

(2009) 09 CAL CK 0069
In the Calcutta High Court
Case No : Writ Petition No. 23118 (W) of 2005

Syed Mohmmmed Jamil

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 21, 226, 300A
Merchant Shipping (Amendment) Act, 2002 — Section 95
Merchant Shipping Act, 1958 — Section 100, 101(3), 121, 121(1), 129

Citation : (2009) 09 CAL CK 0069

Hon'ble Judges : S.P. Talukdar, J

Bench : Single Bench

Advocate : Udayan Chakraborty, Sanjukta Bhattacharjee and Rabi Prasad Mukherjee, for the Appellant; Jayanta Bhattacharjee and Indranil Chakraborty for Shipping Corpn. of India and S.C. Prasad, for the Respondent

Judgement

S.P. Talukdar, J.—Grievance of the petitioner as ventilated in the writ application relates to alleged illegality and arbitrariness on the part of the respondent-authorities in the matter of payment of arrear salaries, wages, overtime allowances etc. in favour of the writ petitioner.

2. The petitioner had been working as Seaman by signing for 12 months to 18 months on Articles of Agreement in different jobs under Shipping Corporation of India. This was during the period from April 1978 to 1994. On 2nd September, 1994 he signed the Articles of Agreement on the vessel M.T. Dada Bhai Nauraji before the Shipping Master at Calcutta. The vessel anchored at Madras Port on 2nd November, 1994. The petitioner having fallen sick was compelled to sign off. He was admitted in Nursing Home and was under treatment till 4th November, 1994. Since he was not allowed to join the ship, he came to Calcutta on 12th November, 1994. He was not paid any subsistence allowance. 13th November, 1994 being a holiday, the petitioner reported at SCI Office on 14th November, 1994. On 28th November, 1994, he was declared fit by Dr. P.K. Banerjee and on the same day he was ordered by the SCI to vacate his hostel, "Nabik Griha".

Though SCI authorities were under obligation to pay for his hostel accommodation etc., it had to be done by him. On 10th February, 1995, the petitioner filed an application being C.O. No. 23193 (W) of 1995 alleging arbitrariness on the part of the authorities for non payment of wages etc. Learned Court by order dated 10th February, 1995 directed filing of an affidavit. The petitioner was directed by the Learned Court to withdraw the amount alleged to have been deposited by the SCI with the Government Shipping Master, Calcutta. The petitioner found that an amount of Rs. 9,000/- had only been deposited by the S.C.I. on his account instead of his dues of more than Rs. 40,000/-. The petitioner withdrew the same under protest. The writ petition was disposed of by judgment and order dated 7th May, 1997 with a direction upon the respondent-authorities to release all legitimate dues of the petitioner and further direction for allotment of short Voyage. Since the said order dated 7th May, 1997 was not duly complied with, a contempt application was filed and learned Court by order dated 19th December, 1997 directed issuance of show cause notice. By order dated 5th February, 1999, the learned Court disposed of the contempt application with direction upon the respondent-authorities to comply with the order dated 7th May, 1997. The petitioner was also directed to appear before the Medical Officer of the SCI and in the event of issuance of certificate of fitness in his favour, the respondent-authorities were to allot him ship in SCI Voyage. The petitioner was, thereafter, medically examined and was found fit. The SCI authorities continued to remain indifferent thereby compelling the writ petitioner to send an advocate's letter. On 10th May, 1999, the petitioner was selected for Voyage and was again directed to appear before the nominated Medical Officer for medical check up and examination for pathological test. On 19th May, 1999, the petitioner signed on the Articles of Agreement in the vessel M.T. Vashaveshwara. The petitioner joined vessel on 28th May, 1999. He signed off on 12th December, 1999. On 2nd September, 2000, the petitioner was selected for Voyage in another vessel M.V. Rishikesh which was scheduled to go abroad. In October/November, 2000, he signed off from the said vessel. Dispute regarding overtime was raised by the Seamen's Union. The petitioner approached the respondent-authorities demanding justice. In absence of proper and positive response, the petitioner approached this Court with an application under Article 226 of the Constitution.

