i.e. AG-2005-Res-05. Initially its status was of an observed as Non Governmental Organisation (NGO). In
E Public International Law, keeping in view its status, INTERPOL is considered to be an International Organisation with its own legal personality. The contribution to the financing of the organization is by the Member States. Member States can have several delegates in the General Assembly.

F **INTERPOL NOTICES**

71. The organizational system of issuing International notices forms the backbone of its functioning. The Member countries in terms of notices share critical crime related
G information. They concern individuals wanted for serious crimes, missing persons, unidentified bodies etc. Such notices contain comprehensive identity particulars of the individuals concerned including the physical description, fingerprinting, occupation and all other relevant information including the
H offence with which the person has been charged, reference to

the law under which the charge was made or the conviction was obtained etc. The notices issued by the INTERPOL are of six types – Red Notice ; Yellow Notice ; Blue Notice; Green Notice ; Black Notice and Orange Notice. It also contemplates Interpol-United Nations Special Notice.

72. We are concerned herein only with Red and Yellow Notices. A Red Corner notice is issued to seek the provisional arrest of a wanted person. However, it by itself does not have the effect of warrant of arrest. It is issued for persons, against whom a national or international court has issued a warrant of arrest. It is solely a request of the issuing entity to provisionally or finally arrest the wanted person for extradition. A Yellow notice, however, is issued for finding a missing person or to identify people who are not capable of identifying themselves. It is an "International Missing Person Notice". It is issued specially to locate minors.

PROCEDURE FOR ISSUING NOTICE

73. Notice in terms of Article 10.5 of the RPI (Rules governing the processing and communication of police information) of the INTERPOL can be issued by the General Secretariat either at the request of an authorized entity or on its own initiative as is the case in Green and Orange Notices. Usually, the NCBs are the authors of a Red or Yellow Notice. The General Secretariat before issuing or distributing Notices, especially to other offices than the NCBs, has to evaluate, whether the issue is necessary and advisable having regard to the aims and tasks of the organization, the respect of Human Rights and the required security measures against possible menaces to the police cooperation, to Interpol itself or to the member states. The General Secretariat has been authorized by the General Assembly to forbid the issuing of a Notice, if it does not meet the requirements of a request for provisional arrest. However, we must place on record that a reference to the presumption of innocence of the wanted person is not a part of the published rules and regulations. Only the corresponding

A pages of the internet appearance of the organization contain explicitly highlighted warnings of this kind.

74. It bears repetition to state that the General Secretariat of the Interpol publishes the notices either on its own initiative, or based on the requests from the NCB or international organization or entities with whom the INTERPOL has special agreements.

75. It may be of some interest also to notice that in the year 2008 alone the INTERPOL issued 3126 Red Corner Notices and around 385 Yellow Corner Notices.

76. At this juncture we may also place on record that Article 12 of the Extradition Treaty dated 14th September, 1999 entered into between the Government of India and the Government of the United States of America deals with provisional arrest of the person sought pending presentation of the request for extradition providing that the facilities of the INTERPOL may be used to transmit such a request. Furthermore, Article 21 of the Treaty providing for Consultation also contemplates the use of the INTERPOL'S services.

BINDING NATURE OF THE INTERPOL NOTICES:

77. 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.

78. Infact 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.

79. They, however, do not entirely lack external effects. A number of states recognizes 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.

80. The trans-nationalization takes place through the membership in the organization, through the supervision proviso of the General Secretariat and the recognition of the transnational effect of the information.

81. A successful search does not result in Interpol's further operative involvement, either. Concerned authorities or the public are supposed to contact the local police office, which then gets in touch with the issuing authority and initiates the necessary steps.

82. Therefore, the member state usually gives the initiative for a Notice, and cooperates with one or several other member states in order to find and arrest the wanted person. Existing information is just distributed through a special communication channel. Interpol's role is limited to that of a service agency. {See Bettina Schondorf-Haubold, The Administration of Information in International Administrative Law – The Example of Interpol, 9 German L.J. 1719}

CENTRAL BUREAU OF INVESTIGATION (C.B.I.)

