A M.T. ENRICA LEXIE & ANR.

v.

DORAMMA & ORS.

(Civil Appeal No. 4167 of 2012)

B MAY 2, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Search and Seizure:

C *Power of police officer to seize certain property – Two Indian fishermen killed as a result of firing from an Italian ship – Letter issued by Kerala Police to Master of the vessel not to continue her voyage without prior permission – Held: Admittedly, the vessel was not object of the crime nor have* D *any circumstances come up in the course of investigation that create suspicion of commission of any offence by the vessel – It has been further stated that the detention of the vessel was no longer required in the matter – Most of the safeguards sought for have been taken care of by the vessel and her* E *owner – The assurance given by the Republic of Italy to secure the presence of the four Marines, if required by any court or lawful authority, fully meets the ends of justice and protects wholly the interest of the State Government – In no way it affects the State Government's right to proceed with the investigation and prosecute the offenders – The State* F *Government and its authorities shall allow the vessel to commence her voyage subject to the directions given in the judgment – Code of Criminal Procedure, 1973 – s.102.*

On 15.2.2012, an FIR was lodged by the owner of an G **Indian fishing boat that as a result of indiscriminate firing from an Italian ship i.e. appellant no. 1, two of its fisherman died. During the course of investigation the Circle Inspector of the Kerala Police issued a letter to the Master of appellant no. 1 vessel not to continue her**

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voyage without his prior permission. The vessel and its owner filed a writ petition before the High Court. Their stand was that the Master of the ship was in no way responsible and could not interfere with the military activities undertaken by the NMP Squad which was directly under the command of the military of Republic of Italy. The writ petition was allowed by the Single Judge of the High Court permitting the vessel to commence her voyage subject to certain conditions. On the appeal filed by the wife of the one of the deceased fisherman, the Division Bench of the High Court set aside the orders of the single Judge and permitted the vessel and its owner to approach the jurisdictional Magistrate with an application u/s 457 CrPC. Aggrieved, the vessel and its owner filed the appeal.

Meanwhile three admiralty suits were filed by the owner of the fishing boat and the heirs of the deceased fishermen. Three settlements took place before Lok Adalat. The State Government contended that the said settlements were against public policy as also the Indian laws and would be challenged in appropriate proceedings. The Republic of Italy was also permitted to intervene.

Disposing of the appeal, the Court

HELD: 1. The police officer in the course of investigation can seize any property u/s 102 CrPC if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under s. 102 of the Code, the police officer can seize such property which is covered by s.102(1) and no other. [para 13] [181-G-H; 182-A]

A 1.2. It is the admitted case that the vessel was not object of the crime nor have any circumstances come up in the course of investigation that create suspicion of commission of any offence by the vessel. It has been further stated that the detention of the vessel was no B longer required in the matter. In view thereof, the order of the Division Bench of the High Court in upsetting the order of the Single Judge is set aside. [para 14] [182-C-D]

C 1.3. Two things are required to be made clear - (i) In the instant appeal, the Court is not directly concerned with the correctness, legality or validity of the settlements arrived at between the Republic of Italy and claimants-plaintiffs. Having regard to certain clauses in the settlements, insofar as the instant appeal is concerned, D these settlements deserve to be ignored; and (ii) the limited question for consideration in this appeal is with regard to the voyage of the vessel and, therefore, it is not necessary for this Court to dwell on the position taken up by the Republic of Italy with regard to the jurisdiction E of Indian authorities and courts. [para 23] [186-E-H; 187-A]

1.4. Most of the safeguards sought for have been taken care of by the vessel and her owner. However, for F securing the presence of four named Marines, it is expressly stated that the Republic of Italy is agreeable to give assurance to this Court that if the presence of these 4 Marines is required by any court or in response to any summons issued by any court or lawful authority, the Republic of Italy shall ensure their presence before the G appropriate court or such authority. This assurance is subject to the right of the persons summoned to challenge the same before a competent court in India. The assurance given by the Republic of Italy fully meets the ends of justice and protects wholly the interest of the H State Government and in no way it affects its right to

proceed with the investigation and prosecute the offenders. [para 24, 25] [187-B-F] A

1.5. The State Government and its authorities shall allow the vessel to commence her voyage subject to the directions given in the judgment. [para 26] [187-G] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4167 of 2012.

