Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 71 of 2022
(Arising out of SLP (Crl.) No. 7723 of 2019)

Union of India & Anr.

.... Appellant(s)

Versus

Shaikh Istiyaq Ahmed & Ors.

.... Respondent (s)

J U D G M E N T

L. NAGESWARA RAO, J.

Leave granted.

1. The Respondent was convicted by the Supreme Court of Mauritius under Section 30(1)(f)(II), 47(2) and 5(2) of the Dangerous Drugs Act for possession of 152.8 grams of heroin and was sentenced to imprisonment for 26 years. He was transferred to India as per the Repatriation of Prisoners Act, 2003 (hereinafter, '*the 2003 Act*') on 04.03.2016. He preferred a representation under Section 13 (6) of the 2003 Act and requested for scaling down the sentence to 10 years as per Section 21 (b) of the Narcotics Drugs and Psychotropic Substances Act, 1994 (hereinafter, *'NDPS Act'*). In the same

representation, he also requested that the sentence that he has already undergone in Mauritius may be taken into account for revision of his release date. By an order dated 03.12.2018, the Ministry of Home Affairs, Government of India informed the Respondent that the period spent by him in remand will be deducted from the sentence of 26 years. However, another order was passed on the same day, rejecting his request for reduction of sentence to 10 years from 26 years. The said order rejecting the representation for reduction in sentence was challenged by the Respondent in a Writ Petition before the High Court of Bombay which was allowed by the judgment dated 02.05.2019. Aggrieved thereby, this Appeal is preferred.

2. Detention of foreign prisoners was a matter of concern for the Government of India as well as foreign Governments for which the Repatriation of Prisoners Act, 2003 was enacted in conjunction with bilateral treaties enabling the Central Government to transfer foreign convicted persons to their country and vice versa. One of the objectives of the 2003 Act was the transfer of foreign convicted nationals to their respective nations in order to take care of the human aspect in as much as the said convicts would be near their families and have better chances of social rehabilitation. One of the

salient features of the legislation is that the enforcement of the sentence shall be governed by the law of the receiving State. However, the receiving State shall be bound by the legal nature and duration of the sentence as determined by the transferring State. Section 12 and 13 of the 2003 Act, which are relevant for the adjudication of this case, are as follows:

> ***"12. Transfer into India. —***
> *(1) The Central Government may accept the transfer of a prisoner, who is a citizen of India, from a contracting State wherein he is undergoing any sentence of imprisonment subject to such terms and conditions as may be agreed to between India and that State.*
> *(2) If the Central Government accepts the request for a transfer under sub-section (1), then, notwithstanding anything contained in any other law for the time being in force, it may issue a warrant to detain the prisoner in prison in accordance with the provisions of section 13 in such form as may be prescribed.*
>
> ***13. Determination of prison and issue of warrant for receiving transfer in India. —***
> *(1) The Central Government shall, in consultation with a State Government, determine the prison situated within the jurisdiction of such State Government where the prisoner with respect to whom a warrant has been issued under sub-section (2) of section 12, shall be lodged and the officer who shall receive and hold him in custody.*

(2) The Central Government shall authorize any officer not below the rank of a Joint Secretary to that Government to issue a warrant under sub-section (2) of section 12 and to direct the officer referred to in sub-section (1) to receive and hold the prisoner, with respect to whom the warrant is issued, in custody.

(3) It shall be lawful for the officer referred to in sub-section (1) to receive and hold in custody any prisoner delivered to him under the direction made in the warrant issued under sub-section (2) of section 12 and to convey such prisoner to any prison determined under sub-section (1) for being dealt with in accordance with the said warrant and if the prisoner escapes from such custody, the prisoner may be arrested without warrant by any person who shall without undue delay deliver such prisoner to the officer in charge of the nearest police station and the prisoner so arrested shall be liable for committing an offence under section 224 of the Indian Penal Code (45 of 1860) and shall also be liable to be dealt with in accordance with the said warrant.

(4) A warrant under sub-section (2) of section 12 shall provide for—

(a) the bringing of the prisoner into India from a contracting State or a place outside India;

(b) the taking of such prisoner in any part of India being a place at which effect may be given to the provisions contained in the warrant;

(c) the nature and duration of imprisonment of the prisoner in accordance with the terms and conditions referred to in sub-section (1) of section 12 and the imprisonment of such prisoner in India in such manner as may be contained in the warrant; and

(d) any other matter which may be prescribed.

(5) Notwithstanding anything contained in any other law for the time being in force, the imprisonment of a prisoner in compliance with a warrant issued under sub-section (2) of section 12 shall be deemed to be imprisonment under a sentence of a court competent to pass such a sentence of imprisonment in India.

