
(2006) 09 KL CK 0008
In the High Court Of Kerala
Case No : Criminal M.C. No. 2745 of 2006

Hisa A. Sheng

APPELLANT

Vs

Administrator

RESPONDENT

Date of Decision : 29-09-2006

Acts Referred:

Foreigners Act, 1946 — Section 14
Merchant Shipping Act, 1958 — Section 161, 162, 163, 164, 165
Penal Code, 1860 (IPC) — Section 280, 336
Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 — Section 4

Citation : (2007) CriLJ 821 : (2006) 4 KLT 945

Hon'ble Judges : K.R. Udayabhanu, J

Bench : Single Bench

Advocate : V.J. Mathew, for the Appellant; Shafik M. Abdulkhadir and John Varghese, Assistant Solicitor General, for the Respondent

Judgement

K.R. Udayabhanu, J.—Petitioners 33 in number are the distressed and marooned seamen belonging to different nationalities who are the crew of "ISABELL-III", wrecked at the reefs of the sea near the Islet of Suheli Par, part of the Lakshadweep group of Islands. The prayer is to quash the proceedings initiated against them vide Crime No. 11/2006 of Kavaratti Police Station under Sections 280 and 336 of the Indian Penal Code and Section 14 of the Foreigners Act. It is the case of the petitioners that they are bona fide crew of the foreign fishing vessel, wrecked and stranded on 15-7-2006 while the above fishing vessel was sailing from Oman to Singapore. The accident happened when the vessel was passing through the Indian territorial waters by way of innocent passage; and immediately the matter was informed to the Indian Coast Guard. The incident took place at 20.30 hours. u/s 393 of the Merchant Shipping Act and the U.N. Convention on Law of the Sea, the seamen in distress is entitled to pass over to the adjoining land of any nation for saving their lives. The Merchant Shipping (Distressed Seamen), Rules 1960 prescribes that the derelict seamen should be saved at any cost and repatriated to their return port at the cost of the owner of

the vessel. The petitioners were forced to enter the Lakshadweep Island and hence they are protected under the Merchant Shipping Act, the Merchant Shipping (Distressed Seamen) Rules, 1960 and the U.N. Conventions on the law of the sea. It was at the instructions of the Coast Guard and Naval authorities that they jumped into the sea and swam for 4 to 5 hours to the nearby Suheli Par Island. The Chief Engineer was rescued as air lifted by the Naval Helicopter as he was unable to swim that much of distance. At best the offence u/s 280 I.P.C., i.e., rash navigation of the vessel, will lie only against the first accused, who is the Master of the vessel whereas the Lakshadweep police have charged all the 33 of the crew for the offences u/s 14 of the Foreigners Act and Sections 280 and 336 of I.P.C. The Master had put the vessel on an auto pilot mode and the crew on duty on the deck was keeping watch on the voyage which is the permitted usual practice. In the instant case the crew on duty could not locate the Islet as no light emanated from the light house situated therein. The petitioners have also been charged u/s 336 I.P.C, which also will not lie as it was definitely and admittedly a ship wreck. The ship was on an auto pilot set at 10 nautical miles speed. It was due to faulty compass and rough sea and bad weather that the vessel happened to wrongly deviate at 10 degree from the normal route and hit at the coral reefs. It was nothing but force majeure and act of god and hence none of the alleged offences will lie against any of the crew.

