



Case of Enrica Lexi and Indian Jurisdiction

* **Rajendra Kumar. M**

* **Advocate, High Court of Kerala.**

ABSTRACT

The Italian Ship Enrica Lexie shooting incident in the Indian coast has gained much importance in diplomatic, political and legal circles. Even though Italy raised the jurisdiction issue, Kerala High Court and Supreme Court decided for the trial in India. Supreme Court further went on to state that Kerala has no jurisdiction and the Union of India alone has jurisdiction for the trial of mariners and directed to constitute a special court with consultation with the Chief Justice of India. Supreme Court also stated that the observation in the judgement relates only to the question of jurisdiction prior to the adducing of evidences and once the evidence is recorded the matter of jurisdiction can be agitated before the trial court. These findings have much importance in the legal circles. The study is made to point out the importance.

Keywords : Enrica Lexi, Indian Economic Exclusive Zone , Contiguous Zone of India, jurisdiction, evidences, judgement

On 15 February 2012 Italian Navy Mariners on board the Italian - flagged oil Tanker Enrica Lexie opened fire on an Indian fishing vessel St. Antony killing two of its crew members Ajesh Binki and Valentine alias Gelastine, natives of Tamil Nadu and Kerala states respectively. The shooting occurred at 20.5 nautical miles off the Kerala coast in The Southern part of India. This maritime incident has generated a diplomatic row between the Italian and Indian Governments creating political overturns at both the countries as well as legal fights over jurisdiction and immunity.

The Indian case is that First Corporal Andronico Massino and Sergeant Vogilano Renato from the Italian navy on duty on board the Enrica Lexi has opened fire from the guns assigned to them in the direction of the vessel St. Antony without any provocation killing an armed Indian fishermen. The forensic examination revealed that the shots were from the guns used by the two mariners. The Indian Coast Guard stated that the Italian ship sailed towards Egypt without reporting the incident. The ship was asked to return to Kochi by the Coast Guard when it was intercepted about 70 nautical miles away from the place of incidence. The Indian authorities insisted on a trial of the incident in India.

Indian Coast Guard and the survived crew of St. Antony had stated that the incident occurred at around 16:30 IST and well within the Indian Contiguous Zone. The Voyage Data Recorder on board the Enrica Lexi which could be a valuable source of information was of any use as it was hampered by the crew of the ship. India's maritime guideline stipulates that all commercial merchant vessels with PCASPs and VPDs should obtain a Pre-Arrival Notification for Security (PANS) clearance prior to the entrance and transit through either the Indian Economic Exclusive Zone (EEZ) or the Indian Search and Rescue Region (ISRR). The Enrica Lexie had entered "Indian Customs Waters" without informing Indian authorities about the presence of military VPD personnel and weapons on board the privately owned merchant vessel. Indian customs waters are defined as the waters extending into the sea up to the limit of Contiguous Zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976).¹

But the contention of the Enrica Lexi was that they were trying to avert a piracy attack." The master also activated the Ship Security Alert System (SSAS) which sent out signals to the Italian Maritime Rescue and Coordination Centre (MRCC). The master also reported the incident on the mercury chart which links together and transfers information to the community including several navies across the world fighting piracy, including to the Indian Navy headquarters. The 'Military Report' was also done. A report was sent to MSCHOA at UK. Since the attempted attack was averted, the vessel continued on its scheduled course of journey.²

Kerala Police entered the ship along with the Italian Embassy officials took into custody the mariners and were remanded to judicial custody and interrogated for charges for homicide under section 302 of the Indian Penal Code. In the meanwhile the Italian Government made an out of court settlement with the kin of the victims.