(6) If the sentence of imprisonment passed against the prisoner in the contracting State is incompatible with the Indian law as to its nature, duration or both, the Central Government may, by order, adapt the sentence of such punishment as to the nature, duration or both, as the case may be, as is compatible to the sentence of imprisonment provided for a similar offence had that offence been committed in India:

Provided that the sentence so adapted shall, as far as possible, correspond with the sentence imposed by the judgment of the contracting State to the prisoner and such adapted sentence shall not aggravate the punishment, by its nature, duration or both relating to the sentence imposed in the contracting State."

3. On 24.10.2005, an agreement was entered into between the Government of India and Government of Mauritius on the Transfer of Prisoners. Article 8 of this Agreement refers to conditions for continued enforcement of sentence, which are as follows:

"ARTICLE 8
Continued enforcement of sentence

1. *The receiving State shall be bound by the legal nature and duration of the sentence as determined by the transferring State.*

2. *If, however, the sentence is by its nature or duration or both incompatible with the law of the receiving State, or its law so requires, that State may, by court or administrative order, adapt the sentence to a punishment or measure prescribed by its own law. As to its nature and duration the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the transferring State. It shall however not aggravate, by its nature or duration, the sentence imposed by the transferring State."*

4. In so far as the conviction and sentence of the Respondent is concerned, he travelled twice to Mauritius in the guise of doing business in scrap metal. On the third occasion, he was found to be in possession of 152.8 grams of heroin and was arrested. The Supreme Court of Mauritius convicted the Respondent after taking into account the mitigating circumstances pleaded by the Respondent and sentenced him to imprisonment for 26 years. On 09.10.2015, an undertaking was given by the Respondent that he will abide by the terms and conditions of the sentence adaptability order issued under the agreement/treaty on transfer of sentenced prisoners entered into between India and Mauritius while making a request for his repatriation to India. Subsequently, his repatriation to India was approved on 04.03.2016 and a warrant of transfer was issued on 24.10.2016. After the transfer of the

Respondent to India under the 2003 Act, the Respondent preferred a representation to the Ministry of Home Affairs, Government of India for reduction of sentence from 26 years to 10 years which is the maximum punishment prescribed under Section 21 (b) of the NDPS Act as applicable for the quantity of heroin seized from the Respondent. By an order dated 03.12.2018, his representation for reduction of sentence term was rejected.

5. While allowing the Writ Petition filed by the Respondent, the High Court was of the opinion that if the offence was committed in India, the Respondent would have been sentenced to for a maximum period of 10 years as provided in Section 21(b) of the NDPS Act. The reason given by the authorities for not accepting the request made by the Respondent for reduction of sentence by 10 years was found to be not justifiable. The rejection of the request of the Respondent was found to be in violation of Section 13 (6) of the 2003 Act. On such findings, the High Court declared that the Respondent was entitled for the benefit of adaptation of sentence in terms of Section 13 of the 2003 Act. Notice was issued by this Court on 26.08.2019 in the SLP and the judgment of the High Court was stayed.

6. Ms. Madhvi Divan, learned Additional Solicitor General for India appearing for the Appellant relied upon the

statement of objects and reasons of the 2003 Act to submit that the receiving State is bound by the legal nature and duration of the sentence as determined by the transferring State, though the enforcement of the sentence is governed by the law of the receiving State. She further submitted that the Central Government may accept the transfer of the prisoner in accordance with Section 12 of the 2003 Act subject to the terms and conditions as are agreed upon between India and another contracting State. Section 13 (6) of the 2003 Act gives discretion to the Central Government to adapt the sentence of imprisonment passed against the prisoner in the contracting State if it is incompatible with the Indian law as to its nature, duration or both. As per Section 13 (6), the adaptation should be compatible to the sentence of imprisonment provided for a similar offence, had the offence been committed in India. According to the proviso to Section 13 (6), the sentence adapted shall as far as possible, correspond to the sentence imposed by the judgment of the contracting State to the prisoner and such adapted sentence shall not aggravate the punishment by its nature, duration or both relating to the sentenced imposed in the contracting State. The ASG relied upon Article 8 of the agreement between the Government of India and Government of

Mauritius to argue that India is bound by the legal nature and duration of the sentence as determined by the transferring State. She asserted that the expression 'incompatible' appearing in Section 13 (6) of the 2003 Act was misconstrued by the High Court. According to the learned Additional Solicitor General, discretion vested in the Central Government under Section 13 (6) of the 2003 Act required to be exercised only when the sentence of imprisonment passed against the prisoner by the contracting State is incompatible with the Indian law as a whole. The exercise of discretion of the Central Government under Section 13 (6) of the 2003 Act depends on variety of factors, keeping in mind the comity of nations and strategic partnership. Mechanical reduction of sentence would be detrimental to the interests of the other prisoners awaiting repatriation from Mauritius to India. She further asserted that the Respondent cannot seek reduction of sentence after submitting an undertaking that he will abide by the sentence adaptability order issued at the time of his repatriation back to India. The contention of the Appellant is that the decision to not reduce the sentence of the Respondent is prompted by foreign policy which should not be lightly interfered with by judicial review. The learned Additional Solicitor General further referred to the strong

bilateral ties between India and Mauritius which may be adversely affected by interference with the sentence imposed by the Supreme Court of Mauritius in a case of drug trafficking which is a pressing issue in Mauritius presently.