2. Respondents 1 and 2, Lakshadweep Administrator and the Circle Inspector of Police, Kavaratti have filed a joint counter affidavit. It is mentioned that Lakshadweep Administration immediately despatched its cargo barge M.V. Cheriyaam along with police and port personnel on receipt of the SOS from the vessel. All the crew were rescued from the Suheli Par Island. On 16-7-2006 at around 15 hours they were brought to Kavaratti by naval helicopter. They were examined at the local hospital and were detained for detailed interrogation. It is learnt that the vessel left Oman on 10th July 2006 for Singapore with 50 tonnes tuna fish. The petitioners could be properly interrogated only on 27-7-2006 with the help of the foreign language expert of the Intelligence Bureau, New Delhi as the crew did not speak English. During the interrogation, the first petitioner, captain of the ship did not disclose the entire information. It appeared that he is a regular visitor to Oman and that he travelled through the same sea route earlier and had come closer to Suheli Par Island before the incident, in 2006 itself. He has also admitted that he had not checked either the GPS or Radar system which would indicate the exact position of the vessel and obstructions en-route if any. He has admitted that he is entirely responsible for the mishap. It was also found that he was not carrying the necessary certificate of qualification for running the vessel which has a length of 50.8 metres. The Chief Engineer has also not disclosed the exact quantity of fuel available in the vessel. The statements of the crew are prevaricating and contradictory. Hence, a detailed interrogation and investigation is required. An information intercepted over fax to the captain of the vessel from Hal Soon International Trading Pvt. Ltd. contained the direction to give only vague replies and not to be specific. It is pointed out

that the investigation is not complete and the inspection of the vessel could not be carried out due to the rough and turbulent sea. On 15-7-2006 on the ill-fated day although the sea was rough, there was no rain at Suheli and the visibility was not poor. Had the captain been careful in his duties, the accident could have been averted. Had he bothered to ascertain the exact course of ship that went astray for hours together and had any of the crew been vigilant, the Island could have been sighted even with naked eye before at least two hours. The vessel was in the territorial waters and inside the Exclusive Economic Zone of India at least from the early hours of the day on 15-7-2006 which is in violation of the Passport Rules and the Foreigners Act. The respondents have no case that the petitioners have violated any provision of the Merchant Shipping Act, U.N. Conventions, or the Provisions of Maritime Zone of India (Regulating of Shipping by Foreign Vessels) Act, 1981. The owner of the vessel or the Vessel's agency has not taken any steps to prevent spillage of oil from the vessel. There was no natural calamity sufficient enough to cause the accident but for the weather conditions prevailing due to the monsoon season. The innocence of the crew can be ascertained only after thorough search of the vessel. It is asserted that the petitioners have committed the offence punishable u/s 14 of the Foreigners Act and Sections 280 and 336 of the Indian Penal Code. The captain of the vessel is primarily responsible for the act and the other members are also individually responsible.

3. Respondents 3 and 4, the Coast Guard and the Union of India did not file any counter statement.

4. I find that it is seen from the statements recorded on interrogation of the first petitioner, captain of the vessel and the 2nd petitioner. Chief Engineer that the ship contained about 120 tonnes of oil required for navigation of the vessel and about 50 tonnes of fish. More than 70 days since the date of the ship wreck the petitioners are in custody. There is nothing to show that any attempt has been made to enter the vessel by the Naval authorities or by the Coast Guard. As pointed out by Mr. V.J. Mathew, counsel for the petitioners, it is hard to believe that the above authorities are incapable of entering the wrecked vessel, by making use of advanced technology and equipments. The specific allegation in Annexure-A5 F.I.R. is that the captain and crew wilfully entered the territorial waters, and that the vessel got agrounded at Suheli Par due to the rash and negligent navigation of the Master of the vessel, i.e. first petitioner which also amounted to endangering the life and safety of the crew of the vessel and hence the offences are committed.

5. There is no dispute that the vessel involved is a fishing vessel. The crew 2 to 13 are Philippines nationals, petitioners 14 to 25 and 31 to 33 belonged to the Peoples Republic of China, petitioners 26 and 27 are Indonesian nationals and petitioners 28 to 30 are Vietnamese nationals. All of them were carrying their respective passports. The vessel is owned by a Taiwanese company by name Ocean Age Fishery Co. Ltd. and managed by Deep Sea Fisheries Management

Ltd. Kaohsiung, Taiwan, and the vessel is registered at Port of Victoria, Republic of Seychelles and it was sailing from Oman to Singapore. The petitioners have also produced true copy of the certificate of Seychelles registry under the Merchant Shipping Act which is Annexure-A1. Annexure-A6 is the permit issued by the Government of Sultanate of Oman to fish within the territorial waters of Sultanate of Oman. As per Section 4 of the Territorial Waters, Continental shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, all foreign ships other than war ships including submarines and other under water vehicles shall enjoy the right of innocent passage through the territorial waters. The Managers of the vessel, according to the petitioners, had sent a fax message to the Indian Coast Guard Headquarters on 13-7-2006 intimating that the said vessel was passing through the Indian territorial waters on 15-7-2006 on its way to Singapore and the same was acknowledged, and the copies of which are Annexures A7 and A-7(a). The above facts are not disputed.

