

CONFLICT OF LAWS AND THE JURISDICTIONAL DILEMMA IN THE ITALIAN MARINERS' SHOOTING CASE

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I. Introduction

The shooting and murder of two Indian fishermen on board St. Antony fishing vessel committed by Italian Mariners on board M.V. Enrica Lexie at 20.5 nautical miles off the coast of Kerala was a rare case of its kind in the legal and litigational history in India.² The FIR of this case was filed in the Coastal Zone Police Station Neendakara and the mariners were produced before the Chief Judicial Magistrate's Court, Kollam. The Mariners were arrested and put in jail. The mariners filed writ petition in the Kerala High Court under Article 226 for quashing of the FIR and their release which was dismissed by the High Court. The case ultimately reached the Supreme Court by way of writ petition under Article 32 of the Constitution and also by way of Special Leave Petition for appeal from the order of dismissal of the writ petition of the mariners in the High Court. The Supreme Court of India was in dilemma about the jurisdiction of the criminal court to take cognizance of such a serious offence of double murder of innocent Indian fishermen. The relevant provisions under the Constitution of India, Indian Penal Code, Code of Criminal Procedure and special enactments on the subject such as Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 and Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 and the notification dated 27th August 1981 extending the provision of section 188-A, Code of Criminal Procedure to Exclusive Economic Zone (EEZ) were analysed. The international conventions, especially provisions of the UNCLOS, 1982 were also referred to in arriving at a reasonable conclusion.

II. Legal Background

The Constitution of India prescribes certain limitations, either express or implied on the territorial extent of the authority of the Sovereign Democratic Republic of India. Article 1(3) of the Constitution defines the

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² Republic of Italy, through Ambassador and Ors. v. Union of India and Ors.,(2013) 4S.C.C.721.

territory of India.³ Article 297 of the Constitution deals with “maritime territory”. Article 297(3) reads: “The limits of territorial waters, the continental shelf exclusive economic zone and other maritime zones of India shall be such as may be specified from time to time, by or under any law made by the Parliament”. The authority of a sovereign state to make laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. It is also a well-accepted principle of international law that sovereignty of a coastal State extends to its territorial waters. The Parliament made the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zone Act, 1976 in exercise of the authority conferred under Article 297. Section 3(1) of the Act declares that the sovereignty of India extends, and has always extended to the territorial waters of India and to the seabed and subsoil underlying, and the air space over, such waters. Under sub-section (2), the limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate base line. Sub-section (3) authorises the Government of India to alter the limit of territorial waters by a notification approved by both the Houses of Parliament, with due regard to the international law and state practice. Sections 5 and 7 of the Act define contiguous zone and exclusive economic zone and stipulate their area of limit to be 24 and 200 nautical miles respectively from the appropriate base line. While Parliament authorises the Government of India, in the prescribed manner and having regard to the international law and practice, to alter the limits of territorial waters, contiguous zone and EEZ under sections 3(3), 5(2) and 7(2) respectively, the law does not authorise the alteration of the limit of the continental shelf. What is to be noted is that while section 3 declares that “the sovereignty of India extends and has always extended to the territorial waters”, no such declaration is found in the context of contiguous zone. At the same time with reference to continental shelf it declares under section 6(2) that, “India has and always had, full and exclusive sovereign rights in respect of continental shelf. Section 7(4)(a) declares that in the EEZ, the Union has sovereign rights for the purpose of exploration, exploitation, conservation and management of natural resources, both living and non-living as well as for producing energy from tides, winds and currents.

The Maritime Zones Act 1976 declares that once a notification is issued in official gazette of India extending the application of such enactments like Indian Penal Code and Criminal Procedure Code to such maritime zones, the enactment whose application is so extended “shall have effect as if” the contiguous zone or exclusive economic zone, as the case

³ Constitution of India, Article 1 (3) : The territory of India shall comprise -
(a) The territories of States; (b) The Union territories specified in the First Schedule; and (c) Such other territories as may be acquired.

may be is part of the territory of India. This is a legal fiction creation of which is within the authority of sovereign legislative body of India, Parliament. In exercise of the power conferred by section 7(7) of the Maritime Zones Act, 1976 Government of India extended the application of both IPC and Cr.PC to the EEZ by a notification dated 27-08-1981. By the said notification, Cr.PC also stood modified and a new provision, section 188-A came to be inserted in the Cr.PC. This reads as follows:

“188 A. *Offence committed in exclusive economic zone* :
When an offence is committed by any person in the exclusive economic zone described in Sub-section (1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 (80 of 1976) or as altered by notification, if any, issued under Sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under section 13 of the said act”.

