ROSILINE GEORGE

v.

UOI & ORS.

OCTOBER 11, 1993

[KULDIP SINGH AND S.P. BHARUCHA, J.]

International Law—Extradition—Procedure to be followed—Held Municipal law determines procedure. Surrender of fugitive criminals— Held: not without request, formal authority or by statute or treaty.

International Treaties—Rights and obligations—Lapse of—Held : a political question dependent upon intention of concerned state—No automatic lapse on external change of sovereignity over the territory—Treaties not come to an end on change of Government.

Fugitive Offender Act 1881—Not applicable to British possessions.

Treaty—Who can enter into.

Held: Governor General of India had no authority to enter into treaties on behalf of India and it was only the prerogative of Head of a State to do so.

Treaties:

Held: Not the subject matter of Indian Independence (International Arrangements) Order 1947 which only dealt with Municipal Law.

Existing Indian Laws under the 1947 order—S.18(3) of Indian Independence Act—Meaning of—Did not prevent order-in-Council from operating.

Constitution of India 1950 : Art 372(1)—Law in force immediately before commencement of the Constitution—Meaning of—U.S.A. (extradition India) Order-in-Council 1942 (1942 Orders) in accord with Constitution of India.

Extradition Act 1963—Treaty—Operation of—Held: Applicable to whole territory of India.

Section 5 and Section 10—Documents under Section 10 along with

A *order of the Central Govt. under Section 5—Held part of evidence in support of Extradition Act—Extradition Act being special provision excludes from operation general provisions of Criminal Procedure Code.*

The U.S. Embassy in a letter of request for extradition stated that an Indian citizen G while working in an American Bank, was guilty of
B **embezzlement of funds of the Bank by fraud and forgery by transferring a certain sum to another country by wire. An indictment was returned in the U.S. District Court charging G with embezzlement, forgery, fraud by a banker, wire fraud, transportation of stolen money in foreign commerce and receiving stolen money. A warrant for G's arrest was issued by the**
C **U.S. Magistrate. The letter of request for extradition by the U.S. Government was accompanied by the original set of duly certified and authenticated documents in support of the request. The Government of India by an order under Sec. 5 of the Extradition Act 1962, requested an enquiry by the Magistrate in Delhi. The Magistrate after examining the documents caused G to be arrested and produced before him on 17th April, 1989 and**
D **on 3-5-1989. There after various proceedings were taken by G and his wife in the Magistrate's Court apart from filing 2 Writ petitions and ultimately the matter was carried to the Supreme Court and the proceedings were pending for over five years.**

E **There existed a 1931 Extradition Treaty between U.S.A. and Great Britain. For the purpose of the said treaty the territory of His Britannic Majesty did not include India. However, in 1942 under the powers reserved under Article 14 of the said treaty, an order was issued by which the British Government through His Majesty acceded to the 1931 treaty on behalf of India and thereafter a notification under S.3(1) of he Extradition Act read**
F **with S.3(3) was issued setting out in full the 1931 Treaty between U.S.A. and India and the provisions of the Extradition Act were also made applicable to the United States of America. Thereafter both the Indian Embassy in U.S.A. and the Department of State of U.S.A. confirmed and acknowledged the existence of the treaty. Extradition proceedings were**
G **challenged in this Court by G. and his wife by way of a Writ Petition and Civil Appeals against the High Court's orders on the following grounds:**

(a) A treaty signed prior to the coming into force of the Constitution on 26-1-1950 automatically ceased to exist.

H **(b) Under the Government of India, Act, only the Governor General**

of India could accede to the extradition treaty. A

(c) The 1942 order extending and making applicable the treaty to India ceased to be existing Indian Law and became inoperative after coming into force of the India (Adaptation of Existing Laws) Order, 1947 and the Adaptation of Laws Order 1950. B

(d) The Indian Extradition Act 1903 being applicable to British India, could not apply to an erstwhile native India State like Kerala where G. was arrested and therefore his arrest and detention was illegal and unathorised.

(e) Adequate evidence not having been produced within two months of G's apprehension, he was liable to be set at liberty under Clause 11 of the 1931 Treaty. C

(f) The competent Magistrate to hold an enquiry under the Extradition Act was the Chief Judicial Magistrate Ernakulam, where G was found and arrested in view of S.5 of the Extradition Act read with S.177, 188, 190 of the Criminal Procedure Code. D

Dismissing the Criminal Appeals & Writ Petition, this Court

HELD: 1. Procedure to be followed by Courts in deciding whether extradition should be granted is determined by the Municipal Law of the land even though extradition itself is in implementation of the international commitment of the State. [155-D-E] E

2. There cannot be surrender of fugitive criminals or a request therefor without formal authority either by statute or treaty. [156-C] F

3. There is no general rule that all treaty rights and obligations lapse upon external changes of sovereignity over territory, nor is there any principle which is generally accepted and favours continuity of treaty relations. The general working rule is to ascertain the intention of the concerned State by looking at relevant treaty and other arrangement accompanying change of sovereignity, and it is a political question to be determined in view of the circumstances accompanying the change in sovereignity. [156-F; 157-A-B] G

4. The Government of India has accepted the 1931 treaty as operative between United States of America and India. The 1931 treaty as extended H

A to India by the 1942 order is operative between the two countries.
[157-G-H; 158-A]

5. Existing treaty obligation of a State do not automatically lapse under public international law on an external change of sovereignity. Termination of treaty is a political question and the controlling importance is
B of the governmental action. [158-B, G]

Tom C. Clark v. *Alvina Allen,* 331 U.S. 503-5-18, relied upon.