83. A Special Police Force was constituted in the year 1943 by promulgation of an Ordinance by the Government of

A India in terms whereof the powers of investigation of certain offences committed in connection with the departments of the Central Government committed any where in British India were vested with it. The said Ordinance lapsed on 30th September, 1946. As the Central Government felt the necessity to cope with
B the cases of bribery and corruption investigated after the end of the war, the said Ordinance was repealed and replaced by Delhi Special Police Ordinance of 1946. The DSPE Act was brought into existence the same year.

84. After the promulgation of the DSPE Act,
C superintendence of Special Police Establishment (SPE) was transferred to the Home Department and its functions were enlarged to cover all departments of the Government of India. It jurisdiction was also extended to all the Union territories. The DSPE Act provided for its extension to States with the consent
D of the concerned State Government. The C.B.I. was established, as it was felt that SPE would not be able to cope with the problems arising out of the country's over-expanding economy, by reason of a Resolution adopted by the Government of India vide Resolution No.4/31/61-T dated 1st
E April, 1963.

85. Later on the SPE was merged with the C.B.I and became one of its Division. In terms of the provisions contained in Section 3 of the DSPE Act, the Central Government issues
F Notifications empowering the C.B.I. to investigate in regard to the offences specified by it; The Notification dated 23rd September 1989, S.O. 2301 empowered the CBI to investigate, among other things, offences relating to Sections 363 ; 363A ; 365 and 368 of the Indian Penal Code being some
G of them.

86. It is at this juncture, a discussion of the DSPE Act becomes imperative.

The Title and Preamble of DSPE Act reads:-

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"An Act to make provision for the constitution of a special police force in Delhi for the investigation of certain offences in the Union territories for the superintendence and administration of the said force and for the extension to other areas of the power and jurisdiction of the members of the said force in regards to the investigation of the said offences."

"Whereas it is necessary to constitute a special police force in Delhi for the investigation of certain offences in the Union territories and to make provisions of for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences."

87. The relevant provisions of the DSPE Act are Sections 2; 3 and 5, which read as under :-

2. Constitution and powers of special police establishment. : (1) Notwithstanding anything in the Police Act, 1861 (5 of 1861), the Central Government may constitute a special police force to be called the Delhi Special Police Establishment for the investigation in any Union Territory of offences notified under Section 3.

(2) Subject to any orders which the Central Government may make in this behalf, members of the said police establishment shall have throughout in any Union Territory, in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein.

(3) Any member of the said police establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf,

A exercise any Union Territory or any of the powers of the officer-in-charge, of a police station in the area in which he is for the time being and when so exercising such powers shall, subject to any such order as aforesaid, be deemed to be an officer-in-charge of a police station B discharging the functions of such an officer within the limits of his station.

3. *Offences to be investigated by special police establishment.* The Central Government may, by notification in the official Gazette, specify the offences or C classes of offences which are to be investigated by the Delhi Special Police Establishment.

5. Extension of powers and jurisdiction of special police establishment to other areas. : (1) Central Government D may by order extend to any area (including Railway areas) a State, not being a Union Territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under E Section 3.

(2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject to any orders which the Central Government may F make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions be deemed to be a member of the police force of the area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer G belonging to that police force.

88. Undoubtedly in terms of Section 5 of the DSPE Act, although the powers of the authority established therein can be extended by the Central Government upon the consent of the H concerned State, we may notice that by reason of the

Government of India's Resolution dated 1st April, 1963 the C.B.I. was empowered to conduct investigation with regard to co-ordination, Inter-State matters and participation as: the National Central Bureau in the work connected with the INTERPOL thereby presupposing the non-requirement of the concerned State's consent.

