

(1997) 12 CAL CK 0007

In the Calcutta High Court

Case No : C.R.R. No. 2770 of 1997, C.R.R. No. 3029 of 1997 and C.R.M. No. 3773 of 1997

Swan Fisheries (Private) Ltd. and Another

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 12-12-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227, 397, 401, 439, 482
Foreigners Act, 1946 — Section 13, 14
Forest Act, 1927 — Section 26
Marine Zones of India (Regulations of Fishing by Foreign Vessels) Act, 1981 — Section 10, 11, 12, 2, 26
Penal Code, 1860 (IPC) — Section 120B, 379, 447, 506
Telegraph Act, 1885 — Section 6
Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 — Section 3, 5

Citation : (1998) 60 ECC 36

Hon'ble Judges : A.B. Mukherjee, J

Bench : Single Bench

Judgement

A. B. Mukherjee, J.—Three applications forming three separate proceedings have been heard together and shall be governed by this judgment.

2. C.R.R. 2770 of 1997 was instituted u/s 482 Criminal Procedure Code by two petitioners being M/s. Swan Fisheries (Private) Ltd., a company registered under the Companies Act and having its registered office at New Delhi and Sanjay Malik, Director of the said company. They have prayed for quashing a proceeding arising out of an FJ.R. being 50 of 1997. dated 26.7.97 made at Gosaba Police Station and the subsequent charge sheet giving rise to Case No. BGR 3147 on the ground that the allegation contained in the F.I.R. on the face of it are not tenable against the company & others.

3. Their case is that petitioner company amongst others owns three fishing trawlers under the name and style of CHANPEN MAUSEHI 35. 49 and CHOKEKAMOINAVA 107 and these trawlers are duly registered with the Director

General of Shipping. The petitioner company and the aforesaid trawlers have the right to carry on fishing in Indian waters including the area within the Exclusive Economic Zones. The requisite authorisation, for foreign collaboration, fishing operations and export to the Thai Party including High Sea transfers are available in favour of the petitioner company.

4. On 25/26.7.97 these three trawlers were detained and the Crew numbering 80 (consisting of Indian, Thai and Myanmar Nationals) were arrested on the basis of an F.I.R. dated 25.7.97 filed at Gosaba Police Station. Allegations have been made against them under Sections 447/379/120B/506 IPC. Sections 13 and 14 of Foreigners Act, Section 26 of Indian Forest Act, Section 6(1)(a) of Indian Telegraph Act and Sections 10, 11 and 12 of the Maritime Zone of India Act (Regulation of Fishing by Foreign Vessels) Act of 1981 hereinafter referred to as MZI Act. In terms of the F.I.R. there was an earlier meeting - by Police Officials, Border Security Force, Coast Guard, District Magistrate and a raid was conducted in which five trawlers including the three belonging to the petitioner company were seized while they were anchored near Mayadip Islands and their crew members numbering 138 were put under arrest. The trawlers were also seized and were taken to Namkhana though these trawlers being meant for deep sea fishing were incapable of sailing in shallow waters and as such in the process of there being taken to Namkhana they stuck the ground twice and suffered considerable damage.

5. The petitioner's case is that, the petitioner company is a joint venture company for carrying fishing operations in the Bay of Bengal and for export of fish to Thai party. The company is functioning in terms of the Memorandum and Articles of Associations of the company. They also obtained requisite clearance and approval from the concerned Ministry of the Government of India and they took prior permission before importing vessels from abroad, in 1994. They also took approval from the concerned Ministry so as to enable them to use the fishing boats for the purpose of fishing. Approval was also taken from Ministry of Defence, prior to engaging Foreign Crew. They also obtained Radio Licence from the Ministry of Communication. Clearance was also obtained from the Ministry of Food Processing Industry and Home Affairs. Prior to the fishing vessels proceeding towards Paradip on 20.7.97 the company informed the Commandant, Coast Guard, Eastern Region at Madras. The company also informed the Assistant Commissioner of Fisheries in the Ministry of Food Processing Industry regarding movement of the vessels. On receipt of the information that there were cyclonic weather and rough sea which was likely to worsen further the trawlers took shelters in the interest of safety of the crew as also the vessels. They also informed such movement to the Ministry of Food Processing and Industry. The vessels are "Indian" vessels being owned by the company incorporated in India also have certificate of Registration. The crew on board were in possession of the Sea-Men Book, the crew members at no point of time landed on Indian soil and they were arrested while the vessels were stationary and lying anchored near Mayadip Islands. The offences under MZI Act were not

