

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF SEPTEMBER, 2022

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BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.5895 OF 2022 (GM-RES)

BETWEEN:

CMA CGM ASIA SHIPPING PTE LTD.,
A COMPANY INCORPORATED UNDER
THE LAWS OF SINGAPORE,
HAVING ITS OFFICE AT 9,
NORTH BUONA,
VISTA DRIVE NO.14-01
THE METROPOLIS TOWER-1,,
SINGAPORE 138588
REP BY POA HOLDER MR.N.KUCHANNA RAI
NADYODI HOUSE, BADGA BELLORE POST
BANTWAL TALUK, MANGALURU.

... PETITIONER

(BY SRI KRISHNA VIJAY SINGH, ADVOCATE)

AND:

UNION OF INDIA
MERCANTILE MARINE DEPARTMENT,
MANGALURU,
FIRST FLOOR, 'A' BLOCK,
MMD RESIDENTIAL QUARTER BUILDING,
23RD STREET, PANAMBUR,
MANGALURU - 575 010
THROUGH SHRI PRAVEEN R. NAIR,
ENGINEER AND SHIP SURVEYOR-CUM-DEPUTY

DIRECTOR GENERAL (TECH)
SURVEYOR IN CHARGE, MERCANTILE MARINE,
DEPARTMENT MANGALURU,
DIRECTORATE GENERAL OF SHIPPING
MINISTRY OF PORTS, SHIPPING AND WATERWAYS,
GOVERNMENT OF INDIA.

... RESPONDENT

(BY SRI VENKATANARAYANA B.S., ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C., PRAYING TO QUASH THE IMPUGNED COMPLAINT AT ANNEX-A BEARING CC NO. 0002328/2021 PENDING BEFORE THE JUDICIAL MAGISTRATE FIRST CLASS-II, MANGALORE AND THE IMPUGNED SUMMONS.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 26.07.2022, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner/CMA CGM Asia Shipping Private Limited, accused No.3 in C.C.No.2328 of 2021 pending before the Judicial Magistrate First Class, Mangalore is before this Court calling in question registration of crime arising out a private complaint registered by the Union of India, Mercantile Marine Department for offences punishable under Sections 285, 286 r/w 436 of the

Merchant Shipping Act, 1958 ('the Shipping Act' for short) and Sections 35, 36, 268, 280, 336, 337, 338 and 304A of the IPC.

2. Brief facts that lead the petitioner to this Court in the subject petition, as borne out from the pleadings, are as follows:

The petitioner is a company incorporated under the laws of Singapore, having its registered office at Singapore. The petitioner was the demise charterer of the vessel and is engaged in the business of shipping and logistics and also involved in containerized cargo transportation around the world through its fleet vessels. The petitioner claims that it has no office or any other presence in India. The respondent/Union of India in the Mercantile Marine Department, Mangalore communicates on 17-08-2021 granting authorization to the Department at Bangalore for conduct of a preliminary enquiry of marine casualty involving an Indian fishing vessel 'Rabah'. The background that led to the said authorization is an incident that took place on 13-04-2021. The vessel owned by the petitioner went on sail on 08-04-2021 from the port of Singapore to Nhava Sheva with draft 15.0 m fore and 15.0 m aft. The vessel was loaded with cargo of 102888 tons in 4693

containers which according to the petitioner was properly stowed. The vessel had 25 seamen and was fully and properly manned and furnished with everything necessary for the vessel and the intended voyage. The claim of the petitioner is that the vessel was seaworthy in all respects with the main engine and machinery, bridge apparatus, aids to navigation and mooring equipment in good order.

3. A fishing boat named 'Rabah' containing 14 fishermen including its captain, which according to the petitioner, did not have lights, navigational aids, and did not even have an insurance, collided with the vessel at 12.15 a.m. when the vessel was sailing as per planned sea passage at a distance of about 49 Nautical Miles in the international waters of the coast of Mangalore. The weather conditions were rough and the visibility was relatively low at the time when the fishing boat was plying around the vicinity that caused the accident. When the accident took place, the vessel immediately turned back to return to the port where the contact was made and the Master of the vessel, was spoken to, and informed about the incident. A message was also broadcasted for

assistance of nearby vessels and also Indian coast guards. On returning to the place of incident, the fishing boat was located in an inverted position and two fishermen who were sitting on the top of the fishing boat were rescued by the vessel and provided necessary first aid and the allegation is that none of the fishing boats in the vicinity cooperated despite request from the vessel. Based upon the said incident, a nomination comes about from the hands of the respondent for surveying the place. An order was passed nominating a Nautical Surveyor-cum-Deputy Director to carry out preliminary enquiry into the marine incident/casualties between the vessel and the fishing boat in terms of Section 359 of the Act.

4. The claim of the petitioner is that the preliminary enquiry under Section 359 embodies the principles of casualty investigation undertaken by each administration at coastal state under Article 94 of the United Nations Convention on the law of the Sea ('UNCLOS' for short). On conduct of a preliminary enquiry it was opined that vessel was responsible for rash and negligent act which killed 12 fishermen including the captain of the fishing boat, and thereafter on the report of the preliminary enquiry, a crime comes to be

registered against all the accused including the present accused/accused No.3. The crime is registered on 21.08.2021. Cognizance is taken by the learned Magistrate in the light of the fact that crime is registered by a public servant in C.C.No.2328 of 2021 and summons were issued to all the three accused, accused 1 and 2 being Singapore nationals and accused No.3 is the shipping company that owns the vessel. It is accused No.3 that has knocked the doors of this Court in the subject petition.

5. Heard Sri Krishna Vijay Singh, learned counsel appearing for the petitioner and Sri B.S. Venkatanarayana, learned counsel appearing for the respondent.

6. The learned counsel appearing for the petitioner while placing reliance on plethora of documents and the Act, as also the UNCLOS, would advance the following contentions:

- (a) A perusal at the entire complaint would not make out any allegation against the petitioner much less the allegations so made under the provisions of the IPC and the alleged rash or negligent act under Section 304A cannot be laid against the company.
- (b) Sections 285 and 286 of the Act which are invoked for registration of crime are not applicable to the petitioner.

- (c) The authority who has registered the complaint is incompetent to register any such complaint.
- (d) There is complete deviation of the United Nations Convention on the Law of the Seas 1982.
- (e) Mandatory enquiry under Section 202 of the Cr.P.C. is not conducted by the learned Magistrate prior to issuance of summons upon the accused as the respondent is beyond the jurisdiction of the learned Magistrate and therefore, the very act of issuing summons gets vitiated.
- (f) Notifications issued under Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 have been violated.