89. We have referred to the said question as one of the contentions raised by Dr. Dhawan is that without the consent of the State, the C.B.I. could not have directed any surveillance on the Appellant or got the warrant of arrest executed through the Mumbai police. Although, we intend to deal with the said question separately we may at this juncture notice the relevant entries in the List I of the Seventh Schedule of the Constitution. They read :-

a. Entry 8: Central Bureau of Investigation.

b. Entry 10: Foreign Affairs; all matters which bring the Union into relation with any foreign country.

c. Entry 11: Diplomatic, consular and trade representation.

d. Entry 12: United Nations Organisation.

e. Entry 13: Participation in International Conferences, associations and other bodies and implementing of decisions made thereat

f. Entry 14: Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

g. Entry 18: Extradition

The legislative power of the Parliament is, therefore, broad and cover wide ranging legislative field.

A **CO-ORDINATION WING OF THE CBI:**

90. The Coordination Wing is a non- investigating Unit of CBI dealing with the general coordination and administrative matters relating to Interpol and Coordination functions of CBI. Its primary duty is to liaise and coordinate with Branches of CBI and other Departments/ Ministries, Law Enforcement Agencies, State/UT Police Forces and foreign Police/Missions and organizations as and when required. One of the main functions which is being looked after by the Coordination Wing of CBI, pertinent in the case of Look out Circulars: All the State Police forces and other law enforcement agencies in India have a link through INTERPOL New Delhi to their counter – parts in other member countries through the Interpol Global Communications System (I- 24/7) prepared to assist in dealing with criminal investigations.

JURISDICTION OF C.B.I.

91. The provisions relating to issuance of the notice by INTERPOL; warrant of arrest by foreign courts vis-à-vis the power of NCB and the local police to act in terms thereof are contained not only in the Act but also in the provisions of the concerned Treaty, Code of Criminal Procedure as also the various Notifications issued by the Central Government in that behalf.

POWERS UNDER THE ACT

92. We will deal with this subject in two parts one is stage before arrest and second stage after arrest.

BEFORE ARREST

93. Power to apprehend or investigate a fugitive criminal, we have noticed hereinbefore, is conferred by Section 14 read with Section 15 of the Act. Section 14 prescribes the form of apprehension of a fugitive criminal under an endorsed warrant or a provisional warrant. Section 14 of the Act reads as

hereunder:

> *"14. Endorsed and provisional warrants.* A fugitive criminal may be apprehended in India under an endorsed warrant or a provisional warrant.

94. Warrant can be issued by a foreign country to arrest a fugitive criminal who is yet to be tried and a person who has already been convicted. A fugitive criminal may be apprehended either under category (i) an Endorsed Warrant ; and (ii) a Provisional Warrant. An Endorsed Warrant is one which is a warrant that has, at first been issued by the foreign country with which India has an Extradition Treaty and subsequently been endorsed by the Central Government. Hence once a warrant issued by the foreign country is endorsed by the Central government, it becomes an Endorsed Warrant in terms whereof sufficient authority is conferred to apprehend a person and to bring him before any Magistrate in India. Power to apprehend includes the power to investigate. Section 15 uses the term "Apprehend" which is defined as "the seizing or taking hold of a man; the act of arresting or seizing under the process of law".

Section 15 of the Act describes 'endorsed warrant'. It reads as:

> *"15. Endorsed warrant for apprehension of fugitive criminal.* Where a warrant for the apprehension of a fugitive criminal has been issued in any 3*[foreign state] to which this Chapter applies and such fugitive criminal is, or is suspected to be, in India, the Central Government may, if satisfied that the warrant was issued by a person having lawful authority to issue the same, endorse such warrant in the manner prescribed, and the warrant so endorsed shall be sufficient authority to apprehend the person named in the warrant and to bring him before and magistrate in India."

