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hold that section 476 limits the jurisdiction of a Court in the manner suggested in the Madras and Calcutta cases. There is no limitation of jurisdiction in the words of the section. The limitation is to be found, if it is found at all, by implication. Arguments as to implication in a case of this kind are always such that some will appeal to one mind, some to another. I confess that I myself see more force in the view taken by the two Judges of this Court who have expressed themselves than by the Judges of the Calcutta and Madras High Courts.

Then as to the word "offence" in section 476: Of course where you have an offence, you must have an offender though you may not know who the offender is. But it seems to me that the section not only intends to, but is expressly worded so that it may confer on a Court a power to inquire into a case and to take action, whoever may prove to be the offender, although months or even years may elapse before it becomes known with any degree of certainty who the offenders are.

I agree to the order proposed by my learned brother.

*Convictions and sentences confirmed.*

R. R.

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## CRIMINAL REFERENCE.

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*Before Mr. Justice Heaton and Mr. Justice Hayward.*

IN RE MURLIDHAR BHAGWANDAS.*

1918.

*July* 10.

*Indian Extradition Act (XV of 1903), sections 18, 7, 8 and 8 A—Extradition treaty with the Hyderabad State†—"Cheating" not mentioned in the treaty*

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* Criminal Reference No. 95 of 1917.

† The material portions of the treaty run as follows :—

The two Governments hereby agree to act upon a system of strict reciprocity, as hereinafter mentioned.

* * * * * *

*though mentioned in the Act—Extradition for cheating, by British Government —Warrant from the Political Agent—Bail not allowed in the warrant— British Magistrate has no power to grant bail—Criminal Procedure Code (Act V of 1898), section 496.*

The offence of cheating is an extradition offence, so far as British India is concerned, under the Indian Extradition Act (XV of 1903), notwithstanding its omission from Article 4 of the Extradition Treaty between the British Indian Government and the Hyderabad State.

The Magistrate in British India to whom a warrant has been addressed under section 7 of the Indian Extradition Act, 1903, has no power to admit an arrested person to bail apart from the provisions of sections 8 and 8A of the Act.

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*Article 3.*

Neither Government shall be bound to deliver up debtors or civil offenders or any person charged with any offence not specified in Article 4.

*Article 4.*

Subject to the above limitations, any person who shall be charged with having committed within the territories belonging to or administrated by the Government making the requisition any of the undermentioned offences and who shall be found within the territories of the other shall be surrendered, the offences are mutiny, rebellion, murder, attempting to murder, rape, great personal violence, maiming, dacoity, thagi, robbery, burglary, knowingly receiving property obtained by dacoity, robbery or burglary, thefts of property exceeding 100 rupees in value, cattle-stealing, breaking and entering a dwelling house, and stealing therein, setting fire to a village, house or town, forging or altering forged documents, counterfeiting current coin, knowingly altering base or counterfeit coin, embezzlement, whether by public officers, or other persons, and being an accessory to any of the above-mentioned offences.

*Note.*—The offence of kidnapping and abduction are also added to the offences enumerated in Article 4.

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*Article 6.*

The above treaty shall continue in force until either one or the other of the high contracting parties shall give notice to the other of its wish to terminate it and no longer.

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THIS was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code, 1898.

The reference was in the following terms :—

The accused in this case one Murlidhar was placed before the learned Acting Chief Presidency Magistrate on 14th August 1917 by Inspector Brijlal Lalman of the Salarjang State Police charged with the offence of cheating at Kopbal. Postponements were granted from time to time to enable the prosecution to obtain an extradition warrant from the Resident, Hyderabad, under section 7 (1) of the Extradition Act (XV of 1903). The learned Magistrate ordered accused to be released on bail in the sum of Rs. 5,000 with one surety in a like amount. On the 17th September 1917, a warrant was received from the Resident, Hyderabad, under section 7 (1) for the arrest of Murlidhar. On this date Mr. Saher who appeared for the accused contended that the Indian Extradition Act did not apply inasmuch as the treaty with Hyderabad State does not make cheating extraditable. Mr. Saher also expressed the desire to put in a statement with a view to moving the Court to report the case to Government under section 8 A. Postponements were granted by the learned Acting Chief Presidency Magistrate for the purpose stated and in order that copies of the Extradition treaties with Hyderabad State might be obtained. Enquiries addressed to the Political Department, Bombay, elicited the fact that the treaties existing between the British Government and the Hyderabad State were those sent to this office with the Government Resolution No. 7651, dated 22nd November 1887 and that they are printed in Mr. A. P. Muddiman's Law of Extradition.