3. Respondent No. 2 contested the case by filing affidavit-in-opposition wherein the material allegations made by the writ petitioner had been denied. Such respondent No. 2 claimed that the petitioner is a Seaman within the meaning of Section 2(42) of the Merchant Shipping Act, 1958. The petitioner was given continuous discharge certificate issued by the Directorate of Shipping through the Shipping Master as required u/s 99 of the said Act. The duty of the Shipping Master was to supervise and facilitate the engagement and discharge of Seamen. In terms of Section 95, it is the business of seamen's employment office to regulate and control the supply of seamen and to recruit persons for their employment as seamen as well as retirement of seamen from their employment.

In terms of Section 100 of the Merchant Shipping Act, 1958, it is the duty of the Master of every Indian Ship to enter into an agreement with every seaman whom he engages as a crew from any Port in India. The agreement with the crew is required to contain the duration of intended voyage or engagement of the maximum period of voyage. The relation with a seaman of the Shipping Company in India is regulated by National Maritime Board Agreement as amended from time to time.

4. Such respondent alleged that a seaman has to get enrolled with the office of the Shipping Master before getting the continuous discharge certificate and boarding the ship. It is the duty of the respondent No. 2 to recruit the required seamen through the Seamen's Employment Office as per Section 95 of the said Act. Such respondent No. 2 has no control over the selection of seaman in respect of any particular ship. The petitioner is not a salaried employee of the respondent No. 2. He is engaged from time to time through Seamen's Union Office as per requirement on the basis of Articles of Agreement as provided in Section 100 of the said Act. Service of the seaman terminates after expiry of each agreement as signed by him. A seaman in usual terms signs off after full payment of his wages and other benefits as per National Maritime Board Agreement, which is paid before the Shipping Master. For his engagement on board, M.T. Dada Bhai Nauraji, he was paid as per the Crew Portage Bill. Such payment was made as per National Maritime Board Agreement prevalent during the period of time. The petitioner raised protest and the balance of wages being Rs. 8, 878/- was not received by him. It was deposited with the Shipping Master by cheque on 14.02.1994. Petitioner's claim of house rent, medical allowance and other allowances had been deposited by such respondent No. 2. It had been specifically claimed that there was no further amount due and payable to the petitioner. On 10.07.1992, the petitioner joined on board the ship M.V. Vishvaabha. All the claims were duly settled. Payment of Income Tax was his statutory obligation. The petitioner was treated at Willington Hospital, Madras under the medical supervision of respondent No. 2. Since termination was on medical ground, he repatriated to his port of engagement at Calcutta. The recruitment of crew for a particular voyage depends on the Shipping Master and the respondent No. 2 being the Shipping Company, had no say in this regard. The system of recruitment fully depends on the criteria under the Merchant Shipping Act as well as Rules framed thereunder. The petitioner has no authority to challenge the recruitment process. The petitioner cannot agitate any grievance for not being selected since he cannot claim any vested right in this regard. On behalf of such respondent No. 2, it was further stated that the dispute was required to be made before the Labour Court under the Industrial Disputes Act. This respondent No. 2 categorically denied that there was any attempt on its part to harass the petitioner. So far the claim for compassionate appointment is concerned, it was required to be dealt with in accordance with the government policies. Such respondent No. 2 further claimed that the writ application is not maintainable since the allegations made herein could only be established by

proper evidence and this was not permissible within the ambit of writ jurisdiction. The dispute raised by the writ petitioner being in the nature of Industrial Dispute, it could only be decided by Industrial Tribunal. Such respondent No. 2 further claimed that the writ petitioner entered into an agreement to board the Vessel M.V. Maharashtra on September 27, 2002. He signed off after termination of Article on May 21, 2003. The petitioner put his signature in acknowledgement of such signing off.