6. Change in the form of government of a contracting state does not put an end to its treaties. Therefore, independence in 1947 and the sovereig-
C nity of a republic could not have put an end to the treaties entered into by the British Government prior to 15th August 1947, on behalf of India.
[160-D-E]

Dr. Babu Ram Saksena v. *The State,* [1950]S.C.R. 573 and *Jhirad* v. *Ferrandina,* 365 Federal Supplement 1155, relied upon.

D

7. Fugitive Offenders Act 1881 could not apply to British Possessions because the Fugitive Offenders Act was an internal statute (of Britain).
[161-B]

State of Madras v. *C.G. Menon & Ors.,* [1955] SCR 280, held inap-
E plicable.

8. The 1931 Treaty between U.S.A. and Indian as notified under S.3 of the Act is subsisting and operative between the two countries. [162-B]

9. Entering into a treaty being the sole prerogative of the British Crown, the Governor General of India had no authority whatsoever to enter
F into treaties with any country on behalf of India. [162-G]

10. Entering into a treaty is the executive act performed by the Head of the State and its implementation is the legislative function if in a given case a law is required to implement the treaty. [163-C]

G 11. Entry 3 List I of the Seventh Schedule to the Government of India Act 1935 only permitted the Legislature to make law, if necessary, in order to implement the treaties which were entered into by the British Crown.
[163-G]

12. The Indian Independence (International Arrangements) order,
H 1947 and the Adaptation of Laws Order, 1950 dealt only with municipal

law which was operating in India and needed adaptation because of the change in India's sovereign status and could not have dealt with the international agreements and treaties entered into by the British Crown in its executive power. [164-C] A

13. The exclusion of 'Order-in-Council' from the definition of the expression 'existing Indian Law' under the 1947 order did not have the effect of preventing the 'Order-in-Council' from operating by virtue of S.18(3) of the Independence Act. [164-F] B

14. The United States of America (extradition-India) Order-In-Council 1942 (1942 Orders) issued by the British Government was in accord with the provisions of the Constitution of India and did not require any adaptation or modification as it was law in force immediately before the commencement of the Constitution and continued in force under Art. 372(1) of the Constitution. The 1950 Order being only for the purpose of adaptation of the 'existing Indian Laws' and as such was not applicable to the 1942 Order. [164-H, 165-A] C D

15. When the native Indian State became part of Independent India after 1947, the territories comprising the States automatically came to be operated by the Municipal laws of the land including the laws enacted to implement the treaties. When the 1963 Extradition Act came into force Kerala was part of India and the notification dated 1st April, 1966 reiterated that the 1931 treaty was operative qua the whole territory of India. [165-D-E] E

16. Documents referred to under S.10 of the Extradition Act, 1963, when placed on record with the order of the Central Government issued under S.5 of the Act, are part of the evidence in support of Extradition. [167-D-E] F

17. The Extradition Act being a special provision to deal with the Extradition of fugitive criminals shall exclude from operation the general provisions of Criminal Procedure Code 1973 and S.5 of the Criminal Procedure Code gives overriding effect to the Special jurisdiction created under any special or local laws. Consequently, S.177, 178, and 190 of the Criminal Procedure Code have no application to the proceedings under the Extradition Act. [168-C-D] G H

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 631 of 1993.

From the Judgment and order dated 14.12.90 of the Delhi High Court in W.P. (Crl.) No.692 of 1989.

B WITH

Criminal Appeal No. 632 of 1993.

AND

C Writ Petition (Crl.) No. 97 of 1992.

R.G. Garg, G.L. Sanghi, Ms. Lily Thomas, for the appellant.

K.T.S. Tulsi, Solicitor General, A.K. Srivastava, K. Swamy, P. Parmeshwarn, Ms. Sushma Suri and M.T. George for the repondents.

D

The Judgment of the Court was delivered by

KULDIP SINGH, J. Leave granted in both the special leave petitions.

E George Kutty Kuncheria, an Indian national, is wanted in the United States of America to stand trial for violation of Federal fraud statutes and related offences. The Embassy of the United States of America in New Delhi sent a latter of request dated September 20, 1988 to the Ministry of External Affairs, Government of India, for the extradition of George to the F United States. The Ministry of External Affairs, Government of India, in exercise of its powers under Section 5 of the Extradition Act, 1962 (the 'Act') passed an order dated December 5, 1988 requesting the Additional Chief Metropolitan Magistrate, Patiala House, New Delhi (the Magistrate), to conduct an inquiry into the matter under the Act. Rosiline, wife of George, challenged the extradition proceedings by way of a writ petition G before the Delhi High Court. The writ petition was dismissed by a Division Bench of the High Court by its judgment dated December 14, 1990. The two appeals by way of special leave filed by Rosiline and George, are against the judgment of the Delhi High Court. The writ petition under Article 32 of the Constitution of India has been filed by George challenging H the extradition proceedings on various grounds.

The facts as disclosed by the Embassy of the United States of America in its letter of request indicate that while employed as an officer of the Chase Manhattan Bank in New York, George defrauded and embezzled from the bank more than one million dollars. He caused - by means of forgery and embezzlement the funds to be transferred by wire out of the United States, to the United Arab Emirates, where he claimed the alleged ill-gotten gains. George is the subject of indictment No.5 88 CR 461 returned on August 16, 1988 in the United States District Court for the Southern District of New York (Manhattan) charging him with two counts of embezzlement, two counts of forgery, two counts of fraud by a banker, two counts of wire fraud, two counts of transportation of stolen money in foreign commerce and two counts of receiving stolen money. A warrant for George's arrest was issued on August 16, 1988, by the U.S. Magistrate of the above court.

