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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2022

CORAM :

THE HONOURABLE MR. JUSTICE A.D.JAGADISH CHANDIRA

Cr1.O.P.No.25550 of 2021
and Cr1.M.P.No.14126 of 2021

Mohammad Zaenal Arifin

... Petitioner/Accused

Vs.

1. The State represented by,
The Inspector of Police,
E-3, Minjur Police Station,
Minjur, Tiruvallur District.
(Crime No. 600 of 2021)
2. The Secretary to Government,
Ministry of Home Affairs,
Union of India, New Delhi.
3. The Chief Immigration Officer,
Foreigners Regional Registration Office,
Tamil Nadu, Puducherry and
Andaman & Nicobar Islands,
No.26, Shastri Bhawan, Annexe Building,
26, Haddows Road, Nungambakkam,
Chennai - 600 006.

... Respondents

PRAYER:

This Criminal Original Petition is filed under Section 482 of Criminal Procedure Code to call for the records of the Charge Sheet in respect of the Petitioner/A1 in P.R.C. No.18 of 2021 pending committal on the file of the Judicial Magistrate Court-II at Ponneri and quash the same.

For Petitioner : Mr.S.Vasudevan

For R1 : Mr.A.Gokulakrishnan
Additional Public Prosecutor

For R2 and R3 : Mr.R.Rajesh Vivekananthan
Assistant Solicitor General



ORDER

The Criminal Original Petition has been filed seeking to call for the records of the Charge Sheet in respect of the Petitioner/A1 in P.R.C. No.18 of 2021 pending committal on the file of the Judicial Magistrate Court-II at Ponneri and quash the same.

2. Brief facts of the case as per the prosecution is that the witness Tmt.Daisen Murali is working as the Assistant Director, Bureau of Immigration, Chennai-Ennore Seaport, Chennai. A1 is a citizen of Indonesia and is working as the 2nd Engineer in the Vessel MT Asian Grace, flag South Korea. A2 is a citizen of South Korea and is working as the Captain of the MT Asian Grace, flag South Korea. A3 is a citizen of India and Manager of Samudra Marine Service Pvt. Ltd and was maintaining the above said Vessel "MT Asian Grace".

3. On 02.09.2021, the above said Vessel "MT Asian Grace" berthed at Kamarajar Port Ltd., Ennore and on 03.09.2021 early morning at about 04.00 hrs., A1 disembarked from the above said Vessel and entered into India without any valid permission or visa under the guise of taking treatment and went outside the main gate of the above said port and took treatment at National Hospital at No.12, Manali Express Highway, Eranavoor and was caught by the CISF, while he was entering into the port around 10.00 hrs., through the above said main gate and A1 entered into the area in India without any valid documents required for such entry and thereby committed an offence punishable under Section 14A(b) of the Foreigners (Amendment) Act, 2004 and A2 and A3 abetted A1 by facilitating him to go outside the Vessel and port and thereby A2 and A3 committed the offence punishable under Section 14C of the Foreigners (Amendment) Act, 2004. Thereby, A1 appears to have committed an offence punishable under Section 14A(b) of the Foreigners (Amendment) Act, 2004. A complaint came to be lodged against the accused and based on the complaint, the petitioner was arrested and remanded to Judicial custody. After grant of bail, now, he is made to stay in the Special Camp for Foreigners at Trichy.

4. The submissions of Mr.S.Vasudevan, learned counsel for the petitioner are as under:-

i) The petitioner is a Seaman as per the meaning of Section 2(i) of the Registration of Foreigners Rules, 1992. He is an Indonesian Citizen and working as 2nd Engineer on board the Ship "MT Asian Grace", which arrived at the Ennore Port on 02.09.2021 for the discharge of the Cargo.

ii) During the discharge operation, the 1st Engineer



allotted some work to the petitioner and the petitioner was unable to complete the work, which resulted in an argument between the 1st Engineer and the petitioner and led to an altercation and the petitioner was assaulted by the 1st Engineer, due to which, he suffered grievous injury on his right forehead.

iii) The Vessel was berthed at Ennore port, where no hospital facility was available and thereby, the petitioner, in order to save his life, had to necessarily go to the nearest hospital for emergent treatment. Since, the petitioner was bleeding profusely and was suffering from unbearable pain, the petitioner had approached the Master of the Vessel "MT Asian Grace", who is arrayed as A2 in this case, for permission to get a Shore Pass, to enable him to visit a Hospital for getting treatment.