A **PROCEDURES REQUIRED TO BE FOLLOWED AFTER A PERSON IS ARRESTED.**

95. The requirement to arrest a person for the purpose of his extradition is in two categories – (1) the cases in which India B has an Extradition Treaty with the concerned country and (ii) those in which no such extradition treaty exits. In the former category of cases the provisions of Chapter III of the Act shall apply. Arrest, as noticed hereinbefore, is made by the police authorities in terms of endorsed warrant ; whereafter the C procedure laid down in Section 17 is to be followed by reason whereof the fugitive criminal is to be brought by the Magistrate. Once the Magistrate satisfies that the fugitive criminal has been brought before him in terms of an endorsed warrant which is duly authenticated and that the offence is an extraditable one, the Magistrate shall commit the fugitive criminal to prison. A D certificate of committal is thereafter sent to the Central Government.

96. Section 17 states that the endorsed warrant in the case of the person who is brought before whom is duly authenticated E and that the offence with which the person is accused of or has been convicted in an extradition offence, the magistrate shall commit the fugitive criminal to prison to await his return and shall forthwith send to the Central Government a certificate of the committal.

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97. Appellant is sought to be apprehended for commission of an offence under Section 363 of the Indian Penal Code. We have noticed hereinbefore that it is an extraditable offence, provided it is not a pure matrimonial dispute. C.B.I. for intent and purport exercises the power of NCB in terms of the Treaty G and thus derive its authority from INTERPOL itself.

98. C.B.I. is thus the designate of the INTERPOL in India and endorsing warrants is an essential attribute of the procedure for the implementation of the Treaty.

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99. The Ministry of Home Affairs by a circular letter dated 18th March, 1949 issued to all State Governments and Union Territories established the Intelligence Bureau as the ICPO-INTERPOL, the National Central Bureau for India. The C.B.I. was established as the representative of India for the purpose of correspondence with ICPO-INTERPOL by reason of a circular letter dated 17th October, 1966.

100. We have noticed hereinbefore that by a Resolution dated 1st April, 1963 the Government of India gave to the C.B.I. the powers of Investigation of crimes, handled by the Intelligence Bureau of the SPE and for participation as the NCB in the work connected with the INTERPOL. It is of significance to notice that C.B.I. in its website maintains that it handles all procedures related to Extradition and Issuance of Interpol Notices.

101. We have proceeded on the basis that the power of C.B.I. and its delegated authority namely, the State police to keep a person under surveillance ; arrest him in terms of warrant of arrest issued by a foreign country and Red Corner Notice is an absolute one. Similarly the power to find out a missing person in terms of the Yellow Notice is also absolute. However, the question in regard to the necessity of warrant being endorsed or the effect of the Red Corner Notice vis-à-vis the fundamental right of an individual in terms of Article 21 of the Constitution of India as also his right of privacy and the loss of reputation would be dealt with at an appropriate stage.

POWERS UNDER THE CODE OF CRIMINAL PROCEDURE

102. We may also notice some of the provisions of the Code of Criminal Procedure laying down the procedures after arrest.

103. It is, however, beyond any doubt that the power is exercised by the C.B.I. or a police officer to arrest a person, although no warrant is issued in terms of Section 41(1)(g) of

A the Code of Criminal Procedure. It pre-supposes satisfaction of a police officer to arrest a person, if he has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received in, any act committed at any place out of India which, if committed in India, would have B been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in India.

104. However, the CBI website states that in case an C action is taken under S. 41(1)(g), the matter must be immediately referred to the Interpol Wing for onward transmission to the Government of India to take a decision or otherwise.

105. In terms of the aforementioned provisions, sanction D of the Central Government is contemplated. We may, however, place on record that strictly construed in a case involving extradition, Section 41(g) of the Code may not have any application.