From the Judgment & Order dated 03.04.2012 of the High Court of Kerala at Ernakulam in W. A. No. 679 of 2012. C

Goolam E. Vahanvati, Attorney General, Indira Jaising, ASG, K.K. Venugopal, V.J. Mathew, Gopal Subramaniam, Harish N. Salve, Suhail Dutt, Raghenth Basant, Vipin Varghese, Ankur Talwar, Arjun Singh Bhati (for Senthil Jagadeesan), Harris Beeran, Nishanth Patil, Prashant Patil, Supriya Jain, Rekha Pandey, D.S. Mahra, M.T. George, K.T. Kavitha, P.V. Dinesh, D P.V. Vinod, Jaimon Andrews, P.P. Sandhu, Robin V.S. Parameswaran Nair, Diljeet Titus, Abhixit Singh, Achint Singh Gyani, Jagjit Singh Chhabra, Jaswant Perraya, Ankur Manchanda for the apprearing parties. E

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. We have heard Mr. K.K. Venugopal, learned senior counsel for the appellants, Mr. Goolam E. Vahanvati, learned Attorney General of India for respondent No. 6, and Mr. Gopal F Subramaniam, learned senior counsel for respondent Nos. 2 and 3. Despite service, respondent No. 1 has not chosen to appear.

3. The vessel - M.T. Enrica Lexie - and M/s Dolphin Tanker G SRL (owner of the vessel) are in appeal aggrieved by the order passed by the Division Bench of the Kerala High Court on April 3, 2012 whereby the Division Bench set aside the judgment and order of the Single Judge dated March 29, 2012.

4. The controversy arises in this way. On February 15, 2012 H

A an First Information Report (FIR) was lodged at Neendakara Coastal Police Station by one Fredy, owner of the Indian registered fishing boat St. Antony. It was alleged in the FIR that at 4.30 p.m. (IST) on that day while the fishing boat St. Antony was sailing through the Arabian Sea, incriminate firing was
B opened by an Italian Ship - M.T. Enrica Lexie (first appellant). As a result of firing from the first appellant vessel, two innocent fishermen who were on board the fishing boat St. Antony died and the other occupants of the boat saved their lives as they were lying in reclining position on the deck of the boat. On the
C basis of FIR, Crime No. 2/2012 under Section 302 of the Indian Penal Code, (IPC) was registered. Neendakara Coastal Police Station also informed the matter to the Coast Guards and, accordingly, the first appellant vessel was intercepted and brought to the Port of Cochin on February 16, 2012. Two
D Marines who allegedly committed the offence were arrested on February 19, 2012.

5. It is not necessary to go into details of the investigation into the above crime. Suffice it to say that on February 26, 2012, the concerned Circle Inspector of Police issued a letter
E to the Master of the first appellant vessel directing that the vessel shall not continue her voyage without his prior sanction.

6. The stand of the first appellant is that she was on way from Singapore to Egypt having 24 crew members on board.
F The vessel also had on board six Marines personnel, i.e., Naval Military Protection Squad (NMP Squad). The NMP Squad was deployed on board the first appellant vessel by the Government of Republic of Italy due to severe threat of Somalian pirates in the Arabian Sea. The second appellant - owner of the vessel - is a member of the Italian Ship Owner's Confederation. The
G NMP Squad was on board to ensure efficient protection to the vessel because of piracy and armed plundering as per the agreement between the Ministry of Defence - Naval Staff and the Italian Ship Owner's Confederation. The Master of the ship is in no way responsible for choices relating to operations
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involved in countering piracy attacks, if any; the Master of the ship cannot interfere with the military activities undertaken by the NMP Squad for the defence of the vessel, its crew and cargo in the face of pirate attacks and the NMP Squad on board the vessel is always under the direct command of the military of Republic of Italy.

7. According to the appellants, although all the agencies had completed their respective investigations, none of them were giving official clearance for the vessel to sail and that necessitated them to file a Writ Petition before the High Court of Kerala for appropriate directions and permission to the first appellant vessel for sailing and proceeding with her voyage.

8. In response to the Writ Petition, counter affidavit was filed by the Circle Inspector. The Single Judge, after hearing the parties, allowed the Writ Petition filed by the appellants, issued a writ of mandamus directing the present respondent Nos. 1 and 2 to allow the first appellant vessel to commence her voyage on certain conditions.