After referring to the Government Resolution (hereto annexed) and to pages 206 and 208 of Muddiman's Law

of Extradition, I held that the offence of cheating had not been made an extraditable offence by treaty with Hyderabad State.

On the 3rd November 1917, I reported the case to Government under section 8 A of the Indian Extradition Act (XV of 1903) recommending the discharge of the accused on the ground that the offence was not extraditable. Pending the orders of Government, the accused was allowed to continue on the same bail. On 18th December 1917, I received a letter from the Under Secretary to Government, Bombay, stating that Government saw no reason to interfere in the matter. The Under Secretary to Government stated that whether or not the offence is included in Article 4 of the treaty of 1867, I was bound under the Indian Extradition Act 1903 to extradite an offender upon the Resident's warrant and that since no endorsement of the kind mentioned in section 8 appeared upon the warrant issued in the present case I should execute it according to the provisions of section 7.

On receipt of the letter the accused was requested to attend and he attended with counsel Mr. Saher on December 20. The orders of Government were explained to Mr. Saher. Mr. Saher, however, contended that in view of section 18 of the Indian Extradition Act (XV of 1903) the opinion of Government that the Indian Extradition Act applied, whether or not the offence of cheating was included in Article 4 of the Treaty with Hyderabad was incorrect. Mr. Saher applied that the matter might be referred for the opinion of the High Court. As the question is one of considerable importance and as there appeared to me much force in the argument of Mr. Saher, I acceded to his request.

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I have, therefore, the honour to refer the following questions for the opinion of the High Court :—

1. Whether in view of section 18 of the Indian Extradition Act (XV of 1903) the offence of cheating is an extradition offence, so far as British India and Hyderabad State are concerned, notwithstanding its omission from Article IV of the treaty, dated the 8th May 1867, between the British Government and Hyderabad State ?

2. Whether the agreement, dated 21st July 1887, modifying the provisions of the Treaty of 1867 (see Muddiman's Law of Extradition, page 208) only modified the *procedure* to be followed in the case of offences included in Article IV of the Treaty of 1867 ?

3. Whether the agreement, dated the 21st July 1887, also modified the *offences* which were extraditable from British India to Hyderabad State and *vice versa* so as to include not only the offences mentioned in Article IV of the Treaty of 1867 but also all offences which are extraditable by the law relating to the extradition of offenders for the time being in force in British India ?

4. Whether a Presidency Magistrate to whom a warrant has been addressed under section 7, Act XV of 1903, has power, apart from the provisions of section 8 and section 8 A of the Act, to release the offender on bail, provided the offence alleged is one which would be bailable, if committed in British India ?

The reference was heard.

*Strangman*, Advocate General, with *Nicholson*, Public Prosecutor, for the Crown.—As the offence of cheating is not mentioned as an extraditable offence in the treaty entered into between the British Indian Government and the Hyderabad State, it is not open to

the latter to demand extradition for the offence as of right; but when once a warrant for the offence is issued by the Political Agent under section 7 of the Indian Extradition Act, the Magistrate in British India is bound to execute it, if the warrant is for an offence extraditable under the Act. What the treaty says is that the contracting powers are bound to extradite only in certain cases, in which cases the extradition is compulsory; but in other cases, the British Indian Government may, if it chooses, surrender the person.

Section 18 of the Act refers only to procedure, and it comes into operation only when something is done in derogation of the treaty. Here, for instance, by extraditing for cheating you do not take anything away from the treaty; but on the contrary, you add something to it.

As regards bail, the Magistrate has no power to grant it unless the warrant is endorsed under section 8 of the Act: *Balthasar* v. *Emperor* [1].

*G. N. Thakor*, for the accused:—The offence of cheating is not mentioned in the treaty though it is enumerated in Schedule I to the Indian Extradition Act as an extraditable offence.