iv) The Master of the Vessel had intimated to the Agent to get necessary permission for the petitioner to go out for treatment. Since, they have not got necessary permission and the petitioner was suffering from unbearable pain and he was bleeding profusely, he had searched for a location of the Hospital outside the Ennore Port through online search and he had left the Vessel without informing anyone on board and reached the Port premises through the CISF Security Main Gate.

v) The Security Personnel, finding that the petitioner was profusely bleeding and was suffering from unbearable pain, allowed him to go out and thereupon, he went out in search of the Hospital and had taken treatment from one Dr.Anbarasu, who has been examined by the police as LW10.

vi) The Doctor/LW10, finding that it was a Medico Legal case, had wanted to inform the police, however, fearing that the Ship would be detained, the petitioner had not preferred to intimate it to the police and had immediately after treatment, returned to the Vessel through the main entry where he was detained.

vii) The Doctor had sent the Medico Legal/Police intimation report, which is annexed to the final report. As per the Medico Legal report, the petitioner had suffered head injury and was having vomiting, headache and seizure.

viii) It was a case of life or death of the petitioner. In such emergency situation, the petitioner, without any understanding of the legal consequences, rushed to the hospital, despite the fact that permission was not granted to him. It is a case, where the petitioner had not attempted to sneak illegally and he had passed through the Security gates and there is no hidden/concealed/covered or veiled conduct in



reaching the hospital. The petitioner had passed through the CISF Main Gate and had also returned back through the very same gate. The petitioner had no mala fide intention other than to reach the hospital for taking emergency treatment. Whereas while returning back, the petitioner was detained at the gate and he was handed over to the investigation officer.

ix) The petitioner, being a Seaman, who has violated the Act, is entitled to be removed from the Country in accordance with Section 6 of the Foreigners Act and Para 6 of the Foreigners Order, 1948. Thereby, the petitioner had sent a representation to the Immigration Authorities/3rd respondent on 11.10.2021 seeking to deport the petitioner to his Country.

x) The Indonesian Government has also given request to the Government of India, to bear the expenses of the deportation through the Marine Insurance Company and the said Insurance Company had also undertaken to bear the expenses for deporting the petitioner out of the Country.

xi) The petitioner had not entered into the Country to do any illegal activity, but only in a situation of life or death, he had entered into the Country for taking treatment and for nothing else. It is not the case, where the petitioner stayed continuously without permission and immediately within few hours, he had returned back through the main gate to board the Vessel and he was detained at the gate.

xii) The petitioner has not been brought any adverse notice, even in his Country. The petitioner has age old parents and he is married and he got three children and the last child is only 7 months old. The Republic of Indonesia has also certified the good conduct of the petitioner.

xiii) In a similar situation, when Indonesian citizens have been detained for violation of Visa Rules in the case of 'Md Kameual Islam and others Vs the State represented by the Inspector of Police, Dindigul and others represented in CrI.O.P. (MD).Nos.5769, 6018 and 6103 of 2020, finding that even in cases, where there are prima facie materials available to show that the offence has been made out, had quashed the proceedings and permitted the petitioners to leave the Country.

xiv) Merely because the petitioner is alleged to have contravened the Provisions of the Foreigners Act, he cannot be termed as a criminal. The petitioner was arrested and released on bail. Thereafter, he was lodged in the Special Camp for Foreigners at Trichy. The Court may sympathise with the situation and the proceedings may be quashed invoking the inherent powers under Section 482 Cr.P.C.



5. Mr.A.Gokulakrishnan, learned Additional Public Prosecutor would submit that the petitioner, without obtaining permission, had gone out of the Vessel and gone to the hospital and returned back to the Vessel and finding that he had contravened the provisions of the Foreigners Act, he was detained by the CISF Personnel, handed over to the Immigration Officer and on the complaint given by the Assistant Director of Bureau of Immigration, a case was registered in Crime No.600 of 2021 for offences punishable under Sections 14A(b) and 14C of the Foreigners (Amendment) Act, 2004 and after completion of investigation, the final report has been filed by the 1st respondent for the offences punishable under Sections 14A(b) and 14C of the Foreigners (Amendment) Act, 2004. He would submit that as per the charge sheet, there are 14 witnesses. He would fairly concede that other than having gone to the hospital, the petitioner had not indulged in any illegal activity and the petitioner had not been brought to any adverse notice and within few hours of taking treatment, he had returned to the Port and he was detained at the gate. He would also submit that in respect of Section 6(4) of the Foreigners Act and Para 6 of the Foreigners Order, it is for the 2nd respondent to take appropriate action. He would reiterate that the petitioner had left the Port through the CISF Main gate and had returned back through the CISF gate only and the petitioner had not hidden himself.