Elaborating the aforesaid points of submission, the learned counsel for the petitioner would contend that –

- (i) There is no concept of vicarious liability in criminal law as the owner or charterer cannot be alleged of rash and negligent navigation of the vessel by the crew. The person in-charge of the ship is the master and not the owner or charterer and therefore, there can be no allegation in the eye of law against the petitioner.
- (ii) Sections 285 and 286 of the Act are applicable only within the territorial waters of India as Section 2 of the Act provides that unless otherwise expressly provided, the provisions of this Act would apply to a foreign vessel

if any act has occurred within the territorial waters of India. Since the accident has taken place at 42 nautical miles of the coast of India, the Act itself is not applicable.

- (iii) The letter issued by the Department is granted to one Sri Praveen R.Nair, Officer of the MMD, Bangalore to file, defend and other actions of MMD within the jurisdiction of Mangalore only for the purpose of conduct of preliminary enquiry. It does not empower registration of a complaint or to make investigation into the shipping casualty.
- (iv) Article 97 of the UNCLOS would become applicable to an incident of collision in high seas and if that would result in penal or disciplinary responsibility of the master or of any other person in the service of the ship, it shall be instituted by the judicial or administrative authorities either of the flag State or of the State of which such person is a national. Since the petitioner is not a national of India no penal or disciplinary action can be taken against him.
- (v) Merely because the complaint is registered by a public servant, it would not absolve the mandatory duty of the learned Magistrate to conduct an inquiry under Section 202 Cr.P.C. Section 202(1)(b) only exempts a Court

from mandatory inquiry which would mean that if the Court is the complainant, then the mandatory inquiry is not necessary and not with regard to a public servant.

- (vi) Notifications issued under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act cannot stretch to the Exclusive Economic Zones.

Coherence of all these submissions of the learned counsel for the petitioner is that the entire proceedings are vitiated as they are one without jurisdiction *qua* the petitioner.

7. Per-contra, B.S.Venkatanarayana, representing the Union of India, through its Mercantile Marine Department, refuting all the contentions of the learned counsel appearing for the petitioner would contend that -

- (i) If the accident had taken place in the Exclusive Economic Zone ('EEZ' for short) the Act and the provisions of the IPC would become applicable to foreign nationals as well.
- (ii) Article 297 of the Constitution of India permits such enactment to bring in the crimes that are committed in the EEZ. The incident that has happened was on

account of rash and negligent navigation of the vessel which led to 6 innocent fishermen dying and bodies of 6 innocent fishermen still missing.

- (iii) He would submit Maritime Zones Act which defines Exclusive Economic Zones extends up to 200 nautical miles from appropriate baseline and in terms of sub-section (7) of Section 7 of the Maritime Zones Act, the provisions of the IPC and Cr.P.C. are made applicable.
- (iv) The contention with regard to proceedings initiated being in violation of Article 97 of the UNCLOS is unfounded, as Article 97 deals with high seas and has no application for EEZ. Section 285 of the Act clearly permits collision regulations to be observed by foreign vessels within Indian jurisdiction.
- (v) Insofar as the contention with regard to an inquiry to be conducted by the learned Magistrate is concerned, notwithstanding registration of complaint by a public servant it is no longer *res integra* as a Co-ordinate Bench of this Court in ***SERDIA PHARMACEUTICALS (INDIA) PRIVATE LIMITED v. UNION OF INDIA – Criminal Petition No.919 of 2020*** decided on **24th March 2021** has held that Section 202 inquiry is not required when it is registered by a public servant.

- (vi) In all, the learned counsel, to buttress his submission would rely on the judgment rendered by the Apex Court in the case of **REPUBLIC OF ITALY v. UNION OF INDIA AND OTHERS**¹ wherein the Apex Court has held that provisions of the IPC and Cr.P.C. are extended by virtue of the Notification dated 27-08-1981 issued under the Maritime Zones Act, 1976.

8. I have given my anxious consideration to the submissions made by respective learned counsel and perused the material on record. In furtherance whereof, the following issues arise for my consideration:

- (i) *Whether the Merchant Shipping Act insofar as it penalizes action under Sections 285 and 286 of the Act is applicable to the petitioner?*
- (ii) *Whether the penal provisions of the IPC or the Cr.P.C. are applicable to the petitioner whose ship is flagged outside India and the flag ship does not come within the territory of India?*
- (iii) *Whether the Company/petitioner/accused No.3 could be made a party to the proceedings?*
- (iv) *Whether non-conduct of inquiry under Section 202 of the Cr.P.C. on a complaint registered by a public servant vitiates entire proceedings?*

¹ (2013) 4 SCC 721

- (v) *Whether the respondent did have the authority to file the complaint?*

Issues No.1 and 2 are intertwined, therefore are taken up together:

- (i) *Whether the Merchant Shipping Act insofar as it penalizes action under Sections 285 and 286 of the Act is applicable to the petitioner?***
- (ii) *Whether the penal provisions of the IPC or the Cr.P.C. are applicable to the petitioner whose ship is flagged outside India and the flag ship does not come within the territory of India?***

9. The afore-narrated facts are not in dispute. The crime is at the stage of issuance of summons. On summons being issued to the petitioner, along with two others, has knocked the doors of this Court with the afore-quoted contentions. To consider the respective contentions of both the petitioner and the respondent, it is germane to notice the statutory frame work of the Merchant Shipping Act, 1958, Maritime Zones Act, 1976, the provisions of the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the Articles of the United Nations Convention on the law of the Sea.

10. The Shipping Act was promulgated to foster the development and ensure efficient maintenance of an Indian

mercantile marine. Section 2 of the Act deals with application of the Act and reads as follows:

"2. Application of Act.—(1) *Unless otherwise expressly provided, the provisions of this Act which apply to—*

- (a) *any vessel which is registered in India; or*
- (b) *any vessel which is required by this Act to be so registered; or*
- (c) *any other vessel which is owned wholly by persons to each of whom any of the descriptions specified in clause (a) or in clause (b) or in clause (c), as the case may be, of Section 21 applies, shall so apply wherever the vessel may be.*

(2) *Unless otherwise expressly provided, the provisions of this Act which apply to vessels other than those referred to in sub-section (1) shall so apply only while any such vessel is within India, including the territorial waters thereof."*

Sub-section (2) of Section 2 makes the Act applicable to vessels other than those referred in sub-section (1) to such vessels if they are within India including the territorial waters thereof. Sections 285 and 286 of the Act that are invoked for initiation of impugned proceedings deal with provision of collision regulations and observance of collision regulations and they read as under:

"285. Collision regulations.—(1) *The Central Government may make regulations for the prevention of collisions at sea, and may thereby regulate the lights and shapes to be carried and exhibited, the fog and distress signals to be carried and used, and the steering and sailing rules to be observed by Indian ships and sailing vessels registered in India.*

(2) The collision regulations, together with the provisions of this Part relating thereto or otherwise relating to collisions, shall be observed by all foreign ships and sailing vessels within Indian jurisdiction, and in any case arising in any court in India concerning matters arising within Indian jurisdiction, such ships and sailing vessels shall, so far as respects the collision regulations and the said provisions of this Act, be treated as if they were Indian ships or sailing vessels registered in India, as the case may be.