In the above legal background, the case of Italian Mariners firing from the Italian ship MV Enrica Lexie at the fisherman on board St. Antony Fishing vessel came to be decided by the Supreme Court. The incident of firing from the Italian ship on the Indian fishermen took place admittedly at a distance of about 20.5 nautical miles from the coast line of the State of Kerala. The Italian mariners' case is that they mistook the Indian fishing vessel to be a pirate vessel and therefore responded in defence by firing which resulted in the killing of two Indian fishermen. After the incidence, on proceeding further 38 nautical miles on the high seas and on receiving a telephonic and an email message from the Maritime Rescue Co-ordination Centre from Mumbai asking to return to Cochin port to assist with the enquiry into the incident the Italian vessel M.V. Enrica Lexie altered its course and came to Cochin the next day. On the basis of first information report (FIR) the mariners were charged under section 302 read with 34 Indian Penal Code and had been in judicial custody after remand. The petitioners had filed a writ petition before the Kerala High Court under article 226 of the Constitution challenging the jurisdiction of the state of Kerala and Police to conduct investigation and arrest the petitioners 2 and 3 and prayed for quashing of the FIR and their release.

During the pendency of writ petition, criminal proceedings were initiated against the two accused in Italy. Subsequently the Counsel General filed a further affidavit for the Republic of Italy claiming that the accused had acted in an official capacity and asserting that Italy had exclusive jurisdiction over writ petitioners and invoked sovereign and functional immunity. The High Court in the meanwhile heard the matter and reserved

the judgement. Since the judgement of the High Court was not forthcoming, the petitioners filed another writ petition under Article 32 of the Constitution before the Supreme Court seeking for similar relief. During the pendency of the writ petition before the Supreme Court, the Kerala State Police filed charge sheet against the petitioners under section 302, 307, 427 read with section 34, IPC and section 3 of the Suppression of Unlawful Acts against Safety of Marine Navigation and Fixed Platform and Continental Shelf, Act 2002 (SUA Act). The learned single Judge of the Kerala High Court dismissed the writ petition on two grounds. Firstly, under notification No. S.O.67/E, dated 27th August 1981, the entire Indian Penal Code had been extended to the E.E.Z. and territorial jurisdiction of the Kerala State was not limited to 12 nautical miles. Secondly, under the SUA Act, the State of Kerala had jurisdiction up to 200 nautical miles from the Indian coast falling within the E.E.Z. of India. Aggrieved by the above judgement of the Kerala High Court, the petitioners filed Special leave petition challenging the order of dismissal of their writ petition by the Kerala High Court. The subject matter and reliefs prayed in the writ petition before the High Court, S.L.P. before the Supreme Court and the writ petition under Article 32 before the S.C. were the same and the S.L.P. and writ petition before the S.C. were heard together.

The case of the petitioners before the Supreme Court was that the petitioners had been discharging their duties as members of the Italian Armed Force in accordance with Public International Law requiring the presence of armed personnel on board commercial vessel to protect them from piracy. The determination of international disputes and responsibilities and proceedings connected therewith must necessarily be between the sovereign governments of the two countries and not constituent elements of a federal structure and the proceeding if any could only be initiated by the Union at its discretion and not by the state unit. So the arrest and detention of the petitioners by the state of the Kerala Police is accordingly unlawful and based on a misconception of law relating to disputes between two sovereign nations. Counsel for the State of Kerala emphasised the jurisdiction of the Kerala State and the Police to investigate and try the case, which was supported by the counsel for the Union of India also.