Section 18 of the Act is divisible into two parts. The first part says that nothing in Chapter III of the Act shall derogate from the provisions of any treaty for extradition of offences. Secondly, the section goes on to say that the procedure provided by such treaty shall be followed in preference to the one provided by the Act. This means that when there exists a treaty, it is that treaty alone which is to be taken as a guide for the substantive portion as also for the procedural functions.

(1) (1906) 33 Cal. 1082.

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To determine what is an extraditable offence, one has to look at the terms of the treaty alone, for the definition of the term extraditable offence in section 2 of the Act yields, under section 18, to the enumeration of the offences in the treaty.

The main idea of a treaty is reciprocity. The treaty here also opens with a similar preamble of reciprocity. If, therefore, the Hyderabad State cannot be compelled to extradite for the offence of cheating, while the British Indian Government undertakes to extradite a person for the offence, something is clearly done in derogation of the treaty. The word "derogate" is defined in the Oxford Dictionary, as (1) to repeal or abrogate in part (a law, sentence, &c.); to destroy or impair the force and effect of; to lessen the extent or authority of; (2) to detract from; to lessen; abate; disparage, depreciate; (3) to curtail or deprive (a person) *of* any part of his rights; (4) to take away (something *from* a thing) so as to lessen or impair it.

It being the privilege of a British subject not to be surrendered to a foreign State for an offence not mentioned in the treaty, it is a derogation of the terms of the treaty that he can be extradited for an offence not mentioned in the treaty. The Act is a penal Statute; it encroaches upon the liberty of the British subject, and also on the right of British Government. It must, therefore, be strictly construed to respect such rights: see Maxwell on Interpretation of Statutes (Fifth Edition), page 461. Where section 18, therefore, is patient of such a construction, this Court should accord that construction, even if the root sense of the term "derogate" may not be quite favourable to it.

Suppose, a treaty includes more offences than what are enumerated in the Schedule to the Act, then unquestionably section 18 comes into play. But, when the

case is converse, you trench upon the rights of the British subjects and derogate from the terms of the treaty: see also Halsbury's Laws of England, Volume XIV, page 406, section 930.

All the crimes enumerated in the Extradition Act are not, however, to be found in every treaty and the Acts are not applicable so far as they can be applied consistently with the terms and conditions contained in the treaty: Halsbury's Laws of England, Volume XIV, page 407, section 933; St. 33 and 34 Vic., c. 52, section 2; *The Queen* v. *Wilson* (1); Maxwell on Interpretation of Statutes, (Fifth Edition), page 39.

The High Court has ample powers to grant bail to a person who is being proceeded against under the Indian Extradition Act: *Rudolf Stallman* v. *Emperor* (2).

*Strangman*, in reply :—Where an Act under which proceedings are taken makes special provision for the grant of bail, such provision must be followed in preference to the more general provisions contained in the Criminal Procedure Code.

The term "derogate" means to repeal in part or take away from. When the Act adds one more offence to those mentioned in the treaty, it does not take anything away from the treaty; but it really adds something to the treaty.

The appeal *ad misericordiam* has no substance at all, for the Act provides a number of safe-guards. First, the authority to issue a warrant under section 7 rests with the Political Agent and not the Native State. When the Political Agent acts he is fenced by a number of rules (see page 55 of Muddiman's Law of Extradition). Next, the Magistrate executing the warrant has the power to report the case for order of Local Government

(1) (1877) 3 Q. B. D. 42. (2) (1911) 15 C. W. N. 736.

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[section 8 (*a*)]; and finally, the Local Government has the power to stay proceedings and discharge the person in custody (section 15).

HEATON, J.:—The Chief Presidency Magistrate finding himself in difficulties in a case which he had to deal with under the Indian Extradition Act, XV of 1903, has referred certain questions to us which he is empowered to do by section 432 of the Criminal Procedure Code.