286. Observance of collision regulations.—(1) The owner or master of every ship and the owner or tindal of every sailing vessel to which Section 285 applies shall obey the collision regulations, and shall not carry or exhibit any lights or shapes or use any fog or distress signals, other than those required by the said regulations.

(2) If any damage to person or property arises from the non-observance by any such ship or sailing vessel of any of the collision regulations, the damage shall be deemed to have been occasioned by the willful default of the person in charge of the ship or the sailing vessel, as the case may be, at the time unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary.”

(Emphasis supplied)

Section 285 deals with collision regulations. The collision regulations would become applicable to all foreign ships and sailing vessels within the Indian jurisdiction and if such ships or sailing vessels indulge in collision, they would be treated and tried as if they were Indian ships or sailing vessels registered in India. Section 286 mandates certain observance of collision regulations and willful

default of the person in-charge of the ship would become open for penal action if they are not observed and penal action is dealt with under Section 436 of the Act. Any person contravening the provisions of the Act shall become punishable according to the table appended to Section 436.

11. The afore-quoted would indicate, in its first blush that the Act would not become applicable to those vessels who indulge in accidents beyond the territorial waters of India, in the high seas, as sub-section (2) of Section 2 makes the provisions of the Act applicable to any such vessel within India. But, the Parliament is fetterless from enacting laws for it to stretch beyond the territorial waters of India, in terms of the power conferred under the Constitution. Article 297 of the Constitution of India deals with things of value within territorial waters or the continental shelf and resources of the EEZ to vest in the Union. Article 297 reads as follows:

"297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.—(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the *exclusive economic*

zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the 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 Parliament."

(Emphasis supplied)

In terms of Article 297, the Government of India has enacted the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976. Section 2 of the said Act defines the 'limit' and reads as follows:

"2. Definition.—In this Act, "limit", in relation to the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India, means the limit of such waters, shelf or zone with reference to the mainland of India as well as the individual or composite group or groups of islands constituting part of the territory of India."

(Emphasis supplied)

The limit in relation to territorial waters would mean with reference to EEZs as well. Section 5 defines what is Contiguous zone of India and reads as follows:

"5. Contiguous zone of India.—(1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial

waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of Section 3.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the contiguous zone.

(3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

(4) The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to,—

- (a) the security of India, and
- (b) immigration, sanitation, customs and other fiscal matters.

(5) The Central Government may, by notification in the Official Gazette,—

- (a) extend with such restrictions and modifications as it thinks fit, any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof, to the contiguous zone, and

- (b) **make such provisions as it may consider necessary in such notification for facilitating the enforcement of such enactment,**

and any enactment so extended shall have effect as if the contiguous zone is a part of the territory of India.”

(Emphasis supplied)

Section 6 defines what is Continental shelf and reads as follows:-

"6. Continental shelf.—(1) The continental shelf of India (hereinafter referred to as the continental shelf) comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3 where the outer edge of the continental margin does not extend up to that distance.

(2) India has, and always had, full and exclusive sovereign rights in respect of its continental shelf.

(3) Without prejudice to the generality of the provisions of sub-section (2), the Union has in the continental shelf,—

- (a) sovereign rights for the purposes of exploration, exploitation, conservation and management of all resources;**
- (b) exclusive rights and jurisdiction for the constitution, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the continental shelf or for the convenience of shipping or for any other purpose;**
- (c) exclusive jurisdiction to authorise, regulate and control scientific research; and**
- (d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution.**

(4) No person (including a foreign Government) shall, except under, and in accordance with, the terms of a licence or a letter of authority granted by the Central Government, explore the continental shelf or exploit its resource or carry out any search or excavation or conduct any research within the continental shelf or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever.

(5) The Central Government may, by notification in the Official Gazette,—

- (a) declare any area of the continental shelf and its superjacent waters to be a designated area; and
- (b) make such provisions as it may deem necessary with respect to,—
 - (i) the exploration, exploitation and protection of the resources of the continental shelf within such designated area; or
 - (ii) the safety and protection of artificial islands, off-shore terminals, installations and other structures and devices in such designated area; or
 - (iii) the protection of marine environment of such designated area; or
 - (iv) customs and other fiscal matters in relation to such designated area.

Explanation.—A notification issued under this sub-section may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India.

(6) The Central Government may, by notification in the Official Gazette,—

- (a) extend with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the continental shelf or any part [including any designated area under sub-section (5)] thereof; and
- (b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment,

and any enactment so extended shall have effect as if the continental shelf or the part [including, as the case may be, any designated area under sub-section (5)] thereof to which it has been extended is a part of the territory of India.

(7) Without prejudice to the provisions of sub-section (2) and subject to any measures that may be necessary for protecting the interests of India, the Central Government may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf by foreign States:

Provided that the consent of the Central Government shall be necessary for the delineation of the course for the laying of such cables or pipelines."

(Emphasis supplied)

It is here that continental shelf of India is held to be comprising of the seabed and subsoil of the submarine areas that extend beyond the limit of India's territorial waters up to a distance of 200 nautical miles from the baseline referred to sub-section (2) of Section 3. Section 3 defines sovereignty over and limits of territorial waters and reads as follows:

"3. Sovereignty over, and limits of, territorial waters.--(1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters.

(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 baseline.

(3) Notwithstanding anything contained in sub-section (2), the Central Government may, whenever, it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters.

(4) No notification shall be issued under sub-section (3) unless resolutions approving the issue of such notification are passed by both Houses of Parliament."

(Emphasis supplied)

The baseline as defined under sub-section (2) is twelve nautical miles from the nearest point of the appropriate baseline. Section 7 deals with Exclusive economic zone and reads as follows:

"7. Exclusive economic zone.—(1) *The exclusive economic zone of India (hereinafter referred to as the exclusive economic zone) is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3.*

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, after, by notification in the Official Gazette, the limit of the exclusive economic zone.

(3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

(4) In the exclusive economic zone, the Union has,—

(a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents;

(b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the

exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose;

(c) exclusive jurisdiction to authorise, regulate and control scientific research;

(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and

(e) such other rights as are recognised by International Law.

(5) No person (including a foreign Government) shall, except under, and in accordance with, the terms of any agreement with the Central Government or of a licence or a letter of authority granted by the Central Government, explore or exploit any resources of the exclusive economic zone or carry out any search or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever:

Provided that nothing in this sub-section shall apply in relation to fishing by a citizen of India.