In support of the United States' request for extradition of George, an original set of documents, duly certified and authenticated, was transmitted along with the said letter. The details of the documents are as under:–

i. Certificate of authentication by the Attorney-General of the United States by affixing the seal of the Department of Justice.

ii. Certification by the Director, Office of International Affairs, Criminal Division, United States Department of Justice, certifying that the judicial certificate of authentication, affidavits, exhibits and attachment are all original and have been offered in support of the United States request for the extradition of George.

iii. Prosecutor's affidavit in support of request for extradition.

iv. Exhibit 1 to the prosecutor's affidavit is a certified true copy of the indictment No.S.88 C.R.C.461 which was filed against George on August 16, 1988, in the United States District Court for the Southern District of the New York.

v. Exhibit 2 to the prosecutor's affidavit is a certified true copy of the warrant for arrest issued for George by the Embassy concerned.

vi. Exhibits 3, 4, 5, 6 and 7 to the prosecutor's affidavit are affidavits

A of witnesses relating to the indictment against George. Each of these exhibits is a true copy of the original affidavit which has been filed and is part of the official court record in this case. Exhibits 3, 4, 5 and 6 have been sworn to before the United States District Court Judge.

B vii. Exhibit 8 to the prosecutor's affidavit consists of true copies of the relevant statutes of the United States which were in effect at the time of the alleged offences.

viii. Certification by the Director, Officer of International Affairs,Criminal Division, United States Department of Justice cer-
C tifying that the judicial certificate of authentication signed by United States District Court Judge, the affidavit of prosecutor (Assistant United States Attorney) and Exhibits 1 to 8, are original. It was further certified that all the document mentioned above are offered in support of the United States request for the extradition
D of George.

On receipt of the letter of request for extradition of George, the Government of India issued the order dated December 5, 1988, requesting the Magistrate to conduct an inquiry into the alleged offences. Para 5 of
E the said order is as under :-

"The letter of request received from the US Embassy in New Delhi for the extradition of Shri George Kutty Kuncheria together with documents furnished by the Government of USA in support of their request are enclosed herewith.

F

G. Jagannathan, Deputy Secretary, Ministry of External Affairs, Government of India, presented the order dated December 5, 1988, along with the original file of the case before the Magistrate on December 7, 1988. After examining the documents, the learned Magistrate ordered that a warrant of arrest of the fugitive criminal be issued returnable by January
G 4, 1989. George was produced before the Magistrate on April 17, 1989. He was remanded to judicial custody. Thereafter, nothing material happened on the next six hearing before the learned Magistrate. On May 3, 1989, copies of the documents numbering 99 pages were supplied to George through his counsel. These were the documents placed on record in terms
H of para 5 of the order reproduced above, the Government of India dated

December 5, 1988. A

On May 6, 1989, George filed a writ petition being criminal writ petition No.314 of 1989 before the Delhi High Court. The original record from the Magistrate's court was summoned to the High Court. The writ petition was dismissed as withdrawn on November 2, 1989. During the B period from May 1989 to December 1989, thirty three further hearings took place before the Magistrate but the inquiry could not commence because the High Court was seized of the matter. On December 5, 1989, Shri Jagannathan, Deputy Secretary, Ministry of External Affairs, Government of India, was present before the learned Magistrate along with his counsel. C George requested the Magistrate that he had no faith in his counsel and to enable him to engage another lawyer, the inquiry be adjourned. Despite the direction of the High Court to proceed with the inquiry on day-to-day basis, the learned Magistrate, in the interest of justice, adjourned the hearing. On December 8, 1989, George was not produced before the Magistrate from Judicial custody. It was stated that he had been advised D rest by the jail doctor. The learned counsel for the Union of India contended before the Magistrate that the report of the jail superintendent was concocted. He requested the Magistrate to inquire into the matter. On the next six hearings, neither the accused appeared before the Magistrate nor the medical report summoned by him was produced. Finally, on January E 19, 1990, the Magistrate passed an order stating that the non-production of the accused and non- production of the medical record would be treated as disobedience of the court's order and as much legal action in accordance with law would be initiated. On January 30, 1990, the medical record was produced before the court by the accused prayed that he could not afford F to engage a lawyer and, as such, legal aid be provided to him. During the next several hearings extending upto February 19, 1991, the accused did not permit the court to record the evidence produced by the Government of India on one pretext or the other. He moved five application before the Magistrate and insisted that the inquiry could not commence till the time G the applications filed by him were disposed of. He did not present himself before the Magistrate on the ground that he had undergone an operation and was unwell. Meanwhile, Rosiline, wife of the accused, filed another writ petition in the Delhi High Court on October 26, 1989, challenging the extradition proceedings on various grounds. The High Court passed an H

A interim order on December 7, 1989, which was confirmed on January 10, 1990, staying the extradition of George but permitting the inquiry to go on. Various application filed by the accused before the Magistrate were dismissed by him on April 5, 1990. As mentioned above, the writ petition filed by Rosiline was finally dismissed by the High Court on December 14, 1990 B giving rise to these proceedings before us. This Court by order dated January 7, 1991, stayed the extradition of George till further orders. On February 20, 1991, this Court stayed further inquiry before the Magistrate. It is unfortunate that George successfully circumvented the normal extradition proceedings by adopting every possible tactic with a view to prolong the proceedings. The case has been in limbo for over five years. C

Before dealing with the arguments advanced by the learned counsel for the parties, it would be useful to examine the international documents evidencing the conclusion of a treaty between the United States of America and India for the reciprocal extradition of criminals. On December 22, D 1931, a treaty of extradition was concluded between England and the United States of America (1931 Treaty). For the purposes of the said treaty, the territory of His Britannic Majesty did not include British India. The treaty was, thus, not applicable to India. Article 14 of the said treaty, however, provided as under :-

E "Article 14. His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named -- that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zeland, the Union South Africa, the Irish Free F State, and Newfoundland - and India ....."