ordinarily there in the F.I.R. but subsequently added when the crew members filed application for bail, as a result of which the jurisdiction of the Sub-Divisional Judicial Magistrate, Alipore was taken away and as per Rules it vested with the Sub-Divisional Judicial Magistrate, Tamluk and the latter took cognizance of the offence in mechanical manner. The Police Authority has also prayed and obtained a compelling process against petitioner No. 2 showing him as an absconder. Accordingly, they have prayed for quashing of the said proceeding and also an order directing for release of the trawlers and also release of the Sea-Men.

6. C.R.R. 3029 of 1997 is an application u/s 397 read with Section 401 and 482 Criminal Procedure Code by which the petitioners being the master of the three seized trawlers have prayed for an order of release of the vessels which was refused by the Sub Divisional Judicial Magistrate, Tamluk on 5.9.97. In the said application, after narrating the incident they have alleged that the case is not maintainable. Alternatively, they have referred to Section 9(4) Clause "A" of MZI Act, in support of the contention that the vessels may be released in terms of the said provision of the Act, even if the case comes within the purview of the MZI Act. Accordingly, they have prayed for release of the vessel.

7. C.R.M. 3773 of 1997 arises u/s 439 of the Criminal Procedure Code where petitioners numbering 80 including two Indian nationals, the rest being either Thai or Myanmur nationals have prayed for bail on the ground that the F.I.R. does not disclose the offences with which they have been charged. It is also their contention that they are in custody since inception of the case that is 23.7.97 when they were put under arrest and the investigation has come to close with the submission of charge sheet. Accordingly they have prayed for bail since there is no reason to detain them any further.

8. All the three applications have been heard together and shall be governed by a common judgment. The Ld. Advocate appearing for the petitioners in all the three revisional applications based his arguments by referring to several xerox copies of documents which form part of the revisional application being C.R.R. 2770 of 1997 in support of his contention that the raiding party as also the I.O. were under the mistaken belief that the three trawlers out of the five seized by the raiding party were foreign vessels. It is his contention that three vessels out of the five seized by the raiding party on 25/26.7.97, namely, vessels No. 35, 49 and 107 as described in the revisional application as also F.I.R. are in fact Indian vessels within the meaning of MZI Act. In course of his elaborate argument he has referred to some documents in order to show that these three trawlers were imported from Thailand by M/s. Swan Fisheries (Private) Ltd., an Indian company registered under the Companies Act of 1956 after obtaining necessary permission from the concerned Ministry of the Government of India. It is also his contention that the company also obtained requisite permission from the concerned Authority before engaging Foreign nationals as crew members and also supplied their names and other particulars as required under the law. It is his contention that being armed with the Authority given by the Government of

India and also having necessary clearance from the different Authorities including Coast Guard, the trawlers were engaged in catching fish in the Exclusive Economic Zones of India and having the requisite permission to export the catch. They also were transferring at times the catch to other trawlers. It is also contended that sometime before the date of actual seizure there was cyclonic weather in the High Sea and after informing the relevant Authorities they took shelter in the area from where they have been seized in order to prevent loss of life and damage to the trawlers. It is also contended that the crew members had no occasion to land in any Port and as such there was no contravention of the Foreigners Act. It is also contended that the crew members had no occasion to enter into any forest zone and accordingly they do not commit any offence under the Forest Act. It is also contended that the trawlers were armed with necessary licence to use Wireless Sets for communication purpose and accordingly they do not contravene any provisions of the Indian Telegraph Act. It is also his contention that at the time of seizure of trawlers and arrest of the crew members, the trawlers were lying stationery and anchored and as such there is no basis for giving a charge sheet u/s 447/379/120B/506 of the IPC. It is lastly submitted by the Ld. Advocate that continuance of trial of the case involving so many Foreign nationals whose services were duly requisitioned by the company with prior approval of the concerned Ministry of the Government of India shall be an abuse of process of the law and as such in the interest of justice there being no prima facie case against either the petitioner company or the crew members of the trawlers, the case should be quashed and the seized trawlers should be released in favour of the company and the crew members should also be released.