CHARGING OF CASE

Following their arrest on 19 February 2012 on board the Enrica Lexie and after completing formalities in Kochi, the two Italian Marines were produced before the Judicial Magistrate at Karunagapally for Kollam district. The Judicial Magistrate remanded the two marines to three day police custody over charges of murder under Section 302 of Indian Penal Code. On 21 February, the Italian Marines filed a plea in High Court of Kerala to quash the charges against them. The next day the High Court permitted the ship to leave the port on condition getting the clearance from the investigating team and upon making a guarantee of Rupees 25 Lakhs (USD 50000) against the civil suits for compensations.³

The Italian Consul has filed a petition before the Kerala High Court for staying all the proceedings against the mariners alleging that the Kerala police have no jurisdiction to investigate as the incident occurred beyond the Indian territorial waters. On 18 May, after examining 60 witnesses Kerala police filed a 196-page charge-sheet, including forty-six material objects and 126 document annexes, before the Chief Judicial Magistrate in Kollam (Kerala) accusing the two detained Italian Marines (Massimiliano Latorre and Salvatore Girone) of

murder under IPC and also invoking International Maritime Law. Charges were filed under IPC sections 302 (murder) 307 (attempt to murder), 427 (causing damage or loss) and 34 (acting in common intention).⁴ Article 3 of the Suppression of Unlawful Act of International Maritime Navigation was also invoked in connection with the incident. The charge sheet included exhibits seized from the Enrica Lexie, notably the Voyage Data Recorder (VDR), six Beretta guns, two mini-light machine guns, 1690 bullets and the deck-log of the ship and GPS.⁵

KERALA HIGH COURT INTERVENTION

In a Writ Petition WP(C) No. 4542 of 2012 before the Kerala High Court⁶ two questions were raised. The first one was that 'Whether the Italian Marines on board the vessel who shot down two Indian fishermen, onboard a boat registered in India, in the territorial sea / contiguous zone / Exclusive Economic Zone of India are liable to be prosecuted for murder in accordance with the IPC and other domestic laws of India?'

The court held that: 'combined reading of Articles 33 and 56 would show that in the CZ/EEZ, the coastal state has the sovereign right with regard to exploring and exploiting, conserving and managing the national resources whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds. So also, the coastal States has the right for the establishment and use of artificial islands, installations and structures, marine research, protection and preservation of the marine environment etc.

The court further observed: Subclause 2 to Article 56 would show that in exercising the above rights and performing the duties, the coastal state shall act in a manner compatible with the provisions of the Convention. Therefore, the coastal state is entitled to enact any law which is not incompatible with the provisions of the Convention for maintaining law and order, and for exercising and protecting the rights including the lives of the persons employed/engaged in exercise of the above rights. To hold that a coastal state has no right whatsoever to protect its nationals exercising their legitimate rights inside the coastal state's CZ/EEZ, would be nothing but a total travesty of justice and an outrageous affront to the nation's sovereignty. Such a view would mean that any day, any passing-by ship can simply shoot and kill, at its will, fishermen engaged in earning their livelihood; and then get away with its act on the ground that it happened beyond the territorial waters of the coastal state. Such a view will not merely be a bad precedent, but a grossly unjust one, and will go against all settled principles of law.

The Judge thus declared: Going through the provisions of the Territorial Waters Act 1976, the notification issued under Subclause (7) of Section 7 and the SUA Act, I find that the provisions of the above two enactments and the notification are not at all incompatible with the provisions of the convention. Even the petitioners do not have any such plea. Therefore, I find that Territorial Waters Act, 1976, the notification issued under Sub Clause (7) of Section 7 and the SUA Act are compatible with the UNCLOS.⁷ The Italian Marines, who shot dead the two Indian fishermen engaged in fishing in the EEZ are therefore liable to be dealt with under the Territorial Waters Act, 1976, IPC, Cr PC and the SUA Act'.