5. Respondent Nos. 1, 3, 5 & 6 also filed Affidavit-in-Opposition, inter alia, denying all the material allegations made by the petitioner and disputing his claim. Their stand, as reflected from the Affidavit-in-Opposition, is as follows:

The petitioner is a Merchant Navy Seaman. His service is casual in nature. It is regulated under the provisions of Merchant Shipping Act, 1958. Wages and allowances of the Seamen are paid as per bipartite agreement between the ship owner and seafarers' representatives. The seamen are engaged by the Shipping Companies to serve on board their vessels from time to time basis, which settled their wages on completion of voyage. The year of birth of the petitioner as recorded in the office of the Shipping Master, Kolkata is 1942. When petitioner claimed that it was required to be corrected as 1948, he was advised by respondent No. 3 to approach respondent No. 6 with all particulars. But this was not properly done.

6. Since it was increasingly felt unjust and improper, there was need for amendment of Section 95 of the Merchant Shipping Act, 2002. In pursuant to the recommendation of the committee constituted by the Government of India, Ministry of Surface Transport, Director-General of Shipping vide Order No. 1 of 2001 dated 27th March, 2001 regularized the procedure of recruitment of seamen by the ship owners directly from the open market and there would be no requirement for the companies to employ through seafarers from the rosters of SEO. This was u/s 456 of the Merchant Shipping Act, 1958. The said Section reads as follows:

456. Power to exempt ? (1) Notwithstanding anything contained in this Act, the Central Government may, by order in writing and upon such conditions, if any, as it may think fit to impose, exempt any ship or sailing vessel or any master, tidal or seamen from any specified requirement contained in or prescribed in pursuance of this Act or dispense with the observance of any such requirement in the case of any ship or sailing vessel or any master, tidal or seamen, if it is satisfied that requirement has been substantially complied with or that compliance with the requirement is or ought to be dispensed with in the circumstances of the case.

(2) Where an exemption is granted under Sub-section (1) subject to any conditions, a breach of any of those conditions shall, without prejudice to any other remedy, be deemed to be an offence under this Sub-section. The Central Government u/s 7(2) of M.S. Act, 1958 can delegate such a power in favour of

the Director General of Shipping.

7. Such Director General's Order No. 1 of 2001 dated 27th March, 2001 was challenged by the Forward Seamen's Union of India in the High Court of Calcutta, in W.P. No. 864 of 2001. By order dated 9.4.2002, the said application was disposed of in favour of Union of India. The SEOs were abolished from the year 1992 and no fresh registration had taken place from 1997. As per Shipping Merchant Act amendment (2002) the scope of Section 95 was amended and accordingly the SEOs were to regulate and to control all those manning agents and issued licenses. Rules to regulate the manning agencies were notified in the gazette of India dated 18th March, 2005. Seamen are those engaged by the Shipping Companies as per their requirements and not by the respondent Nos. 1, 3, 5 & 6. It was further mentioned that issuance of Continuous Discharge Certificates to the sons and dependants of seamen, who have died or medically incapacitated while in service, has been stopped with effect from 1st August, 2002. Such respondents, for all the aforesaid reasons, sought for dismissal of this writ application.

8. What was essentially urged on behalf of the writ petitioner is that the discharge of the writ petitioner before expiry of the term and before completion of voyage was bad. The petitioner claimed that in the manner in which he was thrown out demands interference. Referring to the Director General's Order No. 1 of 2001 dated 27th March, 2001, it was submitted that prior to dated 27th March, 2001 engagement of Seamen used to be made through Shipping Master.

9. Learned Counsel for the petitioner submitted that the SCI authority was not justified in deducting some amount from the petitioner's salary. He was denied retainer allowances or full salary of M.T. Dada Bhai Nauraji, M.V. Vishvaabha, M.V. Rishikesh, M.V. Maharastra, M.V. Bharatendu and for all these, the petitioner had to knock the door of this Court. The competence of the petitioner was never in doubt. But for reasons best known to the SCI authority, it started harassing the petitioner and denying him his lawful rights. The SCI authority, thus, in an arbitrary manner and with vengeance withheld legitimate dues of the petitioner on various accounts regarding salary, overtime, house rents, income tax and so on and so forth. Since the petitioner on various occasions took up the causes of other seamen, he was not found to be comfortable to the authorities. The petitioner was subjected to harassment while he was on roster seamen and on voyage and on regular service in different vessels. Such voyage took place between 1994 and 21st May, 2003. He was denied his legitimate dues during all that protracted period.