Exercising the powers reserved under the above quoted Article 14 an order called the United States of America (extradition: India) Order-in-Council, 1942 (1942 Order) was issued by the British Government on February 23, 1942. By the said order, "His Majesty acceded to the 1931 G treaty on behalf of India". The treaty was extended and made applicable to India with effect from March 9, 1942.

The next relevant document is The Indian Independence (International Arrangements) Order, 1947 [The International Arrangements H Order]. Under the said order, India agreed that the rights and obligations

under all international agreements to which India was a party immediately before the 15th day of August, 1947 would devolve upon the dominion of India. The schedule to the International Agreements Order incorporating the agreement is reproduced hereunder :-

"*SCHEDULE*

Agreement as to the devolution of International rights and obligations upon the Dominions of India and Pakistan.

1. The international rights and obligations to which India is entitled and subject immediately before the 15th day of August, 1947, will devolve in accordance with the provisions of this agreement.

2. (1) Membership of all international organisation together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

For the purposes of this paragraph any rights or obligations arising under the Final Act of the United National Monetary and Financial Conference will be deemed to be rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.

(2) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organisations as is chooses to join.

3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.

(2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will

A if necessary, be apportioned between the two Dominions;"

The Extradition Act 1962 came to be enforced with effect from January 5, 1963. Sections 2(d) and 3 of the Act are reproduced hereunder:–

"2(d). "Extradition treaty" means a treaty or agreement made by
B India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty or agreement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India;

C 3. Application of the Act. - (1) The Central Government may, by notified order direct that the provisions of this Act other than Chapter III shall apply, --

(a) to such foreign State or part thereof; or

D (b) to such Commonwealth country or part thereof which Chapter III does not apply;

as may be specified in the order.

(3) Where the notified order relates to a treaty States--

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

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

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

G Notification dated April 1, 1966 under Section 3(1) read with Section 3(3) was issued by the Government of India wherein the text of 1931 Treaty between India and United States of America was set out in full and further the provisions of the Act were made applicable to the United States of America.

H The Embassy of India in Washington D.C. by a diplomatic note dated

July 11, 1967, confirmed the existence of the Extradition Treaty between India and the United States. The note is reproduced hereunder :-

"The Embassy of India presents its complements to the Department of States and has the honor to request them to confirm the existence of the Extradition Treaty between India and the United States in these words :-

"The dominion of India, which came into being on August 15, 1947, became the Republic of India on January 26, 1950 but remains a member of the British Commonwealth of Nations. This change is understood not to have affected any agreements in their application between the United States and India. The Treaty of Extradition between the United States and Great Britain entered into on December 22, 1931 and made applicable to India on March 9, 1942 is therefore considered a good subsisting and binding convention between the United States and India as of this date. A copy of the said Treaty is annexed hereto."

The Embassy of India takes this opportunity to renew to the Department of State the assurances of its highest consideration.

Con.48(2)/66
July 11, 1967
Washington, D.C."

The Department of State of the United States of America acknowledged the receipt of the above quoted note dated July 11, 1967 sent by the Embassy of India. The acknowledgment by the United States of America in the following words :-

"The Department of States acknowledges the receipt of the note No.Con,48(2)/66 dated July 11, 1967 from the Embassy of India and is pleased to confirm as follows the existence of the Extradition Treaty in force between the United States and India.

The dominion of India, which came into being on August 15, 1947, became the Republic of India on January 26, 1950 but remains a member of the British Commonwealth of Nations. This change is understood not to have affected any agreements in their application between the United States and India. The Treaty of

A Extradition between the United States and Great Britain entered into on December 22, 1931 and made applicable to India on March 9, 1942 is therefore considered a good subsisting and binding convention between the United States and India as of this date. A copy of the said Treaty is annexed hereto.

B Enclosure : Treaty Series 849.
Department of States,
Washington, July 21, 1967."

Mr. G.L. Sanghi and Mr. R.K. Garg, learned counsel for the appel-
C lants, challenged the extradition proceedings on the following grounds :-

(1) An extradition treaty has to be signed on behalf of two sovereign States by the competent authorities empowered to do so. Any treaty signed on behalf of India prior to January 26, 1950 automatically ceased to exist after India achieved sovereignty. Since there is no concluded extradition
D treaty between India and United States of America after January 26, 1950, the provisions of the Act are inoperative so far as United States of America is concerned and there cannot be an exchange of fugitive criminals between the two countries.

E (2) Under the Government of India Act, it was the Governor-General of India who could accede to the extradition treaty with the United States of America behalf of India. The 1942 Order could not have extended the 1931 Treaty to India as the said power could only be exercised by the Governor-General.

F (3) The India (Adaptation of Existing Indian Laws) Order, 1947 (1947 Order) read with the Adaptation of Laws Order, 1950 (1950 Order) excludes the Orders-in-Council from the definition of "existing Indian laws" and "existing Central laws" and, as such, the 1942 Order ceased to be an existing Indian law and became inoperative after 1947 or, in any case, after
G the coming into force of the 1950 Order.

