

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

I.A. NO. _____ OF 2020

IN

SPECIAL LEAVE PETITION [C] NO.20370 OF 2012

IN THE MATTER OF

Chief Master Sargeant Massimiliano
Latorre & ors.

... Petitioners

Versus

Union of India & ors.

... Applicant /
Respondent

{ Application For Direction }

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ADVOCATES FOR THE APPLICANT :

B. V. BALARAMDAS

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APPLICATION FOR DIRECTIONS

To

Hon'ble the Chief Justice and his
Hon'ble Companion Justices of the
Hon'ble Supreme Court of India.

The humble Application of the
Petitioner/Applicant abovenamed-

MOST RESPECTFULLY SHEWETH :

1. The caption matter is pending consideration before this Hon'ble court. At the outset I respectfully state and submit that the captioned SLP is connected and tagged along with (i) Writ Petition (Civil) No. 135 of 2012 titled as Republic of Italy & Ors Vs. Union of India & Ors.; (ii) Writ Petition (Civil) No 236 of 2014 titled as Chief Master Sargeant Massim Lat. vs. Union Of India; (iv) Writ Petition (Civil) No. 919 titled as Kilsariyan vs. Union Of India. The present application filed by Union of India may, therefore, be treated as an application filed in all the connected matter.

2. The Applicant-Union of India, is filing this Application in pursuance of order dated 6.3.2017 passed by this Hon'ble Court whereby the parties are required to place on record the Award passed by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which

was taken note of by this Hon'ble Court in the present proceedings. The brief facts leading to this Application are as under:-

- 2.1** The petitioners filed WP No. 4542 of 2012 before the Hon'ble Kerala High Court, challenging the jurisdiction of the State of Kerala to conduct investigation on the incident involving Italian Ship *Enrica Lexie* . The Hon'ble Kerala High Court heard the matter and directed the Petitioners to file their additional written submissions, which were duly filed on 2nd April, 2012, whereupon, the Hon'ble High Court reserved its judgement.
- 2.2** It is respectfully submitted that since there was a delay in the pronouncement of the judgment by the Ld Single Judge, the petitioners filed an Article 32 Writ Petition before this Hon'ble court bearing Writ Petition (Civil) No. 135 of 2012 titled as Republic of Italy & Ors Vs. Union of India & Ors.), *inter-alia* praying for a mandamus to declare that any action by all the Respondents in relation to the alleged incident, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Article 14 and 21 of the Constitution of India; and to declare that the continued detention of Marines by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Articles 14 and 21 of the Constitution of India. It is submitted that this writ petition was filed before the passing of the judgment by the Ld Single Judge of the Kerala High Court in Writ Petition (Civil) No. 4542 of 2012.
- 2.3** It is submitted that during the pendency of the said Writ Petition [WP 135 of 2012] before this Hon'ble court, the Kerala Police filed a charge sheet dated 18.05.2012 against the Marines under Sections 302, 307, 427 read with Section 34 Indian Penal Code and Section 3 of the SUA Act.
- 2.4** It is submitted that on 29th May, 2012, the Ld Single Judge of the Kerala High Court dismissed Writ Petition (Civil) No. 4542 of 2012 on two grounds. The learned Single Judge held that under the Notification No. SO 67/E dated 27th August, 1981, the

entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 [SUA Act], the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast falling within the Exclusive Economic Zone of India.

- 2.5** It is respectfully submitted that the Ld Single Judge also observed that the Marines were under the control of the Captain of the ship and hence, were to act only under his orders. There is nothing on record to show that the Italian marines were allowed absolute freedom to shoot and kill any person, even in cases of piracy attacks. Since, there is nothing on record to come to a conclusion that the Captain had given them any instruction to open fire at the boat, it has to be inferred that they did so at their own whim, and not under the command of either the Captain or of their superior officer in the Navy, so as to be able to claim sovereign immunity. The act of shooting the fishermen was observed to be neither an action in defence of the State nor one in defence of the vessel, but a private, illegal and criminal act. Therefore, it was held that the two marines had no immunity.
- 2.6** Aggrieved by the aforesaid judgment dated 29th May, 2012, passed by the Ld Single Judge of the Hon'ble Kerala High Court dismissing the Writ Petition (Civil) No. 4542 of 2012, the petitioners preferred the SLP in question bearing Special Leave Petition (Civil) No. 20370 of 2012.
- 2.7** It is submitted that since the subject matter of the S.L.P. (C) No. 20370 of 2012 (challenging the judgement of the Kerala High Court) as well as the relief sought in Writ Petition (Civil) No. 135 of 2012 were overlapping and inextricably linked therefore this Hon'ble court was pleased to tag the said two matters together.

- 2.8** It is respectfully submitted that in the meanwhile, the petitioners prayed for the stay on further proceedings in the criminal matter pending before the Session Court Kollam District, Kerala pending hearing and disposal of the SLP and, pass appropriate interim order staying operation and effect of the impugned final judgement (dated 29.05.2012) passed by the learned single Judge Hon'ble High Court of Kerala in WP No. 4542 of 2012. And, pass such any other order or such further order as this Hon'ble Court may deem fit or proper in the facts and circumstances of the case. The petitioners also filed various other miscellaneous application for seeking certain interim reliefs. The details of the said application are not necessary for the purpose of the present application therefore as advised the Applicant/UOI is not placing the same in the present application.
- 2.9** It is respectfully submitted that in the meanwhile vide order dated 18.01.2013, reported in (2013) 4 SCC 721 titled as Republic of Italy & Ors. v. Union of India & Ors., this Hon'ble court held that the State of Kerala had no jurisdiction to investigate into the incident, till such time it is proved that the provisions of Article 100 of the UNCLOS apply to the facts of the present case. This Hon'ble court vide the said order further held that the Union of India had the requisite jurisdiction to proceed with the investigation and trial of the Marines. Furthermore this Hon'ble court also directed the Union of India to set up a Special Court to try this case and dispose of the same. The pending proceedings before the CJM, Kollam was therefore transferred to the Special Court to be constituted in terms of this judgment. A copy of the judgment dated 18.01.2013 passed by this Hon'ble court is annexed hereto and marked as **Annexure A-1.**
- 2.10** That thereafter the petitioners filed another writ petition before this Hon'ble court bearing W.P. (C) No. 236/2014 registered on 08-03-2014, *inter-alia* challenging the legality and validity of investigation/prosecution instituted by the National

