

(2016) 11 KL CK 0016
In the High Court Of Kerala
Case No : W.P.(C) No.20722 of 2016

T.S. Sreekumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-11-2016

Acts Referred:

Constitution of India, 1950 — Article 19, Article 21
Merchant Shipping Act, 1958 — Section 118, Section 119, Section 120, Section 122,
Section 191

Citation : (2017) 1 ILRKerala 334

Hon'ble Judges : Mr. Shaji P. Chaly, J.

Bench : Single Bench

Advocate : Sri. N. Nagaresh, Assist. S.G. of India, for the Respondent Nos. 1 to 4, 9 and 11; Sri. Ron Bastian, Govt. Pleader, for the Respondent No. 5 to 8; Sri. V.M. Syam Kumar, Sri. M.B. Sandeep, Smt. Kripa Elizabeth Mathews and Smt. P.F. Rosy, Advocates, for the

Final Decision : Allowed

Judgement

Shaji P. Chaly, J. - This writ petition is filed by the petitioner seeking direction to respondents 2 to 4 and 9 to take urgent steps to afford immigration clearance and discharge for the petitioner from the vessel "MV Brahmekshara", presently birthed at Vizhinjam Port, and for other related reliefs. Facts encapsulated for disposal of the writ petition are as follows:

2. Petitioner is a citizen of India and a "seaman" within the definition of Merchant Shipping Act, 1958, [hereinafter called, "the Act"], and is employed as a Chief Engineer on board the vessel referred to above, which is a marine Tug flying Indian Flag. The said vessel is owned by the 10th respondent. Petitioner was employed in the said vessel pursuant to Ext.P1 contract. The vessel has returned to Vizhinjam after a voyage to Maldives on 01.12.2015. As per the provisions of law under the Merchant Shipping Act, 1958, when a seaman returns from his voyage abroad, he has to be discharged in accordance with the procedure laid down in Sections 118, 119, 120 and 122 of the Act. Such discharge under law

envisages as a condition precedent, the full payment of salary due to the seaman. If the seaman leaves the vessel without a valid discharge, he could be treated as a deserter.

3. Section 191 of the Merchant Shipping Act, 1958 envisages "Desertion" as a misconduct, which has serious repercussions for a seaman detrimentally affecting his chances of future employment. An entry of discharge has to be made in the Continuous Discharge Certificate, which is the identity document of the seaman. This is mandatorily laid down in the Merchant Shipping (Continuous Discharge Certificate-cum- Seafarer's Identity Document) Rules, 2001.

4. The 10th respondent refuses to pay salary and thus has failed to effect the discharge of the petitioner as envisaged under the Act. As regards the recovery of wages, petitioner has invoked Section 145 of the Act and the competent Magistrate Court has passed an interim order. The competent officer though had issued Exts.P4 and P12 orders, to the 10th respondent to effect discharge, same is ignored by the 10th respondent. Though respondents 2 to 9 and 12 are competent to take steps under law, to protect the interests of the petitioner, and to ensure his discharge in accordance with law, no steps have been taken so far. Petitioner is leading a miserable life on-board the said vessel since 01.12.2015, without even basic amenities. With the onset of monsoon, the vessel which is abandoned by the owner is facing serious risk of destruction and petitioner apprehends threat to his life. It is in this background, this writ petition is filed.

5. The 9th respondent has filed a statement virtually admitting the factual circumstances narrated in the writ petition. It is stated that, 9th respondent is entrusted to extend Immigration Clearance to the crew members as well as passengers as and when requested, after strict compliance of the rules and regulations. It is also stated, allowing petitioner to sign off after the contract period as claimed by him, is the sole responsibility of the owner of the ship as well as that of the Master of the vessel. It is true, the vessel was allowed to berth at Vizhinjam Sea Port on 01.12.2015 on an emergency basis on the ground of acute shortage of fuel, food and fresh water for its Crew, while on her way from Maldives to Bombay.

6. It is further stated, respondent No.9 is duty bound to carry out the Immigration procedures only after getting due request from the owner of the vessel or through an authorised agent. The enforcement of contractual obligations between the employer (owner of the vessel) and employees (Crew members) is a subject matter purely concerned with the terms and conditions of employment and the Immigration has no say in the said matter. That apart, it is stated, the duty and responsibility of respondent No.9 is to issue Immigration Clearance to the crew members after getting formal request from Captain of the vessel or from its owner or his authorised representative. Discharging of a crew member from his duties is the sole prerogative of the Master of the vessel. It is done in Continuous Discharge Certificate by making an entry thereto by the Master of the vessel. Hence the averments therein do not pertain to respondent

No.9. Maintaining minimum crew members, ensuring sea-worthy condition of the vessel, its safety and security is the sole responsibility of the owner of the vessel.