III. Issues before the Supreme Court

The case before the Supreme Court was heard by two judges, Altamas Kabir, C.J.I. and J. Chelameswar, J. Based on the contentions raised by the counsels for the parties, the mariners and Counsel General of Italy, the Union of India and State of Kerala, the Chief Justice took up two issues both relating to jurisdiction for determination:

First, whether the Kerala State Police has jurisdiction to investigate the incident of firing at the two Indian fisherman on board their fishing vessel and second, whether the courts of Italy or India have jurisdiction to try the accused.⁴

The incident occurred at a distance of about 20.5 nautical miles from the coast line of the Kerala State, ie., not within the territorial waters of coast line of Kerala, but within contiguous zone of India over which the state police ordinarily has no jurisdiction. The Chief Justice said in very categorical terms as follows:

“The State of Kerala had no jurisdiction over the contiguous zone and even if provisions of Indian Penal Code and Code of Criminal Procedure were extended to the contiguous zone it did not vest the state of Kerala with powers to investigate and thereafter to try the offence. What in effect is the result of such extension is that the Union of India extended the application of the Indian Penal Code and Code of Criminal Procedure to the Contiguous Zone which entitle the Union of India to take cognizance of, investigate and prosecute persons to commit any infraction of the domestic laws within the Contiguous Zone. However such a power is not vested with the State of Kerala.”⁵

IV. Jurisdiction of State of Kerala Excluded

On the first issue, in excluding the jurisdiction of Kerala State police, the Chief Justice of India concluded that the state of Kerala, as one of the units of federal entity would not have any authority to investigate and try the accused who were outside the jurisdiction of the state unit and the state police cannot exercise its authority beyond the territorial waters⁴.

To appreciate the issue of exclusion from the operation of section 2 of the Indian Penal Code it may be quoted for reference:

Section 2: *Punishment of offences committed within India*: - Every person shall be liable to punishment under the Code and not otherwise for every act or omission contrary to the provision thereof, of which he shall be guilty within India.

The question of its applicability can be answered in the opinion of the Chief Justice only from the interpretation of the UNCLOS 1982, which according to him sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.

⁴ *Id.*, para 82

⁵ *Id.*, para 84

The honourable Chief Justice has discussed the relevant provisions of the 1982 Convention which was signed by India and ratified in June 1995 which encapsulates the Law of the Sea and also supplemented by several subsequent resolutions adopted by the Security Council of U.N. He also discussed relevant provisions of other conventions and statutes. Before the UNCLOS came to existence the law relating to the seas which was in operation in India, was the Territorial Waters, Continental Shelf Exclusive Economic Zone and Other Maritime Zone Act, 1976. It spelt out the jurisdiction of the Central Government over the different zones. Article 11 of the Geneva Convention on the Law of the Sea 1958 is also relevant which relates to the interpretation of the expression, “incident of navigation” used there in its application to the firing resorted to by the petitioners on board Italian ship. Resolution 1897 of 2009 adopted by Security Council of the UN on 30th November 2009 is also relevant where in the United Nations renewed its call upon States and Regional Organisations that had the capacity to do so, to take part in the fight against piracy and armed robbery off the sea of Somalia in particular. The Chief Justice found that the provision of the UNCLOS were in harmony with and not in conflict with the provisions of the Marine Zones Act 1976. The only area of difference between the Act and the Convention is in Article 97 of the Convention which relates to penal jurisdiction in matters of collision or any other ‘incident of navigation’.

Whether Firing comes under incident of navigation?

Whether firing incident could be said to be covered by the expression ‘incident of navigation’ was the issue before the court. As asserted on facts of the case by the petitioners, the incident comes within Article 100 of the Convention which provides that all states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state. If Article 97 of the Convention applies to facts of this case then no penal or disciplinary proceeding can be instituted against the master or any person in service of the ship, except before the judicial administrative authorities either of the Flag State or of the State of which such person is national. Article 97(3) clearly stipulates that no arrest or detention of the ship even as a measure of investigation shall be ordered by any authorities other than those of the Flag State. In this case the Italian vessel, M.V. Enrica Lexie was flying Italian flag. The fishing vessel St. Antony was not flying an Indian flag at the time the incident took place. However the court considered the provisions of Article 100 of the Convention relevant only at a subsequent stage if the provision is invoked at the time of trial.

On the question whether the incident of firing could be said to be an incident of navigation, the Chief Justice said that the context in which the

expression had been used in Article 97 of the convention seemed to indicate that it refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended therein could not involve a criminal act in whatever circumstances. Whether accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire was a matter of evidence which could only be established during a trial. The Supreme court held that Article 100 of the convention would become applicable to the facts of the case only if the defence advanced on behalf of the petitioners was accepted.