9. On the other hand, the Ld. Advocate appearing for the State raised his objection against quashing of the case pending in the Lower Court on the ground that the F.I.R. discloses prima facie offence against the company and also the crew members. He however conceded that so far as Indian Telegraph Act is concerned, there is no prima facie violation of any provision and as such there is no prima facie case so far as the Indian Telegraph Act is concerned. Regarding the seized trawlers he opposed the prayer for release and submitted that in the event of a conviction under MZI Act the question of confiscation of trawlers would arise and as such they should not be released. So far as the question of granting bail to 80 crew members are concerned the Ld. Advocate for the State however did not raise any objection but prayed for imposition of condition relating to attendance during trial, since charge sheet has already been submitted in this case. The Ld. Advocate for the State in the face of his stand with regard to bail could not throw any light as to where the crew members would stay, in the event of they being released on bail since they are Foreign nationals and are not in possession of any Passport or Visa to stay on the main land. The Ld. Advocate for the State however, submitted that in that event the crew members could stay in the vessels concerned.

10. The Ld. Advocate for the petitioners referred to a number of decisions

including a decision reported in 1997 (8 Supreme) 490 being *Asim Kumar Roy v. Bipin Meheta and Ors.*, in support of the power of this Court to quash a Criminal Proceeding in appropriate cases u/s 482 Criminal Procedure Code. The said decision also deals with a number of cases decided on this point including cases reported in *R.P. Kapur Vs. The State of Punjab*, and (1996) 8 SCC 104 while discussing the scope of Section 482 Criminal Procedure Code, in its application to the power of quashing a Criminal Proceeding. Some instances have been cited in the said decision and it has been laid down that while no inflexible rule can be laid down which would govern the exercise of inherent jurisdiction there may be some categories of cases where inherent jurisdiction can and should be exercised for quashing Criminal Proceedings. It has been laid down that there may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against the accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would serve the ends of justice. It says that there may be cases where the allegations in the First Information Report or the complaint even if they are taken at their face value and accepted in the entirety do not constitute the offence alleged. Reference has also been made to a decision reported in *K.M. Mathew Vs. State of Kerala and another*, where the action on the part of the Magistrate taking cognizance and issuance of summons subsequently dropping the proceeding after the accused took the plea of innocence was upheld by the Apex Court. Reference has also been made to another decision reported in (1994) 6 SCC 142 [*Minakshi Bala v. Sudhir Kumar and Ors.*] the Apex Court while cautioning the High Court to quash Criminal Proceedings after charge is framed also came to the conclusion that in exceptional cases the High Court can look into those documents which are relevant and are un-impeachable. Reference was also made to a decision reported in *Satish Mehra Vs. Delhi Administration and Another*, where the Apex Court quashed a proceeding as also the charge framed by the Sessions Judge and discharged the accused. It also upheld the proposition that Sessions Judge would be within his powers to consider materials which the accused may produce at the stage contemplated in Section 227 Cr. PC. The sum total of the decisions can be stated thus, namely, the High Court in exercise of its inherent jurisdiction can quash a criminal proceeding at any stage when it comes to the conclusion that the continuance of such proceeding shall amount to an abuse of process of the Court and while doing so, it can consider the documents produced on behalf of the defence, the genuineness of which is not questioned by the prosecution. All the reported decisions, however find the need of exercising the power very sparingly and cautiously only when the Court should come to the conclusion that there would be manifest injustice or there would be abuse of process of the Court if the power is not exercised. When the materials on record on their face value do not justify a prima facie case cognizance taken by Magistrate need be quashed.