7. Mr. A.M. Dar, learned Senior Counsel appearing for the Respondent justified the judgment of the High Court and submitted that no reasons have been given by the Government for rejecting the representation preferred by the Respondent for reduction of sentence. He submitted that Respondent is being discriminated as the Government of India has reduced the sentence in respect of other persons who have been repatriated to India. He also referred to a judgment of the High Court of Bombay by which the sentence of the petitioner therein was reduced to 20 years from 30 years. During the course of hearing, we were informed that the said judgment is subject matter of a Special Leave Petition pending in this Court. He further stated that there is obvious incompatibility between the sentence imposed by the Supreme Court of Mauritius with the sentence that may be imposed for a similar offence under Section 21 (b) of the NDPS Act. The quantity of heroin which was found to be in possession of the Respondent is an intermediate quantity under the NDPS Act and the maximum

sentence that can be imposed on the convict can be only 10 years. As the Respondent has already undergone 10 years, the Government accepted to take into account the sentence undergone by him in Mauritius.

8. To substantiate its argument, the Appellant placed on record a document titled “Commonwealth Human Rights Initiative”, Bringing them Home - Repatriation of Indian Nationals from Foreign Prisons: A Barrier Analysis, 2017. In this document, a reference has been made to the ‘Guidelines for the Transfer of Sentenced Persons under the Repatriation of Prisoners Act, 2003’ issued by the Ministry of Home Affairs, Government of India on 10.08.2015 under the Repatriation Act, 2003. As per the guidelines, in case of adaptation of sentence of a prisoner convicted on the charge of drug trafficking, a reference has to be made to the Narcotics Control Bureau (NCB) to assess the proposed repatriation and the probabilities of the prisoner indulging in similar activity on his release. Before granting permission for repatriation, the prisoner has to be informed about the total quantum of sentence which he will have to undergo in India and repatriation would be allowed only if the prisoner gives his consent in writing. There is no dispute that the Respondent has given an undertaking to this effect on 19.10.2015.

9. The question that arises for our consideration is related to the interpretation on Sections 12 and 13 (6) of the 2003 Act and Article 8 of the transfer of sentenced prisoners' agreement entered between Indian and Mauritius.

10. The preamble of the 2003 Act initially reads as follows: -

> *"An Act to provide for the transfer of certain prisoners from India to country or place outside India and reception in India of certain prisoners from country or place outside India."*

11. The object of the 2003 Act is to provide an opportunity to the convicts to be repatriated to their country so that they can be closer to their families and have better chances of rehabilitation. One of the salient features of the 2003 Act is also that the enforcement of sentence of the repatriated prisoner has to be governed by the law of the receiving State, however in doing so, the receiving State is bound by the legal nature and duration of the sentence as determined by the transferring State. While operating in accordance with this object and feature, Section 12 of the 2003 Act makes it clear that the transfer of a prisoner who is a citizen of India from a contracting State wherein he is undergoing sentence of imprisonment may be accepted by the Central Government, subject to certain conditions that may be agreed between India and the contracting State. The

decision to be taken by the Government on the representation preferred for transfer, therefore, shall be subject to the agreement entered into between Republic of India and Republic of Mauritius regarding the transfer of prisoners. Article 8 of the said agreement categorically states that while continuing the enforcement of the sentence, India shall be bound by the legal nature and duration of the sentence as determined by transferring State.

12. Article 8 (2) of the agreement provides that if the sentence imposed by the transferring State (Mauritius) is incompatible with the law in India by its nature or duration or both, the sentence may be adapted by the receiving State, namely India in this case. The adaptation shall be with regard to the duration or nature of punishment as prescribed by Indian law. However, Article 8 (2) further makes it clear that even when the sentence is adapted by the receiving State (India), the nature and duration of the punishment shall, as far as possible, correspond with that imposed by the transferring State (Mauritius). The provision for adaptation is also found in Section 13(6) of the 2003 Act. Section 13 (6) empowers the Government of India to adapt the sentence compatible to the sentence of imprisonment provided for a similar offence had that offence been committed in India,

provided the sentence of imprisonment passed in the contracting State (Mauritius) is incompatible with Indian law.