(4) The Treaty was made applicable to British India by the 1942 Order. The Indian Extradition Act, 1903 was limited in the its extent and application to British India and was not applicable to the Indian native States. As a consequence the extradition treaty, as acceded to by the 1942
H Order, was not applicable to the Indian native States. George having been

arrested from the State of Kerala which was part of an erstwhile native State where the extradition treaty was not applicable, the arrest and detention of George was illegal and unauthorised. A

(5) Sufficient evidence for the extradition of George has not been produced before the Magistrate within two months of his apprehension. As such, in term of Article 11 of the 1931 Treaty, George is liable to be set at liberty. B

(6) The competent Magistrate to hold an enquiry under the Act is the Cheif Judicial Magistrate, Ernakulam, in whose jurisdiction the fugitive was found and arrested. Reliance in this respect is placed on Section 5 of the Extradition Act read with Sections 177, 188 and 190 of the Criminal Procedure Code. C

The term 'extradition' denotes the process whereby under a concluded treaty one State surrenders to any other States at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Though extradition is granted in implementation of the international commitment of the State, the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the Municipal Law of the land. Extradition is founded on the broad principle that it is in the interest of civilised communities that criminals should not go un-punished and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. J.G. Starke in his book, Introduction to International Law (10th Edition) gives the following rational considerations which have conditioned the law and practice as to extradition. D E F

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

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

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

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

To appreciate the argument it is necessary to examine the inter-
F national law on the subject of treaty succession. There is no general rule that all treaty rights and obligations lapse upon external changes of sovereignty over territory nor is there any generally accepted principle favouring the continuity of treaty relations. Treaties may be affected when one State succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive
G depend on many factors including the precise from the origin of the succession and the type of treaty concerned. The emancipated territories on becoming independent States may prefer to give general notice that they are beginning with a "clean slate", so far as their future treaty relations were concerned, or may give so-called "pick and choose" notifications as to
H treaties as were formally applicable to it before achieving independence.

The "clean slate" doctrine was ultimately adopted in the relevant provisions of the Vienna Convention of 1978. The sound general working rule which emerges is to look at the text of the relevant treaty and other arrangements accompanying change of sovereignty and then ascertain as to what was the intention of the State concerned as to the continuance or passing of any rights or obligations under the treaty concerned. The question whether a State is in a position to perform its treaty obligations is essentially a political question which has to be determined keeping in view the circumstances prevailing and accompanying the change of sovereignty.

We have plenty of evidence to show that India, after achieving independence, has unequivocally committed itself to honour the international obligations arising out of the 1931 Treaty. We have reproduced above the International Arrangement Order wherein India agreed to honour all the international agreements entered into before August 15, 1947 and agreed to fulfil the rights and obligations arising from the said agreements. The Parliament made its intention further clear when under Section 2(d) (quoted above) of the Act it gave inclusive definition to the expression "extradition treaty" by including, the treaties made or entered into prior to August 15, 1947 in the said definition. The most important document in this respect is the Notification dated April 1, 1966 issued by the Government of India under Section 3 of the Act, directing that the provisions of the said Act, other than Chapter III thereof, would apply to the United States of America with effect from April 1, 1966. The opening paragraph of the said Notification is an under :-

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

The full text of 1931 Treaty was thereafter produced in the Notification. It is thus obvious that the Government of India has, in clear terms, accepted that the 1931 Treaty is operative between India and the United States of America. We have produced in the earlier part of the judgment the exchange of diplomatic notes between the two countries reiterating that the 1931 Treaty is considered a "good subsisting and binding convention between the United States and India as on this date". It was further stated

A that after India became a Republic of January 26, 1950, the change had not affected any agreements in their application between the United States and India. We have, therefore, no hesitation in holding that the 1931 Treaty as extended to India by the 1942 Order is operative between the two countries.

B There is no rule of public international law under which the existing treaty *obligation of a State* automatically lapse on there being an external change of sovereignty over its territory. India after achieving independence specifically agreed to honour its obligations under the international agreements. At no point of time, India disowned the 1931 Treaty. Rather, by C various overt acts -- indicated above -- India accepted the existence of the 1931 Treaty between the two countries and repeatedly reiterated that it would honour its obligations under the said treaty. The Supreme Court of the United States in *Tom C. Clark* v. *Alvina Allen*, 331 US 503-518 held as under :-

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> "It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its E treaty obligations is essentially a political question. *Terlinden* v. *Ames*, 184 US 270, 288 46 L ed 534, 545, 222 S Ct 484. We find no evidence that the political department have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect of them. The Allied Control F Council has, indeed, assumed control of Germany's foreign affairs and treaty obligation -- a policy and course of conduct by the political department wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties."

G Whether a treaty has been terminated by the State is essentially a political question. The governmental action in respect to it must be regarded as of controlling importance. So far as India and the United States of America are concerned, it is amply evidenced by their actions that the two States fully recognise their obligations under the 1931 Treaty.

H It would be useful at this stage to refer to the judgment of the United

States District Court, New York, in *Jhirad* v. *Ferrandina*, 355 Federal Supplement 1155. The Government of India sought the extradition of Jhirad, an Indian citizen and a resident alien in the United States of America. It was alleged that while working in the Indian Navy Jhirad embezzled large sums of money from the naval funds. Jhirad challenged the extradition proceedings by way of a writ of habeas corpus before the United States District Court, New York. The United States and India relied upon the 1931 Treaty as made effective by the 1942 Order. Jhirad argued before the court that the 1931 Treaty under which extradition was sought, though made applicable to British India in 1942, did not survive after the creation of the Republic of India in 1950. The court rejected the argument advanced by Jhirad on the following reasoning :-

> 1. As part of the creation of dominion of India, the Indian Government agreed, the Indian Government agreed to take an assignment of all treaties signed on its behalf by the Great Britain. The subsequent change to a "Republic" was certainly of only evolutionary nature, thus the 1931 Treaty would appear to survive.
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> 2. Both the Government of India and the United States of America have been unequivocal in relying on the validity of the Treaty of 1931 and in the past there have been extraditions from both countries.
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> 3. The weight of authority, under international law, supports the view that new nations inherit the treaty obligation of the former colonies. There is a tendency in the direction of continuity of treaties upon independence of colonial territories.