10. He filed a writ application being C.O. No. 23193 (W) 1995 before this Court alleging illegal and arbitrary action on the part of SCI Seamen's Employment Office by way of not releasing and paying due overtime. He also raised dispute regarding various irregularities in giving remark on the respective column of the continuous discharge certificate particularly relating to medical illness. It was required to be done by the Shipping Master on the recommendation of the

Captain of the ship. This was not observed by the respondents-authority. The petitioner made a complaint to the Shipping Master on 5th October, 1994 but to no avail. The learned Court in its order dated 10.2.1995 recorded that SCI authority had deposited the lawful dues of the petitioner with the Shipping Master, Calcutta. Accordingly, the petitioner was given the liberty to withdraw the amount without prejudice to his rights and contentions. The said writ application was finally disposed of by judgment and order dated 7th May, 1997 directing the SCI authority to nominate a Medical Officer before whom the petitioner was to present himself for his medical examination. If the petitioner could be found fit for voyage, the respondent-authority was directed to treat him on board with other seamen and he was to be allotted duties accordingly. The petitioner was further given the liberty to lodge claim before the concerned-authority for settlement of his legitimate dues. Since the said direction was not complied with, a contempt application was filed. The same was disposed of by an order directing compliance of the order dated 7th May, 1997. The petitioner was supposed to get short voyages, which were denied to him. After contempt petition was filed in 1999, he was allowed to join in motor tanker coastal vessel upto 12th December, 1999. He was thereafter engaged in M.V. Rishikesh, a foreign going vessel for a period of 10 months. The petitioner got the NRI status but money was illegally deducted on account of income tax ignoring his aforesaid status. The petitioner was not given overtime of 2192 hours in M.V. Rishikesh, 1655 hours in M.V. Maharashtra and 620 hours in Vishvaabha.

11. The petitioner having failed to evoke any response from the S.C.I.-authorities for not paying off in violation of Section 129 of Merchant Shipping Act and not release of the arrears salary and other various admitted allowances, excepting retainer allowances, had approached this Court with the instant application. Learned Counsel for the petitioner submitted that the respondent-authorities could not refer to any document so as to show that payment was duly made. Reference was made to the earlier writ application filed by the present petitioner in the context of the claim as to completion of signing off and paying off business as per Articles of Agreement in terms of the Merchant Shipping Act and the Rules framed thereunder and payment of arrears salary and other dues and also against illegal discharge before completion of voyage. It was submitted that if any seaman works for more than 184 days abroad in a foreign going vessel then he is entitled to get full income tax relief on the basis of NRI status. The S.C.I. recorded 202 days service in abroad of the petitioner. For such less payment on different heads in the portage bill of the Vishvaabha, the Shipping Master wrote a letter to the S.C.I. for release of money in respect of NRI benefits of income tax, overtime, postal charges and medical benefits etc. The attention of the court was invited to the illegal discharge of the petitioner from the ship of the petitioner's voyage between 2002-2003 in violation of Section 121 and Section 101(3) of the M.S. Act before completion of his voyage at Egypt. In an identical situation arising out of a case of Madras High Court, the Apex Court directed the S.C.I. to rearrange the seamen who were illegally discharged by the S.C.I. and discharge

those who were newly appointed in place of those illegally discharged seamen. Learned Counsel for the petitioner further submitted that the S.C.I.-authorities in breach of Section 121 and Section 101(3) of the Merchant Shipping Act discharged the petitioner arbitrarily and illegally before completion of his voyage without his consent and permission of Shipping Master of Port Suez, Egypt and Indian Consular. Section 213 of the Merchant Shipping Act, requires the Master of the Ship to maintain the official log book regarding recording of the conduct of the seamen at the time of discharge before completion of voyage and the reasons for the same are to be recorded in official log book, which is kept in the ship for such purpose. In the present case, the Master of the Ship did not comply with the same.