(6) The Central Government may, by notification in the Official Gazette,—

(a) declare any area of the exclusive economic zone to be a designated area; and

(b) make such provisions as it may deem necessary with respect to,—

(i) the exploration, exploitation and protection of the resources of such designated area; or

(ii) other activities for the economic exploitation and exploration of such designated area such as the production of energy from tides, winds and currents; or

(iii) the safety and protection of artificial islands, off-shore terminals, installations and other structures and devices in such designated area; or

(iv) the protection of marine environment of such designated area; or

(v) customs and other fiscal matters in relation to such designated area.

Explanation.—A notification issued under this sub-section may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India.

(7) The Central Government may, by notification in the Official Gazette,—

(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof; and

(b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment,

and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.

(8) The provisions of sub-section (7) of Section 6 shall apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the exclusive economic zone as they apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the continental shelf.

(9) In the exclusive economic zone and the air space over the zone, ships and aircraft of all States shall, subject to the

exercise by India of its rights within the zone, enjoy freedom of navigation and overflight.”

(Emphasis supplied)

Exclusive economic zone to mean an area beyond and adjacent to the territorial waters and the limit of such zone to be 200 nautical miles from the baseline and rights of Union of India in the said exclusive economic zone is dealt with under sub-section (4) of Section 7 of the Act which determines sovereign rights. Sub-section (5) of Section 7 empowers the Union to make such provision as it deems necessary in furtherance of the Act. Sub-section (7) of Section 7 empowers the Government to issue a notification bringing in certain zones within the ambit of exclusive economic zone which would be extending the maritime boundaries. On the bedrock of the Maritime Zones Act, 1976 the case of the petitioner will have to be considered.

12. The incident of the accident happens on 13-04-2021 at a distance of **42** nautical miles from the baseline. The contention is that the petitioner being a vessel not registered or belonging to any company in India and its flag State being outside the territory of

India cannot be proceeded against *sans* acceptance. The accident takes place at 42 nautical miles which may not be within the territorial limits of India but is within the territory of exclusive economic zone of India which stretches up to 200 nautical miles from an appropriate baseline. Whatever appropriate baseline to be taken into consideration it would be well within 200 nautical miles. Maritime Zones Act, 1976 is promulgated by the Union of India in exercise of its constitutional power under Article 297(3) which empowers declaration of exclusive economic zone from time to time by the Parliament.

13. The constitutional power is exercised and Maritime Zones Act is notified. The Maritime Zones Act extends beyond the Act. Therefore, the Shipping Act cannot be read in isolation as it will have to be read in conjunction with the Maritime Zones Act, 1976. A notification is issued under sub-section (7) of Section 7 of the Maritime Zones Act, 1976 making the provisions of the IPC and the Cr.P.C. applicable to exclusive economic zone. The Notification is issued by the Government on 27-08-1981 and it reads as follows:

"NOTIFICATION

Ministry of Home Affairs, Noti. No. S.O. 671(E), dated August 27, 1981, published in the Gazette of India, Extra., Part II, Section 3(ii), dated 27th August, 1981, p. 1144 [No. 2/2/81-Judi. Cell]

S.O. In exercise of the powers conferred by sub-section (7) of Section 7 of the **Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976** (80 of 1976), the Central Government hereby extends to the exclusive economic zone, referred to therein, the Acts specified in the Schedule hereto annexed subject to the modifications (if any) and the provisions for facilitating the enforcement of such Acts specified in the said Schedule.

SCHEDULE

PART I

List of Acts

Year No.		Short title	Modifications
1	2	3	4
1860	45	The Indian Penal Code, 1860.	
1974	2	The Code of Criminal Procedure, 1973	<p>After Section 188 of the Code of Criminal Procedure, 1973, the following section shall be inserted, namely—</p> <p>"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 Zone 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."</p>

PART II

Provisions for facilitating the enforcement of the Acts

1. For the purpose of facilitating the application in relation to the aforementioned exclusive economic zone, of any Act mentioned in Part I,

any court of other authority, may construe it in such manner, not affecting the substance, as may be necessary or proper to adapt it to the matter before the court or other authority.

2. (1) If any difficulty arises in giving effect, in relation to the aforementioned exclusive economic zone, to the provisions of any Act specified in Part I, the Central Government may, by order published in the Official Gazette, make such provisions or give such directions as appear to it to be necessary for the removal of the difficulty.

(2) In particular and without prejudice to the generality of the provisions of sub-paragraph (1) of this paragraph, any order made under sub-paragraph (1) may make provisions with regard to construction of references to any functionary specified in such Act."

In terms of the notification issued by the Government of India, as afore-quoted, exercising its power under sub-section (7) of Section 7 of the Maritime Zones Act clearly brings in the provisions of the IPC and Cr.P.C. to become applicable. Therefore, the contention that IPC and Cr.P.C. are not applicable to the ships flagged outside India, in the facts of the case, tumbles down.

14. The contention of the learned counsel for the petitioner that proceedings are in violation of the United Nations Convention on the Law of the Sea with particular reference to Articles 58 and 97, is again unacceptable. Article 58 which deals with rights and duties of other States in the exclusive economic zone and reads as follows:

"Article 58: Rights and duties of other States in the exclusive economic zone.- 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

(Emphasis supplied)

Article 86 deals with applicability of UNCLOS to high seas. Article 97 which is the sheet anchor of the learned counsel for the petitioner reads as follows:-

"Article 97 Penal jurisdiction in matters of collision or any other incident of navigation.- 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, 60 no penal or disciplinary

proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. 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."

(Emphasis supplied)

Article 97 no doubt deals with the jurisdiction of penal or disciplinary proceedings against a person who is outside the territory of a particular State to be dealt with only by the flag State or the State of which such person is a national. This sheet anchor of the learned counsel for the petitioner again tumbles down for the reason that Article 97 deals with waters on the high seas and not on the territorial waters. By the very definition of the article, the said fact can be unmistakably gathered as there is no usage of the word territorial waters in Article 97. It clearly deals with collision or any other incident of navigation concerning a ship on the high seas. Article-97 neither deals with exclusive economic zones nor directs

about proceedings within the territorial waters of any of the consenting States.

15. Reference being made to the judgment of the Apex Court in the case of **REPUBLIC OF ITALY** (*supra*) in the circumstances becomes apposite. The Apex Court considers entire spectrum of the provisions that have fallen for interpretation in the case at hand. The Apex Court was considering an act of crime by Italian nationals which would become offences punishable under the IPC. The Republic of Italy had enacted Government decree which was later converted into Law of Parliament of Italy to protect Italian ships from piracy in international seas. When the vessel had proceeded about 38 nautical miles on the high seas towards Djibouti, an incident happens where two Indian fishermen were shot leading to their death. Proceedings were instituted against those Italian nationals for having committed an act that would become punishable under the IPC. The argument was that the act having taken place in the high seas at 38 nautical miles, the Italian nationals being tried within the territory of India was without jurisdiction. The Apex Court considers Maritime Zones Act, the Act,

UNCLOS and the Notification issued under the Maritime Zones Act dated 27-08-1981 and holds as follows:-

"106. This takes us to another dimension involving the concept of sovereignty of a nation in the realm of public international law. The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976 and UNCLOS, 1982 the exclusive economic zone is extended to 200 nautical miles from the baseline for measurement of territorial waters. Although the provisions of Section 188-A CrPC have been extended to the exclusive economic zone, the same are extended to areas declared 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, the exclusive economic zone continues to be part of the high seas over which sovereignty cannot be exercised by any nation.