The learned counsel for the appellant has relied on the judgment of this Court in *Dr. Babu Ram Saksena* v. *The State*, [1950] S.C.R. 573. In the said case, the question before this Court was whether the Extradition Treaty between the Tonk State and the British Government became extinct by reason of the merger of the said State in the United State of Rajasthan. This Court answered the question in the affirmative. What happened in that case was that several States voluntarily united together and integrated their territories so as to form a larger and composite State of which every one of the covenanting party was a component part. There was to be one common executive, legislature and judiciary and the Council of Rulers would consist of the Rulers of all the Covenanting States. The Covenanting

A States had lost their personality altogether. As a result of amalgamation of merge, the Tonk State lost its full and independent power of action over the subject-matter of a treaty previously concluded and, as such, it was held by this Court that the Treaty must necessarily lapse. The following observations of this Court, in the said judgment, are relevant for our purpose :-

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> "The other case cited by Sir Alladi, viz., that of *Lazard Brothers* v. *Midland Bank Limited,* (1933) AC 289 has absolutely no bearing on this point. It laid down the well accepted proposition of international law that a change in the form of government of a contracting State does not put an end to its treaties. The treaty entered into by the Czarist Russia could be given effect to after the Revolution, once the new government was recognized as a person in International Law."

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It is thus obvious that in *Babu Ram Saksena's* case this Court approved the proposition of International Law that a change in the form of government of a contracting State does not put an end to its treaties. India, even under British Rule, had retained its personality as a State under International Law. It was a member of the United Nations in its own right. Therefore, grant of independence in the year 1947 and thereafter the status of Sovereing Republic could not have put an end to the treaties entered into by the British Government prior to August 15, 1947, on behalf of India.

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Mr. R.K. Garg strongly relied upon the judgment of this Court in *State of Madras* v. *C.G. Menon & Ors.*, [1995] S.C.R. 280. In the said case Menon and his wife were apprehended and produced before the Chief Presidency Magistrate, Egmore, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. The Colonial Secretary, Government of Singapore had requested the assistance of the Government of India to arrest and return to the Colony of Singapore the Menons under warrants issued by the Singapore Magistrate. Menon was charged on several counts of having committed criminal breach of trust and his wife was charged with the abetment of these offences. Under the provisions of the Fugitive Offenders Act, 1881, the British possessions which were contiguous to one another and between whom there was frequent inter-communication were treated for purposes of the said Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these in-

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tegrated territories. As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a prima facie case was made against him was dispensed with. India was, thus, being treated under the provisions of the Fugitive Offenders Act, 1881, as a British possession and by an Order-in-Council was grouped with Singapore and other contiguous British Possessions. This Court came to the conclusion that after the achievement of independence, the provisions of the Fugitive Offenders Act, 1881, could not be made applicable to India. This Court, on examining the provisions of the said Act, came to the conclusion that after the achievement of independence the said Act could not be made applicable to India. This Court reached the said finding on the following reasoning :

> "The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India by described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offenders in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. ..... The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone; India is no longer a British Possession and no Order in Council can be made to group it with other British Possessions. ..... Article 372 of the Constitution cannot save this law because the grouping is repugnant to the conception of a sovereign democratic republic. The political background and shape of things when Part II of the Fugitive Offenders Act 1881 was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions."

It is thus obvious that *Menon's* case has no reliance whatsoever to the facts of the present case. The Fugitive Offenders Act, 1881, was an internal statute which could not be made applicable to India after its independence because of the peculiar provisions under the said Act. On

A the other hand, in this case, we are concerned with the 1931 Treaty which was an external act whereby India as an international person gained rights and obligations vis-a -vis another international person.

We, therefore, reject the contention raised by the learned counsel for the appellant and hold that the 1931 Treaty between India and United B States of America as notified under Section 3 of the Act is subsisting and operating between the two countries.

The second contention raised by Mr. G.L. Sanghi is based on Section 11 read with Entry 3, List I, Seventh Schedule of the Government of India C Act, 1935 (the 1935 Act), Section 11, as it existed in 1942, provided that the functions of the Governor-General with respect to external affairs shall be exercised at his discretion. Entry 3, List I of Seventh Schedule to the 1935 Act was as under :-

ENTRY 3. EXTERNAL AFFAIRS

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"The implementing of the treaties and agreements with other countries, extradition including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India."