6. Mr.Rajesh Vivekananthan, learned Additional Solicitor General appearing for the respondents 2 and 3 would submit that the petitioner is a Seaman and a Second Engineer in the Vessel "MT Asian Grace". He would further submit that the petitioner had left the Vessel without obtaining permission and had gone to the hospital and returned back. He would also submit that the petitioner had taken treatment in the hospital and within few hours, he had returned back to the Vessel. Apart from the fact that the petitioner had gone to the hospital for taking treatment, he has not indulged in any other illegal activities. He would further submit that the petitioner's representation under Section 6(4) of the Foreigners Act and under Para 6 of the Foreigners Order was received by the respondent and it has not been considered so far. He would reiterate that the petitioner had left the Port through the CISF Main gate and had returned back through the main gate only and the petitioner had not hidden or concealed himself.

7. Heard the learned counsel for the parties and perused the materials available on record.

8. It is a very pathetic case, where the petitioner, who is a Seaman, had come to India on voyage and had sustained injuries during an altercation with a co-seaman. Though the petitioner



had requested the Master and the Agent to obtain permission to go out for treatment, it was not obtained for him. The petitioner, who had suffered a head injury and bleeding profusely on account of the assault, having left with no other option, had left the Vessel to a nearby hospital without obtaining permission. Admittedly, after taking treatment, he had returned back to the Vessel immediately. In a life or death situation, he had taken a misadventure which has lead him to criminal prosecution and detention in an alien nation.

9. Admittedly, the petitioner had not involved in any illegal activity other than having gone to the hospital on 2.9.2021 to take treatment in an emergent situation. On 11.10.2021 itself, within two months, as specified under the Act, the Master of the Vessel had sent a representation to the appropriate authority for deportation of the petitioner within the time as required under Section 6(4) of the Foreigners Act and under Para 6(1) of the Foreigners Order, 1948 to deport the petitioner. The Indonesian Government, through the Insurance Company, has also undertaken to deport the petitioner at the expense of the Insurance Company, however, it has not been considered by the Government.

10. In this regard, it is necessary to refer to the relevant legal provisions. Section 6 of the Foreigners Act, 1946 reads as under:-

"6. Obligations of masters of Vessels, etc. - (1) The master of any Vessel landing or embarking at a port in India, passengers coming to or going from that port by sea and the pilot of any aircraft landing or embarking at any place in India, passengers coming to or going from that place by air, shall furnish to such person and in such manner as may be prescribed a return giving the prescribed particulars with respect to any passenger or members of the crew, who are foreigners.

(2) Any District Magistrate and any Commissioner of Police or, where there is no Commissioner of Police, any Superintendent of Police may, for any purpose connected with the enforcement of this Act or any order made thereunder, require the master of any such Vessel or the pilot of any such aircraft to furnish such information as may be prescribed in respect of passengers or members of the crew on such Vessel or aircraft, as the case may be.



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(3) Any passenger on such Vessel or such aircraft and any member of the crew of such Vessel or aircraft shall furnish to the master of the Vessel or the pilot of the aircraft, as the case may be, any information required by him for the purpose of furnishing the return referred to in sub-section (1) or for furnishing the information required under sub-section(2).

(4) If any foreigner enters India in contravention of any provision of this Act or any order made thereunder, the prescribed authority may, within two months from the date of such entry, direct the master of the Vessel or the pilot of the aircraft on which such entry was effected or the owner or the agent of the owner of such Vessel or aircraft, to provide, to the satisfaction of the said authority and otherwise than at the expense of Government, accommodation on a Vessel or aircraft for the purpose of removing the said foreigner from India.

(5) The master of any Vessel or the pilot of any aircraft which is about to carry passengers from a port or place in India to any destination outside India, or the owner or the agent of the owner of any such Vessel or aircraft shall, if so directed by the Central Government and on tender of payment therefore at the current rates, provide on the Vessel or aircraft accommodation to such port or place outside India, being a port or place at which the Vessel or aircraft is due to call, as the Central Government may specify, for any foreigner ordered under section 3 not to remain in India and for his dependents, if any, travelling with him.