9. Being not satisfied with the judgment and order of the Single Judge dated March 29, 2012, Doramma (wife of one of the deceased fishermen), inter alia, filed Writ Appeal No. 679 of 2012. The Division Bench of the Kerala High Court noted that investigation in the matter was not yet complete and no charge-sheet had been filed and now since proceedings had been initiated by the Investigating Officer under Section 102(3) of the Code of Criminal Procedure, 1973 (for short, 'Code'), the matter needed to be considered by the concerned Judicial Magistrate exercising the powers under Section 457 of the Code and the Single Judge was not justified in allowing the Writ Petition and issuing the directions. The Division Bench, accordingly, set aside the order of the Single Judge and permitted the appellants to approach the jurisdictional Magistrate with an application under Section 457 of the Code and observed that the concerned Magistrate should dispose of the application in accordance with the procedure after

A applying its judicious mind to the facts of the case.

10. During the pendency of the matter before this Court, certain events have intervened. In three Admiralty Suits - one filed by the present respondent No. 1 - Doramma, the other by the first informant Fredy, and the third by Abhinaya Xavier and B Aguna Xavier, settlements have taken place after impleadment of the Republic of Italy as one of the parties to the proceedings. The settlement with the present respondent No. 1 - Doramma and the settlement with Abhinaya Xavier and Aguna Xavier took place on April 24, 2012, whereas the settlement with Fredy took C place on April 27, 2012. All three settlements took place before Lok Adalat. The Government of Kerala is seriously aggrieved by various clauses of these three settlements. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, vehemently contended that these settlements were D against public policy and the Indian laws. He submitted that the Government of Kerala intends to challenge these settlements in appropriate proceedings before appropriate forum.

11. In the course of the hearing of this Appeal, an oral E application was made on behalf of the Republic of Italy for intervention. We permitted the intervention of the Republic of Italy, particularly in view of the statements made in the Appeal that the NMP Squad comprising of six Italian Naval personnel on board were always under the direct command of the F Republic of Italy and the Master of the vessel could not interfere with the military activities undertaken by the Naval personnel on board the vessel. The intervention by the Republic of Italy was also found by us proper because of serious challenge by the Government of Kerala to the three settlements entered into between the Republic of Italy and the claimants-plaintiffs in the G three Admiralty Suits.

12. Before we deal with the matter further, we may refer to Section 102 of the Code which reads as follows :

H "102. Power of police officer to seize certain property.-

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the Commission of any offence. A

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer. B

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same: C D

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale." E F

13. The police officer in course of investigation can seize any property under Section 102 if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is G H

A being investigated into by the police officer cannot be seized. Under Section 102 of the Code, the police officer can seize such property which is covered by Section 102(1) and no other.

14. After the Writ Petition was filed by the present B appellants before the Kerala High Court, during pendency thereof on March 26, 2012 a report under sub-section (3) of Section 102 of the Code was filed by the Circle Inspector before the Chief Judicial Magistrate, Kollam reporting to that court that the first appellant vessel has been seized. To our C specific question to Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, whether the first appellant vessel was object of the crime or the circumstances have come up in the course of investigation that create suspicion of commission of any offence by the first appellant vessel, Mr. Gopal Subramaniam answered in the negative. Mr. D Gopal Subramaniam, learned senior counsel for the Government of Kerala, further stated that the detention of the first appellant vessel was no longer required in the matter. In view thereof, the order of the Division Bench in upsetting the order of the Single Judge has to go and we order accordingly.

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15. The question now remains, whether the order passed by the Single Judge on March 29, 2012 can be allowed to stand as it is or deserves to be modified.

F 16. Mr. Goolam E. Vahanvati, learned Attorney General, at the outset, submitted that Union of India has the same position as has been taken up by the Government of Kerala. He referred to the short counter affidavit filed on behalf of the Union of India by P. Sasi Kumar, Under Secretary to Government of India, Ministry of Shipping. In para 6 of the said G counter affidavit, it is stated that the material evidence in relation to the first appellant vessel itself has been collected during the preliminary inquiry for the purposes of Sections 358 and 359 of the Merchant Shipping Act, 1958. The FIR lodged against the accused persons is being investigated by the competent

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authorities of the State of Kerala because law and order is a State subject.

17. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, had already indicated that detention of the first appellant vessel was no longer required. He did not have any serious objection if the first appellant vessel was allowed to commence her voyage. He, however, sought for the following safeguards, viz., (i) the appellants must submit to the jurisdiction of the Indian court/s and they must also clarify their position about settlements in the Admiralty Suits arrived at between the Republic of Italy and the claimants-plaintiffs; (ii) for securing the presence of the six crew members, namely, Vitelli Umberto (Master), Noviello Carlo (Master SN), James Mandley Samson (Chief Officer), Sahil Gupta (2nd Officer), Fulbaria (Seaman) and Tirumala Rao (Ordinary Sea Man) and four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), an undertaking must be given by the Master of the first appellant vessel, the Managing Director of the owner of the first appellant vessel and the Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd.; and (iii) it be clarified that the interest of the Government of Kerala shall remain unaffected by the settlements arrived at between the Republic of Italy and the claimants-plaintiffs and the Government of Kerala should be free to take appropriate legal recourse in challenging these settlements.

18. Mr. K.K. Venugopal, learned senior counsel for the appellants, in response to the submissions made by Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, submitted that the appellants were not associated with the settlements arrived at between the Republic of Italy and the claimants-plaintiffs in the Admiralty Suits. He also submitted that for securing the presence of the six crew members on board the first appellant vessel, an undertaking shall be

A furnished by the Master of the first appellant vessel, the Managing Director of the owner of the first appellant vessel and Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd. He also submitted that the appellants, in fact, have submitted to the jurisdiction of the Indian B courts and they maintain that position. As regards, four Marines on board, Mr. K.K. Venugopal submitted that the Marines being under the direct command of the military of the Republic of Italy, the owner or the Master of the first appellant vessel were not in a position to give any undertaking or make any statement.

C 19. Since we have permitted Republic of Italy to intervene in the matter, we wanted to know from Mr. Harish Salve, learned senior counsel for the Republic of Italy, whether the Republic of Italy was in a position to give any assurance to this Court to secure the presence of four Marines, namely, Voglino D Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), as and when required by the Investigating Officer or any Court or lawful authority, Mr. Harish Salve handed over to us a written note indicating the position of the Republic of E Italy which reads as follows :-

"1. The position of the Republic of Italy is that the alleged incident took place outside Indian territorial waters and the Union of India and the State of Kerala have no jurisdiction F to deal with the matter under Indian municipal laws, including criminal laws, as well as under international law; that the incident is between two sovereign states, i.e., Republic of India and the Republic of Italy and that dispute settlement that are provided by international law and G conventions.

2. The Republic of Italy filed a petition under Article 32 and has also challenged the legal proceedings initiated in Kerala by an appropriate proceeding in the Kerala High Court. Without prejudice to its rights [and obligations] under H international law, and its contentions of sovereign immunity

including those raised in these two petitions, and without accepting that the actions of the Union of India or the State of Kerala are authorized by law, the Republic of Italy is agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, the Republic of Italy shall ensure their presence before an appropriate court or authority. This would be subject to the right of the persons summoned to challenge such summons/order before a competent court in India.

3. On this assurance this Hon'ble Court may, if it considers it appropriate, issue directions in respect of the following:-

(a) The vessel shall be permitted to sail out of India, and the marines shall sail on the vessel [together with all equipments, arms and ammunitions on board] and cross Indian territorial waters.

4. This assurance should not be considered as in any manner detracting from the stand of the Republic of Italy that its officers are entitled to sovereign immunity and that proceedings in India under the Indian municipal laws are illegal.

5. If in appropriate legal proceedings [including the petition filed by the Republic of Italy in this Hon'ble Court] it is declared that the proceedings in India are illegal, then these assurances shall come to an end."

20. In response to the above statement made by the Republic of Italy, Mr. Goolam E. Vahanvati, learned Attorney General, submitted that the Union of India did not accept the correctness of the assurances made in the above statement and, in any case, it must be clarified that the position taken by the Republic of Italy would in no way prejudice the proceedings

A in this Court or in any other Court or forum.

21. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, vehemently opposed the above statement of the Republic of Italy and submitted that the above
B statement was not acceptable to the Government of Kerala. He further asserted the right of the Government of Kerala to investigate into the crime and prosecute the offenders for the death of two fishermen.