11. On the other hand, the Ld. Advocate for the State also relied on a number of decisions including the decision reported in 1996 (3) Crimes 108 (SC), namely

V.B.C. Exports Private Limited and Anr. v. Commandar S.D. Baijal and Ors. It is submitted by the Ld. Advocate that in that case under the Maritime Zones of India Act the charterer of a foreign vessel were found guilty for fishing at a depth of less than 40 Fathoms of water in contravention of the terms and conditions of the permits. It was a case in which a foreign vessel was found to violate the provisions of the permit given under the MZI Act. The said foreign vessels were brought into play by the charterers and the conviction was upheld up to the High Court so far as the Managing Director and owner of the vessel but regarding the charterers and the Managing Director of that company the conviction did not sustain but on appeal the Supreme Court reversed it on the ground that the charterer should be deemed to have the knowledge of violation of the conditions of permit, they should also be held liable.

12. In the light of the aforesaid established principles of law it will have to be seen whether there is a prima facie case against the company, the crew members of the three fishing trawlers as mentioned in the revisional application. Be it mentioned that so far as remaining . two trawlers are concerned, there is no challenge so far that they are foreign vessels and these are not the subject matter of the present revisional applications. The revisional application contains copies of a number of documents being Permits, Licences, Letter of Authority, Clearance Certificate and various other communications between different Authorities of the Government of India and the Swan Fisheries Private Limited and the genuineness of these documents have not been disputed by the Ld. Advocate appearing for the State. As a matter of fact the Lower Court record also contains a large number of such documents filed by the present petitioners and their genuineness was also not questioned at any point of time.

13. The three vessels, namely No. 35, 49 and 107 are admittedly of Thai Origin and they originally belong to M/s. Silver Oceanic Company Limited, Bangkok, Thailand. M/s. Swan Fisheries Private Limited has been incorporated on 11th of November 1994, the Memorandum of Association and also the Articles of Association gives the object of the company which reveals that the company amongst others is to purchase, sell, exchange, hire or otherwise acquire, deal, use trawlers, vessels for catching, procuring, processing, preserving, bottling canning and extracting fish, products, sea foods of all kinds and to establish, conduct, acquire or carry on business as importers, exporters and dealers of or otherwise of all kinds of marine products such as fish, shrimp, frogs, lobsters, carbs, oysters and all types of animals living in water of vegetation which may be useful to human life or otherwise for any other purpose.

14. It appears from annexure "C being a communication from Government of India, Mministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals, Foreign Collaboration-II Section dated 14.10.93 that the Government of India communicated its approval in. the matter of application for Foreign Collaboration while authorising the Swan Sea Foods having its office at Vasant Kunj, New Delhi to obtain foreign collaboration with Silver Oceanic