The precise argument is that the Governor-General of India had the E exclusive power under Section 11 read with Entry 3, of the 1935 Act to accede to the 1931 Treaty and the accession made by the British Sovereign by the 1942 Order was unconstitutional and, as such, there is no subsisting treaty between the two countries. Treaty-making is a subject of public international law. It is the prerogative of the Executive Head of the State F to enter into treaties and agreements with other sovereign countries in the international sphere. The 1931 Treaty was concluded between His Majesty, the King of Great Britain and the President of the United States of America. Under Article 14 of the said Treaty, it was only His Britannic Majesty who could accede to the said treaty on behalf of any of his dominions including India. This was precisely what was done by the 1942 G Order. The Governor-General of India had no authority whatsoever to enter into treaties with any country on behalf of India. This was the sole prerogative of the British Crown. Even otherwise, reliance by the learned counsel on Entry 3, List I, Seventh Schedule to the 1935 Act is wholly misplaced. The said Entry only talks of "the implementing of the treaties H and agreements with other countries." Entering into a treaty and im-

plementing the same are two different subjects. The Governor-General under the 1935 Act had no power to enter into treaties with foreign countries. Under the said Act he had the power only to implement the treaties which had already been entered into and concluded by British Crown. The contention of the learned counsel that the expression "implementation" includes entering into and accession of treaties is only to be mentioned and rejected. It would be useful to refer to Entry 14, List I, Seventh Schedule, the Constitution of India, which read as under :-

> "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

It is thus obvious that entering into a treaty and its performance are two different stages covered by different wings of the Government. Entering into a treaty is the executive act performed by the Head of the State whereas its implementation is the legislative function, if in a given case, a law is required to implement the treaty. In *Maganbhai Ishwarbhai Patel* v. *Union of India & Anr.*, [1969] 3 SCR 254 Hidayatullah, C.J., observed as under :-

> "As was observed by Lord Atkin in Attorney General for *Canada* v. *Attorney General for Ontario,* (1937) A.C. 326 at 347 the position may be summed up thus: there is a distinction between (1) the formation and (2) the performance of the obligation. The first is an executive act, the second a legal act if a law is required. The performance then has not force apart from a law that is to say unless parliament assents to it and Parliament then accords its approval to the first executive act. The treaties created by executive action bind the contracting parties and, therefore, means must be found for their implementation within the law."

We are, therefore, of the view that under Entry 3, List I, Seventh Schedule to the 1935 Act only permitted the Legislature to make law, if necessary, in order to implement the treaties which were entered into by the British Crown. The Governor-General had no power to enter into treaties on behalf of British India with any other country. We see no force in the contention of Mr. Sanghi and reject the same.

Coming to the next argument of Mr. Sanghi, we fail to appreciate

how the provisions of the 1947 Order and the 1950 Order are attracted to the treaties which were entered into by the British Crown in exercise of its prerogative power. Accession to the 1931 Treaty on behalf of India by the 1942 Order was an executive act of the British Sovereign under International Law. The international agreements, including treaties, to which India was a party prior to 1947 were dealt with separately by the international Arrangements Order. The relevant provisions of the said Order have been reproduced in the earlier part of the judgment. By virtue of the said Order rights and obligations under all international agreements, including the 1931 Treaty, to which India was a party immediately before 1947, automatically devolved upon India after it achieved independence. The 1947 Order and the 1950 order were only dealing with the municipal law which was operating in India and which needed adaptation because of the change in India's sovereign status. These Orders did not and could not have dealt with the international agreements and treaties entered into by the British Crown in its executive power.

We may, also, examine the argument by assuming that the 1942 Order was a part of the municipal law of the land. Section 18(3) of the Indian Independence Act 1947 (Independence Act) provided that "the law of British India ..... existing immediately before the appointed day shall, sofar as applicable and with the necessary adaptations, continue as the law of each of the new dominions ..... until other provision is made by laws of the legislature of dominion in question ....." It is thus obvious that the 1942 Order continued to operate by virtue of Section 18(3) of the Independence Act. The purpose and object of 1947 Order was to incorporate such adaptations as were necessary or expedient for bringing the provisions of the "existing Indian law" into effective operation. The exclusion of 'Order-in-council' from the definition of the expression "existing Indian Law" under the 1947 Order only meant that no adaptation could be made in any 'Order- in-Council'. It did not have the effect of preventing the 'Order-in-Council' from operating by virtue of Section 18 (3) of the Independence Act. The 1942 Order did not require any adaptation and as such it was beyond the purview of the 1947 Order. The 1942 Order came to be operative under Section 18 (3) of the Independence Act. Similar was the situation under the 1950 Order. Article 372(1) of the Constitution of India, by and large, substituted the provisions of Section 18 (3) of the Independence Act. The 1950 Order was replacement of the 1947 Order. The 1942 Order was in accord with the provisions of the Constitution and did

not require any adaptation or modification; being law in force in the territory of India immediately before the commencement of the Constitution, it continued in force therein under Article 372 (1) of the Constitution of India. The 1950 Order - like the 1947 order - was only for the purpose of adaptation of "existing Indian Laws" and as such was not applicable to the 1942 Order. Thus, examined from any angle, the argument advanced by Mr. Sanghi is wholly devoid of force and is rejected.

It was next contended by Mr. G.L. Sanghi that the Indian Extradition Act, 1903 was limited in its extent and application to British India which did not include the territories of native Indian States. According to him, the 1931 Treaty to which British Indian acceded by the 1942 Order was not applicable to the native States. The contention is that even today the 1931 Treaty is not operative in the territories of the erstwhile native States and since George was residing at Erankulum in Kerala, which was originally a native State, his arrest under the Act was illegal. The argument is untenable. Treaty-making is the State-prerogative under the international law. The laws made by the State legislatures in the process of implementing a treaty are binding and operative on the territory of the State. When the native Indian States became part of independent India after 1947 the territories comprising those States automatically came to be operated by the Municipal laws of the land including the laws enacted to implement the treaties. In any case, on January 1, 1963 when the Act came into force Kerala was a part of India. The Notification dated April 1, 1966, issued under Section 3 of the Act reiterated that the 1931 Treaty was operative qua the whole of the territory of India. We, therefore, reject the argument of the learned counsel.