E 106. It is sought to be clarified that Section 41(g) of the Code of Criminal Procedure clearly contemplates the power of the Police to arrest under "any law relating to Extradition" thereby contemplating the exercise of powers subject to the provisions of the Extradition Act. Thus the provisions of the Code of Criminal Procedure are subject to those in the Act. F

LIMITATION OF POWER OF C.B.I. AND STATE POLICE

Jurisdiction of CBI in Red Corner Notice

G In its affidavit filed on 23rd January, 2009 by C.B.I. stated as under :-

"3(a) The answering Respondent being the functionary of Interpol, New Delhi (Central Bureau of Investigation) submits that it works as an interface between Interpol H Secretariat General, France, Interpol member countries

and various law enforcement agencies of India.

(b) with regard to location and apprehension of a wanted fugitive, the role of the answering Respondent is to circulate the red corner notice issued by Interpol Secretariat General at the behest of any member country within India.

(c) In order to trace a fugitive criminal, who might have left his/her country, an Interpol Red Corner Notice is got issued through IPSG (Interpol Secretariat General) at Lyon, France based on an arrest warrant issued by the competent judicial authority. Red Corner Notice is sent to the immigration/border control authorities of various countries, who may detain/identify such individual depending upon provisions of their domestic laws and inform the requesting country/and authorities concerned for further necessary action. The domestic legal provisions differ from country to country and while some countries have accorded legal sanctity to Red Corner Notice, others do not do so. Once the fugitive is located on the basis of a Red Corner Notice, the concerned law enforcement agency is required to send a request for provisional arrest followed for extradition request duly accompanied by all necessary documents to the concerned country through diplomatic channels. The requesting country may also make a deportation request.

(d) A red corner notice is supported by an arrest warrant issued by the competent judicial authority which empowers the law enforcement agency of any member country to take follow up action with regard to the arrest of the fugitive criminal.

(e) The National Central Bureau of other countries (member countries of INTERPOL) also a request the IPSG for issuance of Red Corner Notices against their wanted subjects and all the member countries take action for the location, arrest and extradition/deportation for the same as

A per its law of the land.

(f) Similarly the Interpol General Secretariat publishes 'Yellow Notice' to help missing persons, often minors, or to help identify persons who are unable to identify themselves.

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(g) Once a person is detained pursuant to a red corner notice, he is produced before the Magistrate and then further action is taken as per the provisions of the Extradition Act, 1962."

C

107. The question is as to whether the consequences of the Red Corner Notice contravene the civil liberty of a citizen in terms of Articles 14, 19 and 21 of the Constitution of India.

D 108. Before, however, we devolve thereupon, we may notice the Executive Powers of the Union. Any action taken by the Union of India through the Ministry of External Affairs or the C.B.I., on the request of INTERPOL, s Executive Power as contained in Article 73 of the Constitution. We have noticed heretobefore the relevant entries in the Legislative List being E Entry Nos. 8, 10 to 14 and 18 of List – 1 of the Seventh Schedule of the Constitution. We may also notice that in regard to the matter relating to criminal law the Concurrent List provides therefor in Entry Nos. 1 and 2 which read :-

F "1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

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2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."

H 109. Indisputably the Central Government has no

jurisdiction over the police which is contained in Entry 2 of List II of the Seventh Schedule. It includes railway and village police, subject to the provisions of Entry 2A of List I, which reads as under :-

> "2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

Does this violates the doctrine of federalism is the question?

The power of the Central Government vis-à-vis State is in two categories.

110. The police power of the State in respect of any offence committed in a State comes within the legislative competence of the State. The State may exercise some extra territorial jurisdiction only if a part of the offence is committed in the State and the other part in another State or some other States. In such a event the State before an investigation to that part of the offence which has been committed in any State may have to proceed with the consent of the concerned State or must work with the police of the other State. Its jurisdiction over the investigation into a matter is limited. Keeping in view the various entries contained in List I of the Seventh Schedule of the Constitution, there cannot be any doubt whatsoever that in the matter of investigation of the matter committed in a State, the jurisdiction of the Central Government is excluded.