... ..
 121. The sovereignty of a nation/State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and international law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a "coastal State" extends to its territorial waters, is also a well-accepted principle of international law [It is well established that the coastal State has sovereignty over its territorial waters, the seabed and subsoil underlying such waters, and the air space above them, subject to the obligations

imposed by international law. Recently, in *North Sea Continental Shelf* case, 1969 ICJ Rep 3 the International Court of Justice declared that a coastal State has "full sovereignty" over its territorial sea. This principle of customary international law has also been enshrined in Article 1 of the Geneva Convention, and remains unaffected in the draft convention. See *The New Law of Maritime Zones* by P.C. Rao, p. 22.] though there is no uniformly shared legal norm establishing the limit of the territorial waters — "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in *B.K. Wadeyar v. Daulatram Rameshwarlal* [AIR 1961 SC 311] held at para 8 as follows: (AIR p. 314)

"8. ... These territorial limits would include the territorial waters of India."

... ..

143. Therefore, I am of the opinion that Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any municipal court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.

144. Before parting with the topic, one submission of Shri Salve is required to be dealt with: Shri Salve heavily relied upon the decision in *Aban Loyd Chiles Offshore Ltd. v. Union of India* [Aban Loyd Chiles Offshore Ltd. v. Union of India(2008) 11 SCC 439] for the purpose of establishing that the sovereignty of this country does not extend beyond the territorial waters of India and therefore, the extension of the Penal Code, 1860 beyond the territorial waters of India is impermissible.

145. No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act: (*Aban Loyd Chiles case [Aban Loyd Chiles Offshore Ltd. v. Union of India(2008) 11 SCC 439]* , SCC p. 467, para 74)

"74. ... India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters."

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, Parliament expressly asserted sovereignty of this country over the territorial waters but, simultaneously, asserted its authority to determine/alter the limit of the territorial waters.

146. At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of Parliament to extend the laws beyond its territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of *Aban Loyd Chiles case [Aban Loyd Chiles Offshore Ltd. v. Union of India(2008) 11 SCC 439]* , it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that judgment.

147. Coming to the second issue: whether the incident in issue is an "incident of navigation" in order to exclude the jurisdiction of India on the ground that with respect to an "incident of navigation", penal proceedings could be instituted only before the judicial authorities of the "Flag State" or of the State of which the accused is a national.

148. The expression "incident of navigation" occurring under Article 97 of UNCLOS is not a defined

expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of UNCLOS. Article 97 occurs in Part VII of UNCLOS, which deals with "high seas". Article 86 stipulates the application of Part VII. It reads as follows:

"86.Application of the provisions of this Part.—The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58."

149. Further, Article 89 makes an express declaration that:

"89.Invalidity of claims of sovereignty over the high seas.—No State may validly purport to subject any part of the high seas to its sovereignty."

From the language of Article 86 it is made very clear that Part VII applies only to that part of the sea which is not included in the exclusive economic zone, territorial waters, etc. "Exclusive economic zone" is defined under Article 55 as follows:

"55.Specific legal regime of the exclusive economic zone.—The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

That being the case, I am of the opinion that irrespective of the meaning of the expression "incident of navigation", Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that:

"57.Breadth of the exclusive economic zone.—The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, the second submission of Shri Salve should also fail."

(Emphasis supplied)

In the light of the said judgment of the Apex Court, the contention of the learned counsel for the petitioner that the very proceedings instituted are without jurisdiction is rendered unacceptable, as the Apex Court, as observed hereinabove, takes note of all the provisions that are now urged in support of the contention that the same are not applicable. The Apex Court, in the aforesaid judgment, considers every aspect of Maritime Zone Act, EEZ, the concept of nautical miles from a standard point and holds that the limit of 200 nautical miles as indicated in Article 27 of the UNCLOS is internationally recognized. Sub-section (1) of Section 7 of the

Maritime Zones Act stipulates the limit of EEZ to be perfectly in tune with the terms of UNCLOS. The Apex Court, therefore, holds that Article 97 of the UNCLOS has no application to the EEZ. The unmistakable inference that could be drawn from a conjoint reading of the afore-quoted provisions and the judgment of the Apex Court is that Article 97 of UNCLOS would be applicable to the "High Seas" and not to the 'EEZ'. Therefore, the point so arisen for consideration with regard to applicability of the Act or the provisions of the IPC or Cr.P.C. are held against the petitioner for the reasons aforesaid and the conclusion reached that the penal provisions under the IPC and the procedural provisions under the Cr.P.C. are applicable to the petitioner and can be tried for the said offences, as the notification issued in the year 1981 under the Maritime Zones Act which the Government is empowered even under Article 297 of the Constitution, would make provisions of the IPC and Cr.P.C. applicable to the petitioner in the case at hand.

16. Insofar as the issue with regard to whether the entire proceedings are contrary to Article 97 of UNCLOS is concerned, is held in the negative and against the petitioner for the very

same reasons indicated hereinabove, as the Articles which bear consideration at the hands of the Apex Court in the case of **REPUBLIC OF ITALY** (*supra*) considers this very issue of whether Article 97 bars a trial of a foreign national in the Courts of India has held against the contentions of the Republic of Italy and, therefore, the unmistakable inference would be that the proceedings so instituted against the petitioner is not contrary to Article 97 of the UNCLOS. Both the issues that have arisen for consideration are answered against the petitioner.

Issue No.3:

(iii) *Whether the Company/petitioner/accused No.3 could be made a party to the proceedings?*

17. To consider this point, it is germane to notice Section 441 of the Act. Section 441 deals with offences by companies and reads as follows:

441. Offences by companies.—(1) *If the person committing an offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

- (a) "company" includes a co-operative society, a firm or other association of individuals; and*
- (b) "director" in relation to a firm means a partner in the firm."*

Section 441 makes every person who at the time of the offences committed in-charge of, or was responsible to the Company for the conduct of business of the Company, as well as the Company, to be deemed to be guilty of the offences. Therefore, there is no gainsaying that the Company cannot be made a party to the proceedings as only the Master or Captain of the ship is responsible for what happens in the ship. In the light of the Act and the incident being covered by Maritime Zones Act and the vessel being

engaged by the Company, if the Company is not a party to these proceedings, there could not have been any vicarious liability fastened upon the Company. Therefore, being owner of the Company to which the ship belongs, the master of the ship was a servant of, ought to be hauled into the proceedings in terms of Section 441 of the Act. Therefore, the submission of the learned counsel for the petitioner that there is no allegation against the Company and it is not directly involved in the mishap that happened is unacceptable, as Section 441 depicts vicarious liability on the Company as a whole. Therefore, issue No.3 is also answered against the petitioner.