To appreciate the next argument of Mr. G.L. Sanghi, it is necessary to have to look at Article 11 of the 1931 Treaty which is as under :-

> "Article 11. If sufficient evidence for the extradition be not produced within two months from the date of the apprehensions of the fugitive, or within such further time as the High Contracting party applied to, or the proper tribunal of such High Contracting party, shall direct, the fugitive shall be set at liberty."

George was apprehended and produced before the Magistrate on April 17, 1989. Sufficient evidence in support of the extradition was to be produced within two months of the apprehension. As mentioned above, G. Jagannathan, Deputy Secretary, Ministry of External Affairs, Government

A of India, presented the order of the Central Government dated December 5, 1988 along with the original file of the case before the Magistrate, on December 7, 1988. All the documents which were sent along with the letter of request by the United States of America were also submitted before the learned Magistrate. The details of the documents have already been given in the earlier part of the judgment. The copies of all the documents, B numbering 99 pages, were supplied to George through his counsel by the Magistrate. At this stage, we may refer to Section 10 of the Act which is as under :-

> "*10. Receipt in evidence of exhibits, depositions and other documents and authentications thereof.* (1) In any proceedings against a fugi- C tive criminal of a foreign State or Commonwealth country under this Chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence.
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> (2) Warrants, depositions or statements on oath, which purport to have been issued or taken by any Court of justice outside India or copies thereof, certificates of, or judicial documents stating the facts or, conviction before any such Court shall be deemed to be duly authenticated if --
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> (a) the warrant purports to be signed by a judge, magistrate or officer of the State of country where the same was issued or acting in or for such State or country;
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> (b) the depositions or statements or copies thereof purport to be F certified, under the hand of a judge, magistrate or officer of the State or country where the same were taken, or acting in or for such State or country, to be the original depositions or statements or to be true copies thereof, as the case may require;
>
> G (c) the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a judge, magistrate or officer of the State or country where the conviction took place or acting in or for such State;
>
> (d) the warrants, depositions, statements, copies, certificates and H judicial documents, as the case may be, are authenticated by the

oath of some witness or by the official seal of a Minister of the State or country where the same were respectively issued, taken or given." A

Mr. K.T.S. Tulsi, learned Addl. Solicitor General, has placed on the record all the documents sent by the United States of America along with the letter of request for extradition of George. We have examined the documents carefully. They are duly authenticated and certified as required under Section 10 of the Act. These documents are eligible to be treated and received as evidence under Section 10 of the Act. Since these documents have been placed on the life of the Magistrate and copies thereof given to George within two months of the apprehension of George it is futile to say that the terms of Article 11 of the 1931 Treaty have been breached. As mentioned above, on May 6, 1989, George filed a writ petition before the Delhi High Court and thereafter he never permitted the proceedings before the learned magistrate to commence. Section 10(1) of the Act makes it clear that the exhibits and depositions, whether received or taken in the presence of the person against whom they are used or not, and copies thereof and official certificates of facts and judicial documents stating facts, if duly authenticated, can be received as evidence. We are of the view that the documents referred to in Section 10 of the Act, when placed on record along with the order of the Central Government issued under Section 5 of the Act, are part of the evidence in support of extradition. The proceedings before the learned Magistrate show that the Government of India wanted to produce Mr. G. Jagannathan before the Magistrate and for that purpose he was present in the court on more than one occasions but the appellant did not permit his evidence to be recorded on one pretext or the other. We see no force in the contentions of the learned counsel that there has been a violation of the provisions of Article 11 of the Treaty, and reject the same. B C D E F

We may take up the last contention raised by Mr. G.L. Sanghi. Relying upon Section 177, 188 and 190 of the Code of Criminal Procedure, 1973, the learned counsel contended that the inquiry under the Act could only be conducted by Magistrate concerned at Erankulam in whose jurisdiction George was apprehended. We see no force in the contention. Section 2(g) and 5 of the Act are as under :- G

"*2(g)* "magistrate" means a magistrate of the first class or a H

A presidency magistrate;

5. Order for magisterial inquiry - Where such requisition is made, the Central Government may, if it thinks fit, issue an order to any magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits
B of his jurisdiction, directing him to inquire into the case."

It is obvious from the plain language of section 5 of the Act that the Central Government can direct any Magistrate to hold inquiry provided the said Magistrate would have had jurisdiction to inquire into the offence
C if it had been an offence committed within the local limits of his jurisdiction. It is not disputed that the offence alleged to have been committed by George in the letter of request by the State of America would, if committed in the local limits of the Magistrate, have given the Magistrate jurisdiction to inquire into the same. The Act, being a special provisions dealing with the extradition of fugitive criminals, shall exclude from application the
D general provisions of the Code of Criminal Procedure, 1973. In any case, Section 5 of the said Code gives overriding effect to the special jurisdiction created under any special or local laws. Sections 177, 188 and 190 of the Code have no application to the proceedings under the Act. We see no force in the contention of the learned counsel and reject the same.

E As a result of the above discussion, we dismiss the criminal appeals and the writ petition.

George Kutty Kuncheria, the appellant, is wholly and solely responsible for the gross delay in the conclusion of the extradition proceedings
F against him. We direct the learned Magistrate to record the evidence on behalf of the Central Government, if necessary, on October 25 and 26, 1993. Thereafter, he shall given an opportunity to George to produce his evidence in rebuttal, if he so desire, on November 4 and 5, 1993 and hear the arguments thereafter. He shall send his report to the Government of
G India on or before November 19, 1993. We further direct that in case George fails to present himself in the court on one pretext of the other, the Magistrate shall hold the proceedings in the jail premises and complete the inquiry in accordance with the above schedule.

M.M. Appeals dismissed.