111. Extradition of a fugitive criminal from India to any other foreign country, irrespective of the fact as to whether any treaty has been entered into or with that country, is within the exclusive domain of the Central Government. The extradition of a person from India to any other foreign country is covered by the Parliament Act, namely the Act. Keeping in view the

A Constitution of INTERPOL vis-à-vis the Resolutions adopted by the C.B.I. from time to time, although a Red Corner Notice per se does not give status of a warrant of arrest by a competent court. It is merely a request of the issuing authority to keep surveillance on him and provisionally or finally arrest the wanted B person for extradition. The provisions of the Act and the Treaty are required to be given effect to. Whenever a request is received from INTERPOL the authority must act on behalf of the Central Government. The INTERPOL provides constitution of NCBs by Member States. All Members are required to C constitute NCBs which should be an authority within the meaning of the provisions of INTERPOL for coordination of the functioning within the Member States and/or the INTERPOL in case of any request received. Location of a missing person and or tracing the whereabouts of a fugitive criminal is not an easy D task. The authority within the meaning of the words of the INTERPOL must act in cooperation with the State police. For the said purpose it may have to request more than one States. A missing person or a fugitive criminal may move from one State to another. In such a case it is not possible for one State to find out the missing person or fugitive criminal. E

112. C.B.I., although constituted under the DSPE Act its functions are multiple. While acting in terms of the provisions, in particular Sections 3 and 5 of the DSPE Act, it acts as an investigating officer. The Act contemplates commission of the F offences of the nature specified in the Act or those specified in several Notifications issued from time to time. In terms of Section 3 of DSPE Act first information reports are required to be lodged. For the said purpose, the C.B.I. which has several branches all over India is an officer incharge of a police station G within the meaning of Section 154 of the Code of Criminal procedure. The authority specified in the DSPE Act, namely the Superintendent of Police of C.B.I. is an officer entitled to carry out any investigation. Only when an investigation is carried out in relation to an offence which has been committed in a State H and not in the Indian territory or within the territorial jurisdiction

of the Central Government the consent of the State concerned is required to be obtained. A

113. We are not concerned, as it is not necessary for us to determine, whether a direction for making investigation by the C.B.I. by the superior courts of the country is permissible. As the law stands, we place on record such directions by the superior courts are permissible. B

114. C.B.I. has different roles to play. When it acts as NCB, being a department of CBI, it acts under a Treaty. It acts in terms of the constitution of the INTERPOL. It acts as a authority of the Central Government. By reason of such an act it does not carry out investigation, although it is entitled therefor. It functions as an NCB which is to give effect to the request received from INTERPOL and/or foreign country. When it does so, indisputably it has to apply its mind. It can take any action only because it is lawful to do so. It does not exercise absolute discretion. It has to act if a case therefor has been made out including the question as whether any extraditable offence has been made out. For the aforementioned purpose it does not Act as an agency within the four corners of the DSPE Act. It acts, it will be a repetition to state, has an authority of the Central Government. C D E

115. The limitation of its powers having regard to the provisions of Section 5 of DSPE Act as also some of the decisions of this Court, therefore, in our opinion, cannot be said to have any application in the facts and circumstances of this case. F

116. C.B.I., therefore, is entitled to organize and coordinate in regard to the request made by INTERPOL. It may have to obtain endorsed warrant. It may have to give provisional warrant in terms of Section 34B of the Act. G

117. Surveillance per se under the provisions of the Act may not violate individual or private rights including the right to H

A privacy.

118. Right to privacy is not enumerated as a Fundamental Right either in terms of Article 21 of the Constitution of India or otherwise. It, however, by reason of a elaborate interpretation B of this Court in *Kharak Singh v. State of U.P. and others,* [(1964) 1 SCR 332] it was held to be an essential ingredient of 'personal liberty'. This Court, however, in *Govind v. State of Madhya Pradesh* [(1975) 2 SCC 148] upon taking an elaborate view of the matter in regard to right to privacy vis-à-vis the C Madhya Pradesh Police Regulations dealing with surveillance, opined that the said regulation did not violate the "procedure established by law". However, a limited Fundamental Right to Privacy as emanating from Articles 19(a), (d) and 21 was upheld, but the same was held to be not absolute wherefor reasonable restrictions could be placed in terms of clause (5) D of Article 19.