12. In the supplementary affidavit filed on behalf of the petitioner, it had been alleged that the S.C.I.-authorities manufactured documents in order to save themselves from their illegal activities of illegal discharge of the petitioner before completion of his voyage.

13. On behalf of the respondent/Union of India, it was submitted that the service of the writ petitioner who was a Merchant Navy Seaman is on contract basis and casual in nature. It is regulated under the provisions of the Merchant Shipping Act, 1958. The wages and allowances of the seamen are paid as per the bipartite agreement between ship owners and the seafarers' representative. Seamen are engaged by the shipping companies from time to time to serve on board their vessels. Their wages and allowances is also settled by the Shipping Corporation of India Limited on completion of the voyage.

14. Regarding dispute relating to age/date of birth of the writ petitioner, it was contended that despite being advised, the writ petitioner did not choose to submit the requisite documents in order to enable the authorities to examine the claim of the writ petitioner that instead of 1942, his year of birth ought to have been recorded as 1948. It was categorically submitted on behalf of the respondent/Union of India that the liabilities regarding payment, if any at all, are to be taken care of by the Shipping Corporation of India. It was then submitted that after implementation of the order dated 27th March, 2001 issued by the Directorate General of Shipping Company seamen are directly recruited to serve on board their vessels and not through the Director, Seamen's Employment Office, Kolkata. The earlier procedure to engage and discharge (sign off) of the seamen before the Shipping Master has also been dispensed with as per Directorate General of Shipping, Mumbai, Order No. 7 dated 3rd December, 2002.

15. It was then submitted on behalf of Respondent/Union of India that the writ petition is not maintainable in view of Section 145 of the Merchant Shipping Act, 1958 and also for the reasons that the claim as made in the present application is essentially a money claim. In this context, it was also submitted that such claim could very well be taken care of by a Judicial Magistrate of the First Class or any Metropolitan Magistrate.

16. On behalf of Respondent No. 2/Shipping Corporation of India Limited, it was submitted that the petitioner is certainly a seaman within the meaning of Section 2(42) of the Merchant Shipping Act, 1958 which reads:

(42) "Seaman" means every person (except a master, pilot or apprentice/employed or engaged as a member of the crew of a ship under this Act, but in relation to Sections 178 - 183 (inclusive) includes a master.

17. It was contended on behalf of Respondent No. 2 that the petitioner was given continuous discharge certificate issued by the Directorate of Shipping through the Shipping Master u/s 99 of the Merchant Shipping Act, 1958. It is for the Seamen Employment Office (under the Central Government) to regulate and control supply of categories of seamen as well as recruitment of persons for employment as seamen and retirement of seamen from such employment. This is as per Section 95 of the Act of 1958, which deals with the business of the seamen's employment offices.

18. Learned Counsel for the petitioner sought to highlight of the order of the Apex Court in connection with S.L.P., the Writ Appeal No. 772 of 1982 between Shipping Corporation of India Ltd. v. Ashik Ali, Seaman and Ors. Copy of the said unreported order dated 24th December, 1982 was produced. It appears that the Apex Court while disposing of the appeal directed the Shipping Corporation of India Limited to rearrange such of the members of the crew who had been discharged but expressed their desire to be rearranged. Such rearrangement was directed not to be treated as bringing about any break in the continuity of their service. Learned Counsel for the petitioner inviting attention of the court to Section 121 of the Merchant Shipping Act, 1958 which deals with discharge and leaving behind of seamen by masters of Indian Ships. Sub-section 1(b) of Section 121 clearly mentions that the master of an Indian ship shall not except in circumstances beyond its control, leave a seaman or apprentice behind without the authority of the officer specified in this behalf by the Central Government and the officer aforesaid shall certify on the agreement with the crew that he has been granted such authority and also the reason for the seaman being discharged or the seaman or apprentice being left behind.

19. Reference was further made to the minutes of the Sub-Committee appointed by the National Maritime Board (India) at its 41st meeting held on 20th July, 2001. It was mutually settled across the table that the parties to the dispute were to be helped in arriving mutual understanding for settlement of dispute. The Committee defined its role as a facilitator between the parties to the agreement.