Issue No.4:

(iv) *Whether non-conduct of inquiry under Section 202 of the Cr.P.C. on a complaint registered by a public servant vitiates entire proceedings?*

18. To consider the issue as to whether the learned Magistrate could have straight away issued process against the accused who is housed in Singapore which is admittedly beyond the jurisdiction of the learned Magistrate and taken cognizance of the

offence, it is germane to notice Section 202 of the Cr.P.C. Section 202 of the Cr.P.C. reads as follows:

"202. Postponement of issue of process, - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

- (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or
- (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

Section 202 of the Cr.P.C. mandates that any Magistrate prior to issuance of process shall hold an inquiry in the case where the

accused resides beyond the jurisdiction of the said Magistrate. Accused No.3 who is the petitioner herein resides beyond the jurisdiction as the ship was from the Company that had its flag in Singapore. The issue would be with the accused No.1 being a Singapore national, accused No.2 being a Myanmar national and 3 again being a Company which had its office in Singapore. The complainant is the Engineer and Ship Surveyor-cum-Deputy Director, Mercantile Marine Department, Mangalore, a public servant. The complaint is registered by a public servant and recording of his sworn statement is exempted in terms of Section 200(1) of the Cr.P.C. Whether the duty cast upon the Court under Section 202 of the Cr.P.C. is also taken away when a public servant registers a complaint is what is required to be noticed.

19. The learned counsel for the petitioner to buttress the said issue that inquiry under Section 202 Cr.P.C. is mandatory notwithstanding the fact that the complainant is a public servant has placed reliance upon certain judgment of the Apex Court and that of other High Courts. The Apex Court in the case **BIRLA**

CORPORATION LIMITED v. ADVENTZ INVESTMENTS AND HOLDING LIMITED AND OTHERS² holds as follows:

"30. Under the amended sub-section (1) to Section 202 CrPC, it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

... ..
40. Respondents 3, 6, 12 and some of the other respondents are the residents beyond the local limits of the trial court — 10th Metropolitan Magistrate, Calcutta. Since number of accused are residents beyond the local limits of the trial court, as per amended provision of Section 202 CrPC, it is obligatory upon the Magistrate that before summoning the accused, he shall enquire into the case or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there are sufficient grounds for proceeding against the accused. In the present case, the learned Magistrate has opted to hold such enquiry himself.

.. ..
60. The object of investigation under Section 202 CrPC is "for the purpose of deciding whether or not there is sufficient ground for proceeding". The enquiry under Section 202 CrPC is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the accused. As discussed earlier, issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural

² (2019)16 SCC 610

irregularity. In the present case, the satisfaction of the Magistrate in ordering issuance of process to the respondents is not well founded and the order summoning the accused cannot be sustained. The impugned order of the High Court holding that there was compliance of the procedure under Section 202 CrPC cannot be sustained and is liable to be set aside."

The Apex Court in the afore-quoted judgment considers whether it was obligatory upon Magistrates that before summoning the accused who resides beyond its jurisdiction to enquire into the case himself or direct the investigation for finding out whether or not there is sufficient ground for proceeding against the accused. The Apex Court answers that the object of Section 202 of the Cr.P.C. is to see whether the complaint has valid foundation calling for issuance of process to a person or whether it is baseless upon which no action need be taken. The Apex Court was not considering the case whether the complaint was registered by a public servant. The other judgment on which the learned counsel places reliance upon is of a learned single Judge of the High Court of Bombay in the case **AKUMS DRUGS AND PHARMACEUTICALS LIMITED AND OTHERS v. STATE OF MAHARASHTRA AND OTHERS**³ wherein the High Court of Bombay holds as follows:

³ **MANU/MH/0573/2021**

"8. The complaint is preferred by a public servant, and therefore, the Magistrate was not required to examine the complainant and the witnesses under Section 200 of the Code. However, the learned Magistrate was nonetheless required to postpone the process and to comply with the provisions of Section 202 (1) of the Code. Such a view is taken by a learned single Judge in Shishir Joshipura v. State of Maharashtra and another MANU/MH/ 2448/2018:2018 Law Suit (Born) 1551. I am inclined to respectfully agree with the said view.

9. Considering that the order of issuance of process militates against the mandatory provisions of Section 202(1) of the Code, the same is quashed and set aside."

The learned single Judge of Bombay High Court holds that if complaint is preferred by a public servant, the Magistrate is not required to examine the complainant and the witnesses under Section 200 of the Cr.P.C. but holds that Section 202(1) of the Cr.P.C. is mandatory even if the complaint is filed by a public servant if the accused are residing beyond the jurisdiction of the Court before whom a complaint under Section 200 is preferred. The High Court of Punjab and Haryana in the case of **CHEMINOVA INDIA LIMITED AND OTHERS v. STATE OF PUNJAB AND ANOTHER**⁴ also holds that inquiry under Section 202 would be mandatory even if the complaint is registered by a public servant. But, holds that recording of sworn statement of the complainant is

⁴ **2020 SCC OnLine P&H 609**

exempted if the complainant is a public servant. Both these judgments which are relied on by the learned counsel for the petitioner would hold that when a complaint is preferred under Section 200 of the Cr.P.C. by a public servant sworn statement need not be recorded. The said duty cast upon the learned Magistrate is exempted but would further hold that an inquiry under Section 202 if the accused are residing beyond the jurisdiction of the Magistrate is mandatory.