Company Limited at Bangkok. Thailand for the purpose of deep sea fishing with certain conditions amongst others, the approval of inistry of Food Processing Industries, New Delhi. Permission was also given to the company to obtain four vessels from the collaborator on a deferred payment basis. By letter dated 10/15.11.93 the Government of India, Ministry of Food Processing Industries permitted M/s. Swan Fisheries Private Limited to import fourth stern trawlers by the company from Silver Oceanic Co. Ltd. By letter dated 14.9.94 the Government of India, Ministry of Food Processing Industries with reference to the letter of the company, namely M/s. Swan Fisheries Private Limited dated 6.9.94 granted permission of the Government for acquisition of three Deep Sea Fishing Trawlwers out of four as per specification mentioned in the letter. This relates to the vessels No. 35, 42 and 49 which contains certain conditions as mentioned therein and the vessels have been authorised to fish in the Indian Exclusive Economic Zone beyond the area of operation of mechanized, non-mechanized and traditional fishing craft. So far as the engagement of foreign crew separate clearance are to be taken from the Government after furnishing the names and other particulars of such crew. Another condition was that the vessel should not touch any Indian Islands as long as foreign crew are assigned to the project. By letter dated 1.6.95 the Government of India, Ministry of Food Processing Industry authorised M/s. Swan Fisheries Private Limited to import the fourth stern trawler from M/s. Silver Oceanic Co. Ltd., Bangkok. This relates to acquisition of the vessel No. 107 conditions imposed therein are the same of the. earlier three. Xerox copies of the bill of entry for human consumption related to the aforesaid trawlers have also been annexed. The petitioners have also annexed certificate of inspection of fishing boat with regard to all the three vessels together with the number of crew members altogether 80 being annexure "E" to the revisional application. The Certificate of Registration of a fishing boat have also been filed. It also contains the International Tonnage Certificate Issued in terms of International convention of Tonnage Measurement of ships under the authority of the Government of India. Xerox copies of the Certificate regarding Coast Guard Clearance are annexure "C. The company also got approval of the Government of India. Ministry of Food Processing Industries Department regarding engagement of Foreign Crew members on board the fishing vessels. The same is annexure T. The company has got its Certificate of Registration as an exporter from the Marine Products, Export Development Authority being annexure "J". It also appears from the documents being annexure "K" & "L" that the vessels used to keep contact with the Coast Guard and also Ministry of Food Processing Industries relating to the movement of the three vessels. Annexure "M" is the communication from M/s. Swan Fisheries Private Limited . to the Assistant Commissioner (Fisheries). Ministry of Food Processing Industries, New Delhi, dated 21.7.97 which reveals that the vessels were experiencing cyclonic weather & rough sea in the area which is likely to worsen further hence the vessels intend to proceed to take shelter for transfer of fish catch to avoid material damage and loss of life/ship during transshipment. By the said communication the company informed the Ministry of Food Processing

the location of the vessels for the purpose of taking shelter during transshipment of fish catch in order to avoid loss of life or damage to the ship due to cyclonic weather. Thus, it will appear from the communication dated 21st of July 1997 that the movement of the vessels in the particular area is a pre-planned one and the purpose is to avoid loss of life and damage to the trawlers and this information was duly communicated to the Government of India by the petitioner company. It may be mentioned that on 23rd of July 1997, there was a raid following a deliberation by some officials on 21st of July 1997 regarding the presence of some fishing trawlers.

15. The company and the crew members of the three trawlers have been charged with various offences including Sections 10, 11 & 12 of the MZI Act. The said sections deal with contravention of the provisions of Section 3 of the MZI Act by foreign vessels. The MZI Act also defines the foreign vessels being vessel other than Indian vessel. Indian vessel has been defined in Section 2(e) as a vessel owned by Government or by Corporation established by Central Act or a Provincial or State Act or a vessel which is owned wholly by persons to each of whom any of the following descriptions applies:--

(1) A citizen of India.

(2) A company in which not less than 60% of share/capital is held by citizens of India.

(3) A registered Co-operative Society, every member whereof is a citizen of India or where any other co-operative Society is a member thereof, every individual who is a member of such other Co-operative Society is a citizen of India and which is registered under the Merchant Shipping Act or under any other Central Act or State Act.

Apart from the documents annexed with the revisional application, the Lower Court record also reveal certain documents which can be profitably dealt with at the stage. There is copy of letter dated 23.1.95 from the Ministry of Food Processing Industries, Government of India to the petitioner company regarding operation of Deep Sea Fishing under the joint venture acquired from Thailand when permission was given to tranship the catch at High Seas/Foreign Port by the three concerned vessels after giving proper information to the Ministry regarding details of transshipment. It will also from the copies of letters kept with the Lower Court record that the petitioner company was allotted signal to its fishing vessels by the Director General of Shipping, Bombay.

16. So far as the Indian Forest Act is concerned, the alleged offending section, namely, Section 26 amongst others prohibits fishing , in contravention of rules made by the State Government concerned in the forest zone. It may be recalled that the trawlers were seized while they were anchored stationery on water near Mayadip and as such there can be any prima facie violation under the Indian Forest Act as well.