Rare Case of its Kind – No Precedent

The case being a rare case of its kind, no squarely applicable precedent seems to be available though the counsels relied on some of them. Coming to the precedents relied on by Advocate Slave on behalf of the petitioners, the Chief Justice mainly discussed in his judgement the *Lotus* case.⁶ According to the Honourable Judge the relevance of that case shall depend on whether provision of Article 97 of the convention are attracted on the facts of the case or not. He reiterated that the expression incident of navigation as intended in Article 97 could not be extended to the criminal act of killing the two Indian fishermen on board an Indian fishing vessel although the same was not flying the Indian flag. In the *Lotus* case, the Permanent Court of International Justice had to decide the issue of extent of criminal jurisdiction of a state. The case involved a collision between the French Steam Ship 'Lotus' and Turkish Steam Ship 'Boz-Kourt', which resulted in the sinking of the latter ship and the death of 8 Turkish subjects. Permanent Court decided that Turkey had not acted in a manner which was contrary to international law since the act committed on board the Lotus had effect on the Boz- Kourt flying the Turkish flag.

The learned Chief Justice relied on the principles of international law which provides that every vessel sailing in the high seas shall possess the nationality of the flag which it flies. The vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction because no State can extend its territorial jurisdiction to the high seas. The aforesaid principle is subject to the right of "hot pursuit", which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases.

The Chief Justice observed:

“Although the provision of Section 188-A, I.P.C have been extended to the EEZ, the same is extended to areas declared

⁶ *S.S. Lotus (Fr.) v Turk*, (1927) P.C.I.J.

as “designated areas” under the Act which are confined to installations and artificial islands created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also includes the area comprising the continental shelf of a country. However, EEZ continues to be part of the high seas over which sovereignty cannot be exercised by any nation”.⁷

He again noted that, since India is a signatory she was obliged to respect the provision of UNCLOS 1982, and to apply the same if there was no conflict with domestic law. In this context both countries might have subjected themselves to the provisions of Article 94 of the Convention which dealt with the duties of the flag state and in particular, sub-article (7) which provided that each state shall cause an enquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another state.

The incident took place within the contiguous zone, over which both under Maritime Zones Act 1976 and UNCLOS 1982, India is entitled to exercise rights of sovereignty. However, as decided by the Apex Court in *Aban Loyd Chiles Offshore Ltd. v Union of India*⁸, sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas in the EEZ. The same position is reinforced under sections 6 and 7 of the Maritime Zones Act which also provides that India’s sovereignty extends over its territorial waters while the position is different in respect of the EEZ.

The Chief Justice of India finally held on behalf of the Supreme Court that “while India is entitled both under its domestic law and Public International Law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of territorial waters is measured, it can exercise only sovereign rights within the EEZ for certain purposes. The incident of firing from Italian vessel on Indian shipping vessel having occurred within the contiguous zone, the Union of India is entitled to prosecute the Italian mariners under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS 1982. He agreed with Mr. Salve, the counsel for the petitioners that “the Declaration on Principles of International Law Concerning Family Relations and Co-operation between States in accordance with the Charter

⁷ *Id.*, para 96.

⁸ (2008) 11 S.C.C. 439.

of United Nations” has to be conducted only at the level of Federal or Central Government and cannot be the subject matter of a proceeding initiated by a provincial/state government.

V. Setting up of Special Court

Holding that the state of Kerala had no jurisdiction to investigate into the incident the Chief Justice directed the Union of India to set up a Special Court in consultation with the Chief Justice of India to try this case and to dispose of the same in accordance with the provisions of Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982. The proceedings pending before the Chief Judicial Magistrate, Kollam was ordered to stand transferred to the Special Court to be constituted in terms of this judgement, with some other necessary directions and observations.