The questions are four in number, but the one of chief importance arises out of the controversy, to put it briefly, whether a person accused of cheating in the Hyderabad State can be made the subject of a warrant under section 7 of the Indian Extradition Act. If we read the Act by itself, no doubt on the point arises, because cheating is an extradition offence as appears from the Schedule to the Act. But the attention of the Chief Presidency Magistrate was called to the Extradition Treaties between the Governor General of British India and the Hyderabad State, and having read the treaties and referred to section 18 of the Act, a doubt did arise in his mind. It was this: Cheating is an extradition offence under the Act, but it is not one of those offences for which extradition is provided by the treaty. Section 18 says that nothing in the Act is to derogate from the provisions of the treaty. The argument then proceeds: if we extradite under the Act for an offence not mentioned in the treaty, we are derogating from the provisions of the treaty. That, to my mind, quite clearly is an argument based on the assumption that because the treaty provides that there may be or shall be extradition in certain cases, it implies that there shall not be extradition in other cases. I can say this after listening to the arguments and after much discussion: that there is no other logical basis for the contention. For the treaty itself

does not say that there shall not be extradition in other cases, and therefore if it means that, it means it not by what it says but by what it implies. I do not wish for a moment to be understood as meaning that there may not be great force in that way of putting the case. But we have to determine whether or not the treaty does imply that there should be no extradition except in the matter of offences named in the treaty. And though there may be force in the argument urged by Mr. Thakor, it seems to me there is a great deal more force in the argument urged on the other side. When analysed and reduced to the smallest possible compass, it really comes to this, whether extraditing under the Act for an offence not mentioned in the treaty derogates from the provisions of the treaty, and we have to consider what the word "derogate" means. Now it certainly does not derogate from the express provisions. Therefore again we are reduced to a consideration whether it derogates from the implied provisions, or rather whether there are implied provisions of the kind asserted. So that we are practically reduced to the first argument over again. I cannot think that it is implied in the treaty that there cannot be extradition for offences not mentioned in the treaty. Principally for this reason ; if we imply it, we imply that the British Government by making a treaty with a Native State deprived itself of the power to legislate regarding a matter which fell within its own legislative power, i. e., a matter of arresting persons who are supposed to have committed certain offences in Native States. The power of making such arrests is essential where there is an extradition treaty and it may be very desirable where extradition is or can be arranged for otherwise than by treaty. I cannot think that the Government intended by this treaty to deprive itself of the power to legislate for the purpose of facilitating extradition

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which could be arranged for otherwise than by treaty. To imply this seems to me to imply what I cannot think the Government wished to do: what there was no necessity for doing; and what, on the whole, it seems to me it would be unreasonable to do. In arriving at this conclusion I am influenced by the nature of the relations between the Government of India and Native States. I do not assert that the same conclusion would be reached if the parties to the treaty were on both sides independent Sovereign States. I have, therefore, no difficulty in my own mind in answering the first question put by the learned Chief Presidency Magistrate which is:—

Whether in view of section 18 of the Indian Extradition Act, XV of 1903, the offence of cheating is an extradition offence so far as British India and Hyderabad State are concerned, notwithstanding its omission from Article IV of the treaty dated the 8th May 1867 between the British Government and Hyderabad State?

My answer is that the offence of cheating is an extradition offence so far as British India is concerned, notwithstanding its omission from Article IV of the treaty. Whether it is an extradition offence so far as the Hyderabad State is concerned I really do not know, and for the purposes of this case it is quite immaterial to consider.

Questions 2 and 3 do not seem to me to need an answer for the purposes of this reference.

Question 4, to put it briefly, is whether the Magistrate has power to admit an arrested person to bail apart from the provisions of sections 8 and 8A of the Act. I think he has no such power. The Act directs that the person, when arrested, shall, "unless released in

accordance with the provisions of this Act," be forwarded to the place and delivered to the person or authority indicated in the warrant. Then by clause 2 of section 7 and by clause 1 of the same section it is provided that the Magistrate shall act in pursuance of the warrant. If he does these things, it is not open to him to act under section 496 of the Criminal Procedure Code and to admit to bail otherwise than is provided in the Indian Extradition Act, and as the provisions in the Indian Extradition Act are so specific and so clear, there is in my mind no doubt that they override the provisions of section 496 of the Criminal Procedure Code, and I would answer question 4 accordingly.

HAYWARD, J.:—I concur. The main question to be answered is whether cheating is an extradition offence notwithstanding its omission from Articles III and IV of the treaty with the Hyderabad State and in view of the provisions of section 18 of the Indian Extradition Act XV of 1903.