6. The vessel after completing the fishing had sailed from Oman on 10-7-2006 and was to reach Singapore on 25-7-2006. The Coast Guard had. communicated to the owners to take precaution to prevent spilling of oil and to avoid pollution of the sea vide Annexure A-8 which would also show that the vessel was grounded only due to an accident. Vessels registered at Seychelles are being monitored by the Seychelles Government's vessel monitoring, control, surveillance section of Fishing Authority. The authority had monitored and maintained data report of the vessel which is Annexure A-10 and A10(a). The same is fully explanatory about the movements of the vessel. The copy of the letters issued by the Managers of the vessel to the Director General of Coast Guard and Director General of Shipping that they shall be fully responsible and shall take all steps to take out fuel from inside the vessel are Annexures-A11 and A-12. Sections 161 to 167 of the Merchant Shipping Act, 1958 cast duties on the Government of India to provide facilities to the distressed seamen. Part-II of the Merchant Shipping (Wreck and Salvage) Rules mention the duties of the receiver of the ship wrecked. As per the Notification issued u/s 391(1) of the Merchant Shipping Act, the Administrator of the Lakshadweep Island is the receiver of wrecked ship within the area surrounding the Lakshadweep Island. The Merchant Shipping (Distressed Seamen) Rules, 1960 direct the authorities to arrange to repatriate the distressed seamen to the return port. Innocent passage in the territorial sea is also provided in Article 17 of the U.N. Convention on the Law of the Sea, to which India is a party; so also Sections 391, 392 & 393 of the Merchant Shipping Act.

7. I find that the fax message allegedly intercepted was routed to be handed over to the Captain and that the exact words indicated only not to tell the exact figure or quantity which was with respect to the quantity of oil in the vessel for which in case of spillage compensation will have to be paid, stands not refuted. The above version was not disputed and hence the contention of the respondents appears to be a trifle exaggerated and just skirting around. It is pertinent to note that the very allegation in the F.I.R. is that the vessel got agrounded at the

Suheli reef due to rash navigation of the Master of the vessel, Mr. Hisa A.. Sheng which also amounted to endangering the life and personal safety of the crew of the vessel, apart from the general allegation that the captain and the crew wilfully entered the territorial waters, allegedly a brazenly provocative act. The reasoning is facile and irretrievably illogical and the stance of the authorities, most disconcerting. Except the Master of the vessel, the responsibility of the crew for navigation of the vessel that they courted the disaster by design is not spelled out from the allegations in the F.I.R. The documents produced in the case and the circumstances also do not prima facie indicate that the petitioners entered the territorial waters, wilfully and even if so they are entitled for innocent passage being the members of the crew of a fishing vessel as per the existing laws and the International Conventions as noted above, a conclusion which is unexceptionable. The action of the Lakshadweep Administration amounts to multiple interactions of the laws and conventions in this regard. The petitioners after their searing experience are detained at Kavaratti for the last more than 70 days and nothing incriminating has been unearthed so far. Evidently the matters are proceeding at a glacial pace. They are given a raw deal and buffeted by the Lakshadweep Administration, bristling at accepting the obligations under the laws and international treaties. Institutional lethargy and callous indifference is the only reason for the indefensible laid back attitude in this regard. Except the first petitioner, the Master of the vessel, the others are not responsible for rash and negligent navigation as mentioned above. The contention to the contra appears to be of fragile legitimacy. Evidently, the rest of the crew members who belong to different nationalities, are working in the fishing vessel to earn their livelihood.

In the circumstances and for the reasons mentioned above, the case registered against the rest of the crew members except the first petitioner, the Master of the vessel, is herewith set aside. The rest of the crew members except the first petitioner is ordered to be released forthwith. The CrI. M.C. is disposed of accordingly.