Mathew, J. stated:

"The right to privacy in any event will necessarily have to E go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that F the right is absolute."

The law, however, was developed by this Court in *R. Rajagopal v. State of Tamil Nadu* [(1994) 6 SCC 632].

G The law was crystallized in the *People's Union for Civil Liberties (PUCL) v. Union of India* [(1997) 1 SCC 301], holding:

"We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the

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facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law"."

In *State of Maharashtra v. Madhukar Narayan Mardikar* [(1991) 1 SCC 57], this Court protected the Right to Privacy of a prostitute. It was held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

119. In this case, except giving information in regard to whereabouts of the Appellant and his daughter, no other action was taken.

120. It is in the aforementioned context, we may notice a decision of this Court in *Malak Singh v. State of P&H,* [(1981) 1 SCC 420]. This case dealt with an application filed by applicants seeking to remove their names from the surveillance register maintained by the Police Station of their jurisdiction under the Punjab Police Rules. This Court while upholding the jurisdiction of the Punjab Police made observations on the mode of surveillance.

121. The case directly or indirectly laid great emphasis on certain grey areas with regard to carrying out of the activities of surveillance on the part of the CBI and the police authorities. In *Malak Singh* (supra) this Court clearly contemplated surveillance by the police in pursuance to the rules under which they are being done. No such guideline, however, has been laid down in respect of surveillance conducted pursuant to a Red Corner or Yellow Corner Notice.

122. The Central Government and in particular the Ministry of External Affairs, in our opinion, should frame appropriate guidelines in this behalf.

123. Indisputably, further action in terms of the Red Corner Notice has not been and could not be taken against the

A Appellant, in the instant case.

124. It is conceded at the Bar that the proceedings for extradition of a citizen could be initiated provided the conditions precedent laid down in terms of the provisions of the Act. The B Act prescribes a request made by a foreign country whether with it a treaty has been entered into or not. In the absence of any such request, no proceeding could be initiated. In the aforementioned context, it is not necessary for us to enter into the question as to whether the Appellant could be arrested or C not.

125. We have noticed hereinbefore, the affidavit affirmed on behalf of CBI while dealing with the question of the limitation of its power.

D In addition thereto CBI has also stated that:

(i) In the instant case, the averments of the appellant that prima facie the case arises out of a matrimonial dispute are all questions that are required to be gone into either by the Extradition E Court appointed by the Central Government as per section 5 of the Act or subsequent to the Extradition of the Petitioner to the country in question.

(ii) In any event, there has been no arrest of the F Petitioner as the CBI is awaiting the necessary papers from the American Government.

(iii) Also, the fact that India is not a party or signatory to the Hague Convention on the Civil Aspects of International Child Abduction does not make any G difference in the instant case.

(iv) Furthermore, it is incorrect to say that the Petitioner is being treated like a commodity. A warrant of arrest by a competent court in United States has

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been issued against the Petitioner. Under International obligations, the CBI is required, when so requested to act on the red corner notice issued pursuant to the warrant of arrest. If fugitives are not apprehended pursuant to the warrant of arrest/ red corner notice, it would be very easy for such persons to escape punishment. The petitioner has rights under the Act as well as the judicial process in United States (if he is ultimately extradited).

(v) Lastly, that till date the CBI has not received any request from the US authorities for the arrest and Extradition of the Petitioner.

The Ministry of External Affairs, too, through its Joint Secretary (Counsular), Mr. P.M. Meena, by means of an affidavit dated 15th April 2009 admitted that:

(i) It is the Ministry of External Affairs, Government of India, New Delhi which is the nodal agency for Extradition as per the Act and the Extradition Treaty between the Government of India and the United States of America.