Investigation Agency (NIA) on the subject matter. In the said writ petition the Petitioners' made the following prayers:-

- (a) *declaring the NIA's investigation and prosecution without any jurisdiction as illegal and invalid, null and void;*
- (b) *quashing the MHA's notification S.O. 964 (E) Notification No. S.O. 671 dated 27-08-1981 issued under section 7(7) of the Maritime Zones Act, 1976 extending the applicability of the IPC and Cr.P.C. to the Exclusive Economic Zone;*
- (c) *declaring the MHA Order dated 06.02.2014 establishing Special Court ceased to have effect; and*
- (d) *Petitioners are Italian Military and Judicial officials have functional and enjoy sovereign immunity from being prosecuted in India.*

2.11 That on 28.03.2014, this Hon'ble court was pleased to stay the proceedings pending before the Special Court. A copy of the order dated 28.03.2014 is annexed hereto and marked as **Annexure A-2.**

3. The Applicant states and submits that thereafter various interim applications were filed essentially concerning the bail and bail conditions of Italian marine, with which the present proceedings may not be concerned at this stage.

4. The Applicant, however, respectfully submits that on 24 August 2015, International Tribunal on Law of the Sea (ITLOS), on the request of Italy, rendered an Order prescribing provisional measure stating that Italy and India shall both suspend all court proceedings. Vide order dated 26.8.2015, this Hon'ble Court, in view of the pendency of the issue before International Tribunal on Law of the Sea (ITLOS), was pleased to stay the proceedings pending before it and before other Court. A copy of the order dated 26.8.2015 is annexed hereto and marked as **Annexure A-3.**

5. It is respectfully submitted that this Order was later modified on 02-09-2015 by this Hon'ble Court to the effect that ITLOS shall be read as "Annex VII Arbitral Tribunal" thereby the proceedings

pending in the Courts shall remain stayed/deferred till further orders. A copy of the order dated 2.09.2015 is annexed hereto and marked as **Annexure A-4**.

6. That vide order dated 6.03.2017 this Hon'ble court directed the parties to place on record the Award passed by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and list the matter once the same is placed on the record of this Hon'ble Court. A copy of the order dated 6.03.2017 is annexed hereto and marked as **Annexure A-5**.

7. The Applicant states and submits that the Arbitration under United Nation Convention on the Law of Sea [UNCLOS], which was instituted on a request from the Republic of Italy has delivered its Award dated 21.5.2020. Salient features of the said Award are as under:-

- The Tribunal upheld the conduct of Indian authorities with respect to the incident and highlighted the material and moral harm suffered by the Indian fishermen on board the St. Antony on 15 February 2012. It held that the actions of the Italian Marines breached India's freedom and right of navigation under UNCLOS Article 87(1)(a) and 90.
- As argued by India, the Tribunal observed that, in principle, India and Italy had concurrent jurisdiction over the incident and a valid legal basis to institute criminal proceedings against the Marines. However, it found that the immunities enjoyed by the Marines operate as an exception to the jurisdiction of the Indian courts and, hence, preclude India from exercising its jurisdiction over the Marines. The Tribunal also rejected Italy's claim to compensation for the detention of the Marines.
- The Tribunal took note of the commitment expressed by Italy to resume its criminal investigation into the events of 15 February 2012 and decided that India must take necessary steps to cease to exercise its criminal jurisdiction over the marines.

- The Tribunal decided that India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property and moral harm suffered by the captain and other crew members of "St. Antony". The Tribunal also held that the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India. The Tribunal also decided that it shall retain jurisdiction should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India, and that, should no such application be received within one year after the date of the present Award, the proceedings shall be closed.
- India being a Party to the UNCLOS, in accordance with the provisions of the UNCLOS and the Rules of Procedure agreed by the Parties, the Award is final and without appeal and shall be complied with by the parties to the dispute (Article 11, Annex VII, UNCLOS).

8. The applicant states and submits that the Republic of India has taken a decision to accept and abide by the Award passed by the said Tribunal which would have the bearing on the continuance of present proceedings before this Hon'ble Court.

9. The Applicant states and submit that the Applicant is, therefore, placing this Award on record with a prayer that the proceedings with regard to the incident dated 15.2.2012 be disposed of in conformity with the Award passed by the aforesaid Tribunal on 21.5.2020. Copy of the said Award is annexed hereto and marked as **Annexure A-6.**

PRAYER

On the facts and circumstances of the case, this Hon'ble Court may be pleased to:-

- a) dispose of the captioned proceedings in conformity with the Award dated 21.5.2020;

- b) pass such other and further order or orders as may be deemed just and proper by this Hon'ble Court on the facts and in the circumstances of the case.

Drawn by –
Rajat Nair, Advocate

Filed by

Date :- 2.07.2020

B. V. Balaramdas

Place :- New Delhi.

Advocate for Union of India