20. A subsequent development, is that the judgment in **CHEMINOVA INDIA LIMITED** (*supra*) was tossed before the Apex Court. The Apex Court reversed the judgment rendered by the Punjab and Haryana High Court by holding that if the complaint is preferred by a public servant both obligations – one of recording of sworn statement of the complainant and the other an inquiry being conducted by postponing the process under Section 202 would stand exempted. The Apex Court in Criminal Appeal No.750 of 2021 decided on 4-08-2021 has held as follows:

"10. Further, from the averments in the counter affidavit filed on behalf of respondents 1 and 2 and other material placed on record, we are of the view that no case is made out to quash the

proceedings at this stage, by accepting the plea of the appellants that the procedure contemplated under Section 24(4) of the Act and Section 202 of the Code of Criminal Procedure, is not followed. With regard to the procedure under Section 24(4) of the Act, we are satisfied that after the 1st appellant – Company has deposited necessary Demand Draft for sending 2nd sample to the Central Insecticide Testing Laboratory, steps were taken promptly and report was also sent by the Central Insecticide Testing Laboratory within the prescribed period of 30 days. **Similarly, with regard to the procedure contemplated under Section 202 of the Code of Criminal Procedure, the same is to be viewed, keeping in mind that the complainant is a public servant who has filed the complaint in discharge of his official duty.** The legislature in its wisdom has itself placed the public servant in a different pedestal, as would be evident from a perusal of proviso to Section 200 of the Code of Criminal Procedure. Object of holding an inquiry/investigation before taking cognizance, in cases where accused resides outside the territorial jurisdiction of such Magistrate, is to ensure that innocents are not harassed unnecessarily. **By virtue of proviso to Section 200 of Code of Criminal Procedure, the Magistrate, while taking cognizance, need not record statement of such public servant, who has filed the complaint in discharge of his official duty. Further, by virtue of Section 293 of the Code of Criminal Procedure, report of the Government Scientific Expert is, per se, admissible in evidence. The Code of Criminal Procedure itself provides for exemption from examination of such witnesses, when the complaint is filled by a public servant. In the present case, 2nd respondent/public servant, in exercise of powers under provisions of the Insecticides Act, 1968, has filed complaint, enclosing several documents including reports of the Government Laboratories, it is always open for the Magistrate to issue process on such complaint which is supported by documents. In any event, we do not find any merit in the submissions of the learned counsel that proceedings are to be quashed only on the ground that, the Magistrate has taken cognizance without conducting inquiry and ordering investigation. In the absence of showing any prejudice caused to the appellant at this stage, the same is no ground to quash the proceedings in exercise of power under Section 482 of the Code of Criminal Procedure."**

(Emphasis supplied)

The Apex Court while reversing the judgment of the learned single Judge of Punjab and Haryana holds that the procedure contemplated under Section 202 of the Cr.P.C. is to be viewed keeping in mind the complainant is a public servant who has filed the complaint in the discharge of his official duty and the Legislature in its wisdom has itself placed the public servant on a different pedestal. The Apex Court further holds that the object of holding an inquiry/ investigation before taking cognizance in cases where accused resides outside the territorial jurisdiction of the Magistrate is to ensure that innocents are not harassed unnecessarily. Since the Code itself provides for exemption, if the complaint is filed by a public servant, the rigour of Section 202 of the Cr.P.C. is also diluted. Therefore, submission of the learned counsel for the petitioner that non-conduct of an inquiry by the learned Magistrate under Section 202 of the Cr.P.C. has vitiated the proceedings is rendered unsustainable and is, therefore, rejected. Issue No.4 that arose for consideration is also answered against the petitioner.

Issue No.5:

- (v) *Whether the respondent did have the authority to file the complaint?*

21. To consider the said issue it is germane to notice a communication made by the Ministry of Ports, Shipping and Waterways dated 17th August, 2021 which reads as follows:

"TO WHOMSOEVER IT MAY CONCERN

*By virtue of letter of authority (email dated 26.07.2021) issued by the Directorate General of Shipping, the Principal Officer, Ministry Ports, Shipping and Waterways, Directorate General of Shipping, Mercantile Marine Department, Kochi, do hereby authorize Shri Praven Raghavan Nair, Engineer and Ship Surveyor-cum-Deputy Director General (Technical) and **Surveyor in Charge of Mercantile Marine Department, Mangalore to file, defend, depose, represent and such other actions on behalf of Mercantile Marine Department, Mangalore before appropriate Court within the jurisdiction of Mangalore, Karnataka, with respect to and in continuation of the Preliminary inquiry conducted on the marine casualty including MV APL Le Havre and Indian Fishing Vessel "Rabah".***

On this day the 17th August, 2021.

This is issued with the approval of the Principal Officer."

(Emphasis added)

The complainant is specifically authorized to file, defend, depose, and represent all actions of the Mercantile Marine Department, Mangalore with respect to and in continuation of the preliminary inquiry conducted. In the light of this authorization, the submission

of the learned counsel for the petitioner that he was authorized only to conduct investigation or preliminary enquiry and not to register the complaint, on the face of it, runs counter to what is authorized.

22. It is trite law that a crime can be set in motion by any person unless specific authority is indicated under the statute which is not the mandate in the case at hand. Therefore, registration of the complaint by the complainant, cannot be said to be one without jurisdiction, more so, in the light of the fact of the judgment of the Apex Court in the case of **A.R.ANTULAY v. R.S.NAYAK – AIR 1984 SC 718** wherein the Apex Court has held that criminal law can be set into motion by any person unless there is a statutory bar. The submission so made that the letter of authority authorizing the officer to take action on behalf of the respondent with respect to and in continuation of the preliminary inquiry in maritime casualty would not empower the officer to register the complaint is too farfetched a contention that cannot be countenanced. Section 359 of the Act clearly empowers the officer to conduct a preliminary enquiry and the officer who has conducted formal investigation or preliminary enquiry into the shipping casualty has registered the

complaint. Therefore, no fault can be found with the registration of the complaint as well. The registration of the complaint was preceded by an elaborate preliminary enquiry conducted by the Department. Not for nothing did the complaint emerge, as there was elaborate material against the petitioner with regard to the causes and contributing factors for the collision which did contravene the regulations. Clause 3.2 of the preliminary enquiry report becomes germane to be noticed and it reads as follows:

3.2 What are the causes for the collision and other contributing factors?

3.2.1. According to the Rule 13 of the International Regulations for prevention of Collision at Sea (COLREGS) and the Indian Merchant Shipping (Prevention of Collision at Sea) Rules, 1975, as amended, the Container ship was in a overtaking situation with a Indian fishing boat from 00.14 hrs on April 13, 2021. The said rule states "**any vessel overtaking any other shall keep out of the way of vessel bring overtaken**". The Voyage Data Recorder (VDR) data indicates that the container ship did not initiate "early and substantial action to keep well clear" of the fishing boat as per Rule 17 – 'Action by Give way vessel' of COLREGS, which is the root cause of the collision.

3.2.2. The Second Officer who was on navigational watch at the time of the accident, did not comprehend the limitation in maneuverability of the target fishing vessel, speed of which was around 6.3 knots visa-a-vis an overtaking merchant ship cruising at a speed of 19.4 knots. The ship should have steered well clear of the fishing vessel that was being overtaken as per the requirements of COLREGS.