(ii) On receipt of a Red Corner Notice, it is not the invariable practice to arrest the person but efforts are made to trace him though the local police. The consideration of the question of arrest and Extradition would be within the framework of domestic law including Indian Extradition Act and the Extradition Treaty with the Requesting Country. Extradition of a person would only arise after request for extradition is formally received from the country. In the present case, no formal request has been received from the United States authorities.

(iii) Moreover, as per the prevalent practice, in cases pertaining to matrimonial affairs, the view taken is

A that such matters may not generally be held to satisfy the test of dual criminality.

(iv) In any case, since the instant case, is a case of domestic law, the view of the Ministry of Law would be called for and taken into consideration.

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It is, therefore, clear that intervention by the Ministry of External Affairs is crucial when a request is received by it from a foreign country.

C 126. The learned Attorney General states before us that the Ministry of External Affairs invariably refers such matter to the Ministry of Law and Justice for his opinion as to whether in a given situation an extraditable offence has been made out or not. We have been informed that kidnapping in case of D matrimonial dispute per se is not considered to be an extraditable offence. It was furthermore contended that even violation of an order passed by a court of competent jurisdiction in U.S.A. being punishable for imprisonment for six months only, the Appellant cannot be extradited for commission of the said E offence also. We may, however, place on record that United States has enacted the International Parental Kidnapping Crime Act of 1993. However, the law in India shall be governed by the provisions of the Indian Penal Code, 1860.

CONCLUSION

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127. We have already held above 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. The G High Court was, therefore, in our opinion, clearly wrong in holding that a Red Corner Notice should not be tinkered with. When a person complains of a violation of his Fundamental Right and/or otherwise of his fundamental right he is entitled to the right of judicial review. It ought not to be forgotten here that H the dispute between the Appellant and the Respondent No. 6,

being essentially a Matrimonial dispute, is a private dispute and no criminal extraditable offence can be made out of the same, in the absence of a specific request for extradition.

128. The High Court, thus, in our opinion, committed a serious error insofar as it failed to take into consideration the provisions of the Act, in the absence of any request having being made by the Govt. of USA to the Executive Government of the Union of India or any authourization made by the latter on its behalf.

129. A fundamental Right of a citizen whenever infringes, the High Courts having regard to their extraordinary power under Article 226 of the Constitution of India as also keeping in view that access to justice is a human right would not turn them away only because a Red Corner Notice was issued. The Superior Courts in criminal cases, thus are entitled to go into the manner in which such Red Corner Notice, if any, is sought to be enforced and/or whether the local police is threatening a citizen of India with arrest although they are not entitled to do so except in terms of the provisions Act as and when applicable.

130. Furthermore, if a violation of any order passed by a civil court is made the ground for issuance of a Red Corner Notice, indisputably, the court will enquire as to whether the same has undergone the tests laid down under Sections 13 and 44A of the Code of Civil Procedure.

131. As regards the question of custody, we have, however noticed, hereinabove that although the family court at Bombay for all intent and purposes relying on or on the basis of the order passed by the Massachusetts Court directed custody of the girl in favour of her mother, the Bombay High Court has stayed the operation thereof. The Appellant therefore, must be held to be in lawful custody of his daughter unless any other or further order is passed by a court of competent jurisdiction.

A 132. Lastly, it is imperative to note that the State does not seek for enforcement of the custody and/ or restrain order passed by the Probate and Family Court, Massachusetts in view of the rigours contained in Sections 13 and 44A of the Code of Civil Procedure. Even the Family Court does not B appear to have dealt with this aspect of the matter. In any event, as the matter is pending before the High Court, it alone will have a final say therein.

133. For the aforementioned reasons, the impugned judgment cannot be sustained. It is set aside accordingly. The C appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeal allowed.