20. Learned Counsel for the respondent No. 2 submitted that it was the duty and obligation of the Seamen Employment Office to supply crews for each voyage. Respondent No. 2, as such, could not have any direct control over such engagement of the writ petitioner. Petitioner admittedly got employment through the Seamen Employment Office in different voyages including (1) M.V. Debabhai

Nauraji, (2) M.V. Maharashtra, (3) M.V. Vishva Abha, (4) M.V. Rishikesh and (5) M.V. Bharatendu. According to respondent No. 2, the writ petitioner is not entitled to get any further amount and his entire claim had been settled in his favour. It was also submitted that the claim for an amount of Rs. 8 lakhs and odd as made in the writ application have not been sought to be substantiated by any statutory or convincing documents. It was, thus, submitted that it cannot be possible for the writ court to assess or ascertain that actual amount of claim, if any at all. According to the learned Counsel for the respondent No. 2, any evidence in this regard on behalf of the claimant is required to be tested on cross examination. In absence of any scope for preceding with the matter in such manner, it would not be right and proper for the part of the writ court to entertain the claim.

21. It is true that mere availability of an alternative remedy, be it under the Industrial Dispute Act or the Merchant Shipping Act, 1958 cannot by itself close the doors of the writ court. Maintainability and entertainability are not synonymous. In the event of existence of a legal right and alleged infraction of the same, the writ court can very well entertain the same. The hands of law in exercise of jurisdiction under Article 226 of the Constitution are long enough so as to reach injustice anywhere ? subject to territorial jurisdiction. But the question that has rightly been raised as to how to assess the genuineness of the claim and ascertain the extent of arrear pay, if any, on the basis of the materials on record. It was submitted that National Maritime Board Agreement deals with the amount payable to various categories of crews. There is force in the submission made on behalf of the respondent that there could be no reason for the writ petitioner for not pursuing his claim in the said forum.

22. On behalf of the writ petitioner it was submitted that the right to wages is the fundamental right. S.C.I. being a state under Article 12 of the Constitution having acted illegally by discharging and terminating the service of the petitioner before completion of his voyage and withholding his salary and emoluments clearly violated various provisions of the Merchant Shipping Act, 1958 and the rules framed thereunder. Learned Counsel for the petitioner submitted that there had been violation of Articles 14, 21 and 300A of the Constitution of India.

23. As already indicated, this Court does not find any sufficient reason for holding that the writ application, in view of availability of an alternative remedy, is not maintainable.

24. But the court is not expected to issue an order, which in absence of concrete materials, suffers from inherent vagueness and thus, could turn out to be not implementable. It was further submitted that the writ court for the purpose of natural justice and fairplay can very well mould the prayer and grant relief accordingly. The controversy relating to alleged wrong recording of the date/year of birth can also be effectively resolved by the appropriate authority. It was contended on behalf of the respondent No. 2 that despite being given opportunities, the writ petitioner did not choose to produce relevant documents

in support of his claim.

25. After due consideration of relevant facts and circumstances and having regard to the nature of the grievances and the relief sought for, this Court is of the opinion that interest of justice would be best served if the respondent No. 2 is directed to deal with the grievance of the petitioner in accordance with law.

26. Accordingly, the present application being W.P. No. 23118 (W) of 2005 is disposed of with direction upon the writ petitioner to submit a comprehensive representation indicating therein all his grievances relating to alleged nonpayment of salaries, allowances and others and referring to the dispute regarding the alleged wrong recording of the age. Such representation may be backed up and effectively supported by relevant documents. If such representation is received by the respondent No. 2 within a period of 8 (eight) weeks from this date, the said authority must consider the same in its proper perspective and take appropriate action/pass necessary order in respect thereof within a period of 3 (three) months thereafter. This must be done after giving the writ petitioner or his representative an opportunity of hearing.

27. Action to be so taken and order to be passed must also be duly communicated to the writ petitioner within a further period of 2 (two) months.

28. There is no order as to costs.

29. Urgent xerox certified copy of the judgment be supplied to the parties, if applied for, as expeditiously as possible.