3.2.3. The 354m long container ship failed to take avoidance action in ample time. Though, the container ship made minor alteration of course to maintain a CPA of 0.4 NM, as stated by the second officer, the alteration was not large enough to be readily apparent to the fishing boat. Also, the intention of second officer to maintain a very little CPA and 0.4 NM could not be achieved due to inconsistent actions i.e., initially container ship altered course to port side, then starboard side, then back to port side and then few degrees more to starboard side. Initially the ship was maintaining course of 335* when the target 412 (fishing boat) was at a distance of around 6.3 N miles at 00.32 hrs. The fishing vessel was bearing 336* throughout. The ship continued her heading 335*, till the fishing vessel came to a distance of about 3.2 NM at 00.42 hrs. At this point, the ship was found to alter her course to 344* which gave a CPA of 0.5 N miles, but the ship altered back to port side within few minutes and came on a heading of 340* which reduced the CPA drastically. There is a possibility that this inconsistent action by the container ship might have confused the fishing vessel being overtaken. An appreciable alteration of course should have enabled the ship to steer past the fishing vessels in the vicinity without much risk of collision.

3.2.4. Although the duty officer has an assistant – look out person (rank AB) during the navigational watch, there was no effective communication between the two, regarding the developing situation and is a failure of Bridge team management.

3.2.5. On the Radar, the duty officer was seen switching intermittently between the two targets i.e., target 412 (fishing vessel Rabah) and another draft target 452 which was seen to be stationary while he could have selected and displayed both the targets simultaneously on the ARPA for easy reference. There were multiple alarms such as Bow crossing limit and the CPA/TCPA limit alarms intermittently which were alerting the duty officer to take collision avoidance action, but the bridge team were oblivious to the developing situation.

...

3.2.6. When a close quarter situation developed with the fishing boat at 00.53 hrs (six minutes prior to collision), due to change in the track of the fishing boat parallel to the vessel, the container ship failed to attract the attention of the fishing boat by using the ship's whistle or the Day light signaling lamp which is available on the Navigating Bridge for such actions. Instead OOW tried to attract attention by a laser torch which might not have been noticed by the fishing vessel. Also, even at this juncture when the fishing boat was almost right ahead at a distance of 1.4 NM, the container ship failed to take substantial alteration of course or reduction of speed to keep well clear of the fishing boat.

3.2.7. The examination of the Master and the on-duty personnel has revealed that they failed to understand the company SMS procedure manual regarding CPA & TCPA requirements for the 'open sea & coastal waters' and had a misconception about meaning of 'Restricted waters' as mentioned therein. The duty officer has reported that he was trying to maintain CPA of 0.4 NM which is applicable for restricted waters. But in the instant situation the ship was in open sea with ample see room in which minimum CPA of 1.0 NM was required to be maintained as per Masters standing orders. As per Company policy minimum CPA of 2.0 NM to be maintained in Open Sea and Coastal waters. The relevant extract of the SMS and Master's Standing Order are attached as Annexure-E.

3.2.8. The duty officer was found using Course over Ground (CoG) and Speed over Ground (SoG) input in ARPA for collision avoidance. At the time of incident, the ship was experiencing a current of 1.3 knots in NW'ly direction. The correct use of Heading and Speed over Water in ARPA could have given clear indication about the Course and speed over water of the fishing boat.

3.2.9. The fishing vessel, which was moving in an NW'ly direction for most of the time, altered her direction broadly to starboard side around 00.52 hrs when the fishing vessel was at a distance of 1.61 N miles. At 00.56 hrs the fishing vessel was found moving

in a northerly direction. Though the direction of movement of fishing vessel was changed during the period from 00.52 hrs to 00.56 hrs. the bearing of the target did not change appreciably which was a clear indication of the collision risk that existed. The reason for alteration of course by the fishing boat could not be established. There is a possibility that the fishing boat must have altered her course after noticing the huge ship right astern. The effect of alteration of course to starboard by the fishing boat was not fully realized by the bridge team of the container ship immediately which was more focused towards CPA shown in ARPA. Despite the fact that the target is on a collision course, the bridge team did not take any action during these precious four minutes duration i.e., between 00.52 hrs. to 00.56 hrs.

3.2.10. In the given situation, though the fishing vessel should have maintained her course and speed, being a stand on vessel, as per Rule 17 of COLREGS, limitations in maneuvering of small boats should have been kept in mind by the bridge team of large container ship overtaking at a speed of 19.5 knots i.e., three times the speed of fishing vessel.

3.2.11. The duty officer did not realize the maneuvering capabilities of the vessel when he tried to alter the course to starboard at the last moment using bold helm 'hard starboard'. Though the heading was changing to starboard the ship was moving in an original course for a considerable time. At the same time, the stern of the ship started swinging rapidly towards the fishing boat which led to heavy contact with the boat sideways, aft of the accommodation. The prompt and effective use of counter helm to port side to stop the swing of the stern could have avoided the collision even in the last moment."

(Emphasis added)

Therefore, it is not a case where the preliminary enquiry did not bring about any role of the vessel owned by the petitioner. In the

teeth of the aforesaid facts and findings of the preliminary enquiry, it is for the petitioner i.e., the Company to come out clean in a full blown proceeding. On the foregoing analysis, none of the grounds that are taken by the petitioner would sound acceptance for interference at the hands of this Court.

23. Learned counsel for the petitioner also places reliance upon the judgment of the Apex Court in the case of **CAPTAIN SUBASH KUMAR V. PRINCIPAL OFFICER, MERCANTILE MARINE DEPARTMENT** to contend that the issue with regard to competence of registering the crime stands covered and the petition could be allowed even on this score. This submission is unacceptable, as the very judgment permits continuance of action to be taken under Section 363 of the Act, in accordance with law. Even otherwise, the facts in that case was that a shipping casualty had occurred at a distance 232 nautical miles, which was not even within the Exclusive Economic Zone. Therefore, the Apex Court held that an officer who had conducted formal investigation into such casualty was not empowered. It is therefore, the Apex Court further observes that the Government could take action under

Section 363 of the Act. The said judgment is inapplicable to the facts in issue. In the other judgment in the case of **STATE OF U.P. V. SINGHARA SINGH - AIR 1964 SC 358**, the Apex Court was only considering that if a particular thing has to be done in a particular manner or a statute prescribing a particular mode of execution, it shall be done by that mode and none else. There can be no qualm about the principles so laid down by the Apex Court and other High Courts in the respective cases relied on by the learned counsel for the petitioner. They are judgments which have been rendered prior to the judgment of the Apex Court in the case of **REPUBLIC OF ITALY (supra)**. All the earlier judgments, so rendered, would get subsumed into the judgment of the Apex Court in the case of **REPUBLIC OF ITALY**, as the Apex Court considers every contention that is urged by the petitioner herein with regard to applicability of the IPC and CrPC and applicability of exclusive economic zone. Therefore, none of the judgments relied on by the learned counsel representing the petitioner would merit any acceptance, as they are such armory in his arsenal that would not lend any support or assist him in any of the contentions advanced by him.

24. For the aforesaid reasons, the Writ Petition lacking merit, stands dismissed.

**Sd/-
JUDGE**

bkp
CT:MJ