C 22. Pertinently, Mr. Harish Salve, learned senior counsel for the Republic of Italy, also submitted that the settlements arrived at between the Republic of Italy and claimants-plaintiffs could be set aside by this Court in exercise of its powers under Article 142 of the Constitution of India. Mr. Harish Salve further
D submitted that the payments under the settlements have been made by the Republic of Italy to the claimants-plaintiffs not by way of compensation in the proceedings initiated by them but by way of goodwill and gesture.

E 23. We may make two things clear - (i) In the present Appeal, we are not directly concerned with the correctness, legality or validity of the settlements arrived at between the Republic of Italy and claimants-plaintiffs. Having regard to certain clauses in the settlements, we are of the view that insofar as the present Appeal is concerned, these settlements
F deserve to be ignored and we do so, and (ii) The limited question for consideration in this Appeal is with regard to the voyage of the first appellant vessel and, therefore, it is not necessary for us to dwell on the position taken up by the Republic of Italy that the alleged incident took place outside
G territorial waters and the Union of India and the State of Kerala have no jurisdiction to deal with the matter under municipal laws and the stout refutation to that position by the Union of India and the State of Kerala and the strong assertion by the Union of India and the State of Kerala that the offence of murder of two

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Indian citizens was committed within the territorial jurisdiction of India. A

24. Most of the safeguards sought for by Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, have been taken care of by the first appellant vessel and her owner. However, for securing the presence of four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), some difficulty remains. B

25. While taking up its position as set out in the statement handed over to us on behalf of the Republic of Italy, it is expressly stated that the Republic of Italy is agreeable to give assurance to this Court that if the presence of these 4 Marines is required by any Court or in response to any summons issued by any Court or lawful authority, the Republic of Italy shall ensure their presence before the appropriate Court or such authority. This assurance is subject to the right of the persons summoned to challenge the same before a competent court in India. In our view, the assurance given by the Republic of Italy to secure the presence of these four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), if required by any court or lawful authority, fully meets the ends of justice and protects wholly the interest of the Government of Kerala. In no way it affects the Government of Kerala's right to proceed with the investigation and prosecute the offenders. C D E F

26. Having regard to the above, we dispose of the present Appeal by the following order :-

(1) Subject to the compliances by the appellants as noted below, the Government of Kerala and its authorities shall allow the first appellant vessel to commence her voyage:- G

(a) The Master of the first appellant vessel, the Managing Director of the owner of the first appellant H

A vessel and the Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd shall furnish their undertakings to the satisfaction of the Registrar General of the Kerala High Court that six crew members, namely, Vitelli Umberto B (Master), Noviello Carlo (Master SN), James Mandley Samson (Chief Officer), Sahil Gupta (2nd Officer), Fulbaria (Seaman) and Tirumala Rao (Ordinary Sea Man), on receipt of summons/notice from any court or by Investigating Officer or lawful C authority shall present themselves within five weeks from the date of the receipt of such summons/notice and shall produce the first appellant vessel, if required by any court or the Investigating Officer or any other lawful authority, within seven weeks from D the receipt of such summons/notice.

(b) The second appellant shall execute a bond in the sum of Rupees Three Crores before the Registrar General of the Kerala High Court for production of the first appellant vessel and securing E the presence of the above six crew members as and when called upon by any court or the Investigating Officer or any other lawful authority.

(2) The assurance given by the Republic of Italy that if the F presence of the four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), is required by any court or lawful authority or Investigating Officer, the Republic of Italy shall ensure their presence G before such court or lawful authority or Investigating Officer is accepted. Such assurance shall, however, not affect the right of the above four Marines to challenge such summons/ notice issued by any court or Investigating Officer or any other lawful authority before a competent court in India.

H 27. It is clarified that the investigation into Crime No. 2/

2012 registered at Neendakara Coastal Police Station shall not be an impediment for commencement of the voyage by the first appellant vessel subject to port and customs clearances in accordance with law and upon furnishing the undertakings and bond as noted above. A

28. The four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), may sail on the vessel together with all equipments, arms and ammunitions on board the first appellant vessel other than those already seized by the Investigating Officer. B C

29. No costs.

R.P. Appeal disposed of.