13. It is also relevant to examine the scope of Section 12 (2) of the 2003 Act. The Section enables the Government to issue a warrant to detain the prisoner in accordance with the provisions contained in Section 13 (4) if the Government decides to accept the transfer of a prisoner under Section 12(1) of the Act. Section 13 (4) (c) of the Act makes it clear that a warrant shall state the nature and duration of imprisonment of the prisoner in accordance with the terms and conditions as referred to in Section 12 (1) and the imprisonment of such prisoner in India shall be in such manner as may be contained in the warrant. It is relevant to note that the warrant issued in this case on 24.10.2016 refers to the sentence of the Respondent as 26 years.

14. On a combined reading of Section 12 and 13 of the 2003 Act and Article 8 of the Agreement, the following principles can be deduced: -

A. Any request for transfer of a prisoner from a contracting State to India shall be subject to the terms and conditions as stated in the agreement between a contracting State and Government of India.

B. The duration of imprisonment shall be in accordance with the terms and conditions referred to in Section

12 (1) of the 2003 Act, meaning thereby that the acceptance of transfer of a prisoner shall be subject to the terms and conditions in the agreement between the two countries with respect to the transfer of prisoners. To make it further clear, the sentence imposed by the transferring State shall be binding on the receiving State i.e., India.

C. On acceptance of the request for transfer of an Indian prisoner convicted and sentenced in a contracting State, a warrant shall be issued for detention of the prisoner in accordance with the provisions of Section 13 of the 2003 Act in the form prescribed.

D. The warrant which is to be issued has to provide for the nature and duration of imprisonment of prison in accordance with the terms and conditions as mentioned in Section 12(1) of the Act, that is, as agreed between the two contracting States.

E. The imprisonment of the transferred prisoner shall be in accordance with the warrant.

F. The Government is empowered to adapt the sentence to that provided for a similar offence had that offence been committed in India. This can be done only in a situation where the Government is satisfied that the sentence of the imprisonment is

incompatible with Indian law as to its nature, duration or both.

G. In the event that the Government is considering a request for adaptation, it has to make sure that the adapted sentence corresponds to the sentence imposed by the contracting state, as far as possible.

15. It is, therefore, clear that the sentence imposed by the Supreme Court of Mauritius in this case is binding on India. A warrant of detention was issued in which it was specified that the Respondent has to undergo a sentence of 26 years. As per Section 13 (4), the sentence shall be 26 years. The question of adaptation of the sentence can only be when the Central Government is convinced that the sentence imposed by the Supreme Court of Mauritius is incompatible with Indian law.

16. Reference to Indian law in Section 13 (6) is not restricted to a particular Section in NDPS Act. Incompatibility with Indian law is with reference to the enforcement of the sentence imposed by the Supreme Court of Mauritius being contrary to fundamental laws of India. It is only in case of such an exceptional situation, that it is open the Central Government to adapt the sentence imposed by the Supreme Court of Mauritius to be compatible to a sentence of imprisonment provided for the similar offence. Even in

cases where adaptation is being considered by the Central Government, it does not necessarily have to adapt the sentence to be exactly in the nature and duration of imprisonment provided for in the similar offence in India. In this circumstance as well, the Central Government has to make sure that the sentence is made compatible with Indian law corresponding to the nature and duration of the sentence imposed by the Supreme Court of Mauritius, as far as possible._

17. The High Court allowed the Writ Petition only on the ground that there is incompatibility between the sentence imposed on the Respondent by the Supreme Court of Mauritius and a sentence that would have been imposed on the Respondent if a similar offence would have been committed in India. In doing so, the High Court failed to examine the statement of object and reasons for the 2003 Act, the scope of Sections 12 and 13 of the 2003 Act and the agreement for transfer of prisoners as entered into between Republic of India and Republic of Mauritius.

18. The adaptation of sentence from 26 years to 10 years as per Section 21 (b) of the NDPS Act was rejected by the Central Government on the ground that it would amount to reduction of sentence by 16 years which would not be in consonance with Section 13 (6) of the 2003 Act and Article 8

of the Agreement. The reasons recorded by the Central Government to reject the request for scaling down the sentence are in accordance with the provisions of the 2003 Act and the agreement entered into between India and Mauritius as discussed above. As we have upheld the order of the Central Government, for the reasons given above, it is not necessary to refer to the other submissions made by the learned Additional Solicitor General.

19. For the aforementioned reasons, the Appeal is allowed.

.....J.
[L. NAGESWARA RAO]

.....J.
[B. R. GAVAI]

New Delhi,
January 11, 2022.