The question must, in my opinion, be answered in the affirmative. The effect of Articles III and IV of the treaty referred to in this reference amounts to this that the surrender of a person charged with cheating shall not be a bounden duty of the British Government, and it seems to me important to note that the Articles do not provide that such an offender shall not in any case be surrendered by the British Government. On the other hand, the Chief Presidency Magistrate is bound to surrender such an offender in accordance with the Schedule of the Indian Extradition Act if the case is not covered by the provisions of section 18 of the Act. The provision there is that nothing shall be held to derogate from the provisions of the extradition treaty, and it has been argued that it would derogate from the treaty, to add to it the offence of

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cheating. That argument, however, does not commend itself to me as a reasonable interpretation of the words used. If it had been the intention to exclude the addition of any offence, then the word "derogate" or "take away from" could hardly have been used. In its place would have been substituted some such word as "modify". So that, in my opinion, there cannot be said, upon a plain interpretation of the words used, to be any derogation from the provisions of the treaty by the insertion of the offence of cheating in the Schedule of the Indian Extradition Act. It could only, in my opinion, be argued in a strained sense that there would be derogation by regarding the provisions of the treaty as conferring some kind of freedom from liability to surrender a person accused of cheating upon the British Government. But even that argument could not be supported, because entire freedom of action is reserved to the British Government by the provisions of section 15 of the Act which could not, in any sense, be held to be a derogation from the provisions of the treaty under section 18 of the Act.

The subsidiary question referred to us is whether bail could be allowed under the ordinary provisions of the Criminal Procedure Code notwithstanding the special provisions of sections 8 and 8A of the Act. It seems to me that that question must clearly be answered in the negative. The Criminal Procedure Code is a general Act and it is specially provided in the Indian Extradition Act that the accused person, when arrested, shall be forwarded to the authority indicated in the warrant unless released in accordance with the provisions of this Act. That seems to me clearly a provision that the accused person must not be released in accordance with the provisions of any other Act, and the only provisions for his release on bail are those provided in sections 8 and 8A of the Act. The general provisions

of the Criminal Procedure Code must, in this matter, yield, according to the well-known rule, to the special provisions of the Indian Extradition Act.

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*Answers accordingly.*

R. R.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.*

DWARKADAS MOTILAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 7,12, 33, 37 AND 38), APPELLANTS *v.* BAI JAKORE, WIFE OF MAGANLAL BHAGUBHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

1918. *August* 7.

*Hereditary Offices Act (Bom. Act III of 1874 as amended by Bom. Act V of 1886), section 2—Vatan—Inam—Jat or Personal Inam—Grant for maintenance—Government Resolution declaring the Inam held on service tenure—Subsequent settlement with the Government whereby the property permanently enfranchised as private property—Sanad—Construction.*

The property in suit was known as Vania Desai Vatan property. It consisted of four villages Sureli, Vinzol, Padardi and Kasanpur in the Panch Mahals. In 1860, the Panch Mahals passed by a treaty from the Maharaja Scindhia of Gwalior to the British Government, which as a result of the investigation into the nature of the various holdings in the territory ceded by Scindhia found that the four villages were held on service tenure. The Desais presented petitions to Government in 1879 and 1882 and contended that their Inam was Jat or personal Inam, granted for maintenance (Jivak Badal) and not held for service. As a result of these petitions, the Government in a Resolution, dated the 8th May 1884 observed that the title asserted to the villages hardly brought them under the class of Hereditary Inam and arranged with the Desais for a two anna settlement to be calculated on a full assessment of these villages. In 1888, Sanads were issued by Government to Vania Desais in respect of the villages Sureli and Vinzol, reciting that the villages had been found to be held as personal Inam without the condition of service. In respect of the other two villages Padardi and Kasanpur, the Sanads were not forthcoming but it appeared from the alienation register that the Sanads were issued in respect of these villages also and the register showed that the Inam lands in all these villages were "permanently enfranchised as private property." In 1913, the plaintiff as the daughter and reversionary heir of the last male holder of the Inam sued to

* First Appeal No. 174 of 1916.