17. A scrutiny of the aforesaid papers including the F.I.R. and the charge sheet reveals that the three trawlers being Chanpen Mauachi 35, 49 and Chokekamoinava 107 are trawlers of foreign origin which were acquired by M/s. Swan Fisheries Private Limited having its office at New Delhi and incorporated under the Companies Act of 1956. The acquisition was made in accordance with the specification given by the same Ministry of the Government of India while according such permission. The aforesaid move was taken by the company by way of joint venture. They had the authority to engage in fishing in the Exclusive Economic Zone of India as defined in Section 5 of the Territorial Waters Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976. Exclusive Economic Zone extends to 200 nautical miles from the base line referred to in Section 3(2) of the said Act which defines territorial Waters being 12 nautical miles from the base line. The company also took necessary permission from the relevant authority of the Government of India in engaging foreign crew in the three trawlers and in accordance with the rules in this regard the company also furnished the names and other particulars of the crews sought to be employed. It had got the necessary clearance from the Coast Guard and other authorities. They also maintained constant contact with the Ministry of Food Processing as also the Coast Guard with regard to the movement of the three trawlers. Before taking shelter near Mayadip, to avoid cyclonic storm on the High Sea, they gave intimation to the Ministry of Food Processing by a Message dated 21st of July 1997. The acquisition of foreign trawlers for the purpose of catching fish for export in the Indian Exclusive Economic Zone was part of a joint venture which had the blessings of the Ministry of Food Processing. It is really surprising that inspite of the aforesaid documents and authorities in their favour the three trawlers were seized by a raiding party and the crew members were arrested, pursuant to an F.I.R. made to that effect at Gosaba Police Station terminating in charge sheet in a post haste manner without trying to ascertain the actual position, so far as it relates to the three concerned trawlers. Since three vessels are Indian vessels, they cannot be said to have prima facie committed any offence under the MZI Act. These were not caught in the act of catching fish rather they were lying stationery and there is no mention of fishing against them at that time. I have said earlier that prior to taking shelter the company also informed the Ministry of Food Processing about the reason for taking shelter. Therefore, there was no suppression on the part of the company and the trawlers did not come to the position of their arrest and seizure stealthily. This episode, namely, seizure and arrest of the crew members were perhaps under the impression from the name of the vessels which are obviously foreign as also the presence of crew members who excepting two are all foreigners. But it is surprising that without proper verification into the allegations this course was followed and even a charge sheet was submitted introducing offence under MZI Act. In my opinion the act on the part of the officials in the raid was devoid of proper caution and there was also no proper investigation before submission of a charge sheet. The inevitable conclusion will be that this harassment of foreign nationals having no fault of their own by way of seizure

and arrest has got wide repercussions in the outside world and shall not be conducive to the interest of the State. It is a glaring example of misuse of official position and it goes without saying that there is no prima facie case either under the Indian Penal Code or under the MZI Act or under the Forest Act or under the Telegraph Act or Foreigners Act against either the company or its Directors or the crew members who have been arrested. The continuance of trial in the background of the facts and circumstances and the disclosures made by the aforesaid papers will be an abuse of process of Court and in the greater interest of the country, such an adventure should be nipped in the bud. In my considered opinion it is a fit case for exercising inherent jurisdiction u/s 482 Criminal Procedure Code and to quash the proceeding pending before the Ld. Sub Divisional Judicial Magistrate, Tamluk, so far as it relates to the three concerned trawlers.

18. In the result, the said Criminal Proceeding being BGR 3147 of 1997 arising out of Gosaba Police Station Case No. 50(7) of 1997 pending before the Ld. Sub Divisional Judicial Magistrate, Tamluk so far as it relates to the three trawlers described above being Nos. 35, 49 and 107 stands quashed. The said trawlers along with all its equipments and accessories stands released in favour of M/s. Swan Fisheries Private Limited. Its further operation should be restricted to the terms as imposed by the concerned Ministry of Government of India from time to time. The 80 crew members employed in the three trawlers are also discharged and be released forthwith. Process, if any, pending against the company and also its Directors and office bearers concerning the particular Gosaba Police Station Case stand recalled. All the three applications being C.R.R. 2770 of 1997, C.R.M. 3773 of 1997 and C.R.R. 3029 of 1997 are accordingly disposed of.