VI. Concurrent Judgment

Justice Jasti Chelameswar wrote a separate judgement concurring with the Chief Justice with some more additional reasonings. Referring to *Aban Loyd Chilies of Shore Ltd* case which was relied on by the petitioners to contend that the Supreme Court has observed that “India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and EEZ cannot be equated to extending the sovereignty of India over the continental shelf and EEZ as in the case of territorial waters”, Justice Chelameswar observed notably the following:

“With great respect to the learned judges, I am of the opinion that sovereignty is not ‘given’ but it is only asserted. No doubt under the Maritime Zones Act, the Parliament expressly asserted sovereignty of this country over the territorial waters but, simultaneously, asserted its authority to determine/alter the limit of territorial waters”.⁹

Justice Chelameswar made reference to different forms extra-territorial jurisdiction recognised under international law. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible for individuals to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. It is the principle of 19th century English jurisprudence that all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed. But that principle cannot be

⁹ *Supra*, n. 1 at para 135.

accepted as an absolute principle any more. States claim jurisdiction over (1) offenders who are not physically present within and (2) offences committed beyond-the-territory of the State whose "legitimate interests" are affected. This is done on the basis of various principles known to international law, such as, "the objective territorial claim, the nationality claim, the passive personality claim, the security claim, the universality claim and the like. The judge emphasised that these doctrines could be relied upon for conferring jurisdiction on coastal states in situations like those presented in the instant case.

VII. Use of Armed Guards on Board Ships

The widespread increase in the Somali based pirate attacks in the Gulf of Eden compelled nation states to adopt various counter- piracy measures. Vessel Protection Detachments (VPD) and Private Maritime Security Companies (PMSC's) are being increasingly deployed to protect vulnerable vessels at sea. Vessel Protection Detachments are small teams of law enforcement officials comprising of uniformed military officials. France, Belgium, Netherlands, Russia are some of the nations which rely on VPD's to protect its vessels. Private Maritime Security Companies are private contractors employed to provide security personnel, both armed and unarmed, on board for protection against piracy.¹⁰ Germany and the US supports the use of PMSC's whereas France and Japan have prohibited their use.¹¹

The deployment of armed guards has triggered many legal issues like who shall be held responsible when the armed guards violate the criminal law of the coastal state or the port state. It has been doubted whether the very presence of armed guards goes against the concept of innocent passage laid down in UNCLOS. Whether the port state shall have jurisdiction to try the offence committed when there is an arbitrary use of force? Whether the master of the ship can be held responsible when there is a breach? All these are legal issues which arise out of use of armed guards.

Armed guards are governed by the law of the state whose flag the ship is entitled to carry. Domestic laws have limitations in addressing the accountability issues raised by use of armed guards. When an attack occurs within the territorial waters of a country, a conflict of jurisdiction can arise between the flag state, coastal state and the states whose citizens are involved in the incident. The International Maritime Organisation (IMO)

¹⁰ IMO, 'Revised Interim Guidance to Ship owners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area', 2012.

¹¹ Tullio Treves, Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, 20 E.J.I.L. 399 (2009).

came up with some guidelines to address the issue.¹² But the IMO guidelines do not address the issue as to who can be held accountable for deaths and destruction caused by indiscriminate use of force. It is also silent as to the threshold for use of force. An international legal framework with clear rules for use of force is the need of the hour. Clear guidelines as to conditions to be satisfied before resorting to use of force like firing of warning shots, sounding of alarm and use of hoses may be laid down. The legal frame work shall also provide for a clear line of command with a view to ensure discipline among security guards which would also help in fixing responsibility for indiscriminate and irresponsible firing. An international legal framework would help nation states in following a consistent and coherent approach in drafting rules and policies on use of armed guards.

VIII. Conclusion

The Honourable Supreme Court asserted the authority and jurisdiction of Central Government to investigate the incident of firing committed by Italian mariners killing two Indian fishermen in the high seas, ie. beyond the territorial waters. The Supreme Court directed the central government to constitute a Special Court considering the special circumstances of the case. The EEZ regime was a novel innovation created under UNCLOS to balance the rights on coastal states and flag states with respect to exploitation of natural resources in the area. Balancing the economic and legal interests of the coastal states and other state holders in the EEZ has been a challenge faced by the courts in the contemporary world. In *Enrica Lexie* case the Supreme Court tried to achieve the balance by upholding the jurisdiction of Indian states to prosecute a crime committed beyond its territorial waters but which affected its legitimate interests.

¹² IMO, 'Revised Interim Guidance to Ship owners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area', 2012; IMO 'Interim Guidance to Private Maritime and Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', 2012; IMO, 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area', 2012.