7. The 9th respondent has granted Immigration Clearance to the Captain of the vessel on 04.12.2015. On 15.12.2015, the clearing agent of the vessel had also submitted request to the Director, Ministry of Home Affairs, seeking sign off to 5 of its crew members out of the remaining 9 Crew members who are all Indians. After getting permission from Headquarters, the Crew members were allowed to sign off on 30.12.2015. Since Vizhinjam Seaport is only a Customs notified Port, special permission is needed to sign off the Crew as well as the Captain of the vessel. Due to Medical Emergency, Captain of the vessel was allowed to sign off immediately, and other 5 Crew members were granted sign off, after getting concurrence from Headquarters. According to 9th respondent, 9th respondent has discharged its duties in accordance with the rules and regulations in vogue with respect to the issue in concern.

8. It is also stated, respondent No.9 has no objection in granting sign off to the petitioner, provided the owner of the ship or his authorised agent makes a formal request in this regard. That apart, since the vessel is in a state of "cold lay up position" and under the custody and control of Vizhinjam Seaport, the concurrence of Port authorities is also essential. Accordingly, respondent No.9 intimated the petitioner to forward the request for sign off through Purser, Vizhinjam Seaport with his specific recommendation for allowing sign off.

9. State Government has filed I.A.No.16522 of 2016, seeking a direction permitting the State Government to haul up the vessel and keep it in the open beach, since the retention of the vessel at wharf has become a major obstruction to the Port activities and the fishermen are also suffering to a great extent.

10. Heard learned counsel for the petitioner, learned Government Pleader and the learned Assistant Solicitor General. Perused the documents on record and the pleadings put forth by the respective parties.

11. The question to be decided in this case is whether without concurrence of the 10th respondent, who is the owner of the vessel, any action can be taken by the 9th respondent to grant sign off to the petitioner. The fact circumstances put forth by the petitioner and discussed above will clearly reveal that the owner of the vessel has abandoned the vessel. In sum and substance, the said aspect is admitted by the 9th respondent. According to the 9th respondent, sign off of the petitioner can be permitted on the concurrence of the owner of the vessel or the authorised agent by making an application to the said effect. The rest of the matters are contractual in nature by and between the petitioner and the 10th respondent. The 10th respondent has not complied with the order passed by the competent Magistrate, to pay salary to its Crew, and in spite of service of notice from the said Court, 10th respondent has not cared to appear. In this writ petition also, notice was issued to the 10th respondent. However, the same was not returned after service, consequent to which, service to the 10th respondent

is declared by this Court on an application filed by the petitioner, by order dated 30.08.2016. So, apparently, 10th respondent is ignoring the proceedings of a court of law. In my considered opinion, the said irresponsible attitude of the 10th respondent cannot stand in the way of a citizen of this country securing necessary orders to come out of the present impasse. It may be true, as per the provisions of Merchant Shipping Act, 1958, without concurrence of the owner of the vessel or the authorised agent, 9th respondent may not be in a position to grant sign off to the petitioner. Situations discussed above show that, such a circumstance is not available in the peculiar facts and circumstances of this case. If such provisions of the Act in question are put into effect in its tenor and terms, the consequence is, petitioner who is an Indian citizen, will be deprived of his rights under Articles 19 and 21 of the Constitution of India.

12. The fundamental rights guaranteed to a citizen under the Constitution of India, should definitely have a march over the provisions of a statute, if circumstances warrant. This is exactly the fact situation in this writ petition. Circumstances show, petitioner is innocent and has not indulged in any sort of illegality, but however, fact remains, he is deprived of his life and liberty, due to the provisions of the Merchant Shipping Act and the procedures contemplated thereunder. Therefore, the deadlock so occurred consequent to the provisions of a statute is to be unlocked with the Constitutional key. I am also of the considered opinion, the authorities should not be mere onlookers in a situation like this, and quick action should be taken, bearing in mind, the rights of an innocent citizen is the forerunner when pitted against technical snags.

13. Petitioner has also a case, on the basis of an application submitted by the petitioner, he is selected by the Public Service Commission, as Rank No.1 to the post of Tug Driver on the scale of pay of Rs.11620-20240, in the Port Department in Thiruvananthapuram District. In the present situation, not only the petitioner is unable to lead a decent life, but also deprived of his livelihood. Petitioner has every right to get a suitable employment also.

14. The documents produced along with this writ petition will unequivocally establish, petitioner has made all efforts to secure reliefs as sought for in this writ petition, including a report placed by the 2nd respondent before the Human Rights Commission, however, without any fruitful results. Therefore, I think it is only just, proper, fair and legal for this Court to step in and issue necessary directions. Taking into account all these aspects, I am of the considered opinion that a practical way out of the situation is to be adopted by this Court in this writ petition.

15. In that view of the matter, there will be a direction to 9th respondent to grant to the petitioner sign off after securing a simple bond ensuring participation on notice in any proceedings relating to the issue in question. The same shall be done within two weeks from the date of receipt of a copy of this judgment. It is also made clear, the procedure adopted by the 9th respondent when a sign off is permitted, as per the concurrence of the owner of the vessel, can also be

followed by the 9th respondent. The State Government is also permitted to remove the vessel from the Vizhinjam Port to a safe place, after complying with necessary formalities, if any, under the Merchant Shipping Act.

16. The writ petition is allowed accordingly.