The other point raised was that 'Whether the Italian Marines is entitled to sovereign immunity against the prosecution in India? The court held: 'Municipal law as well as International law recognizes sovereign immunity. But the extent of immunity depends upon the circumstances in which the forces are admitted by the territorial State, and in particular upon the absence or presence of any express agreement between the host and the sending State regulating the terms and conditions governing the entry of forces in the coastal territory. In this case there was no 'entry' by the Italian Marines to the

territory of India, but a merciless attack of gunshots at fishermen, while passing through the CZ/EEZ of India, breaching all established guidelines and norms, and without any cause. Where the members of military forces of a country commit wrongful acts, while engaging in non-military functions, it is quite appropriate for the aggrieved state to claim jurisdiction and subject them to the local law. International Law does not recognize any absolute waiver of jurisdiction by the aggrieved State.

The court said: In the case at hand, petitioners 1 and 2 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. In other words, the marines were not under the command of their immediate Superior Officer, but under the Captain of the vessel. 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.

Justice P S Gopinathan declared that: 'In the peculiar facts and circumstances of the case, I find that by no stretch of imagination can it be held that the shooting of two Indians by petitioners 1 and 2 is an act in exercise of sovereign functions. It is neither an action in defence of the State nor one in defence of the vessel, but a private, illegal and criminal act. Therefore, I answer the second issue against the petitioners and in favour of the respondents, by holding that petitioners 1 and 2 are not entitled to any sovereign immunity'.⁸

SUPREME COURT ON THE MATTER

The matter was taken to the Supreme Court. The main question raised was did India have jurisdiction to try the marines and if could this case be tried by the State of Kerala or the Indian Union? Another point raised was with regard to the immunity of the mariners.

Regarding the questions raised Chief Justice Altamas Kabir⁹ considered the point of territorial jurisdiction into two - Whether Kerala as a state of the Indian Union has the jurisdiction to try the mariners or the jurisdiction is vested with the Union of India.

The Supreme Court held that:¹⁰While, therefore, holding that the State of Kerala has no jurisdiction to investigate into the incident, I am also of the view that till such time as it is proved that the provisions of Art.100 of the UNCLOS 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982. The pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of this judgment and it is expected that the same shall be disposed of expeditiously. This will not prevent the Petitioners herein in the two matters from invoking the provisions of Art.100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good.¹¹

It is made clear that the observations made in this judgment relate only to the question of jurisdiction prior to the adducing of evidence and once the evidence has been recorded, it

will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law. It is also made clear that nothing in this judgment should come in the way of such reconsideration, if such an application is made.¹²

CONCLUSION

The Supreme Court dismissed the Italian Government's plea that India had no jurisdiction over the case. The Court also stated that the state of Kerala did not have authority to trial the case, pointing that the jurisdiction of the state extended to only 12 nautical miles whereas the incident occurred at 20.5 nautical miles. The Supreme Court in its judgement also ordered that a special court be set up Union Government after

consultations with the Chief Justice of India, to try the marines in accordance with Indian maritime laws and UNCLOS 1982.

This finding of the Supreme Court is very clear and the jurisdiction factor found by the Court has far reaching effect that it gives the Union of India to try the cases concerning the violence in the territorial waters as in the present case. The finding by the Court that India can exercise jurisdiction in contiguous zone as granted under Article 33 of UNCLOS. It also relied on the Lotus Case.¹³ Another interesting fact is that the Court did not decide the jurisdiction issue conclusively but left it for the outcome of the evidence in trial court. So the mariners can invoke provisions of Article 100 of UNCLOS.

REFERENCES

Press Information Bureau, Government of India. 16 February 2012. | Times of India 3 March 2012. As reported in Wikipedia. | The New Indian Express Daily 22 February 2012. | Even though the initial charge was under Sec.302 of IPC it was changed. | Business Standard 18 May 2012 | (2012)252 KLR 794 | The United Nations Convention on the Law of the Sea (UNCLOS) | (2012)252 KLR 794 | The matter was considered by Chief justice Altamas Kabir and Justice Chelameswar | 2013 (4) SCC 721 | 2013 (4) SCC 721 para.101 | 2013 (4) SCC 721 para 102 | S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) |