(6) For the purposes of this section –

(a) "master of a Vessel" and "pilot of any aircraft", shall include any person authorised by such master or pilot, as the case may be, to discharge on his behalf any of the duties imposed on him by this section;

(b) "passenger" means any person not being a bona fide member of the crew, travelling or seeking to travel on a Vessel or aircraft."

11. Para 6 of the Foreigners Order, 1948 reads as under:-

"6. Liability of master of Vessel etc. to remove a foreigner:



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(1) A civil authority may require the master of the Vessel or pilot of the aircraft in which a foreigner has arrived or the owners or agents of that Vessel or aircraft, as may be appropriate in the opinion of such civil authority, to remove a foreigner who has been refused permission to enter or who has entered India without its permission or who has been landed in contravention of Sub-para (3) and the master, pilot, owner or agent, as the case may be shall comply with such requisition unless it is received more than two months after the date of the arrival of the foreigner in India.

(2) The master of a Vessel or the pilot of an aircraft scheduled to call at any port outside India, shall, if so required by the Central Government, receive a foreigner in respect of whom an order directing that he shall not remain in India has been made, and his dependents, if any, on board the Vessel or aircraft, as the case may be, and afford him and them a passage to that port and proper accommodation and maintenance during the passage.

(3) The master of any Vessel or the pilot of any aircraft shall not, without the permission of the civil authority, land at any port in India any person travelling by that Vessel or aircraft against the wishes of such person unless such person has been required by the Central Government to be brought to India.

(4) Nothing contained in the Foreigners (Exemption) Order, 1957 shall preclude the operation and application of the provision of sub-paragraph (3)."

12. The term "Seaman" has the meaning assigned to it in the Registratin of Foreigners Rules, 1939. "Seaman" means a person employed on, or engaged in the working of a Vessel.

13. Admittedly, the petitioner is a Seaman. He has left the Vessel without obtaining permission and and landed into the Indian Shores in contravention of the provisions of Foreigners Act and thereby the respondents have registered a case for offence punishable under Section 14A(b) of the Foreigners (Amendment) Act, 2004.

14. Section 14A(b) of the Foreigners (Amendment) Act, 2004



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jurisdiction? The Hon'ble Chief Justice has allotted the subject of Criminal Original Petition-Bail, Anticipatory Bail Petitions, Criminal Appeal and Criminal Revision Petitions to be dealt with by me. But, in view of my being a Judge of the High Court, I certainly have the inherent power to make such orders as may be necessary to secure the ends of justice. The Constitution Bench of the Hon'ble Supreme Court in the decision reported in (2002) 4 SCC 578 (P.Ramachandra Rao v. State of Karnataka) had held as follows:

"...In appropriate cases, the High Courts have exercise their jurisdiction under Section 482 of Cr.P.C. for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out. Such power can certainly be exercised on a case being made out of breach of fundamental right conferred by Article 21 of the Constitution. The Constitution Bench in A.R. Antulay's case referred to such power, vesting in the High Court (vide paras 62 and 65 of its judgment) and held that it was clear that even apart from Article 21, the Courts can take care of undue or inordinate delays in criminal matters or proceedings if they remain pending for too long and putting to an end, by making appropriate orders, to further proceedings when they are found to be oppressive and unwarranted."

18. To quote Baxi, at the heart of every constitution there pulsates a distinction between 'us' and 'them', the constitutional self and the constitutional others. But there are provisions transcending this distinction, being applicable to "all persons". Article 21 of the Constitution surely applies to the petitioners also. Failure to respond to the petitioners' existential horror would amount to judicial abdication. If I come to the conclusion that the petitioners have already suffered enough and that they are being put to "surplus or unnecessary suffering", I am obliged to intervene.

19. I assume that the petitioners have committed the offences in question. That need not deter me from granting relief. A learned Judge of the Bombay High Court in 2006 CRL. L.J. 618 (Usha



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Badri Poonawalla v . Kurien Babu) held that the power under Section 482 of Cr.PC is available even in those cases where there is prima facie material available to show that the offence has been made out. It is not that the inherent powers of the High Court are to be invoked only when the offence is not made out . Even when the offence is made out , if the continuance of the prosecution would amount to an abuse of process, this inherent power can be tapped.

20. I now turn to Article 12 of the International Covenant on Civil and Political Rights. It is as follows :

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

India is a signatory to this covenant. It has also ratified it. This Convention has been relied on in quite a few decisions of the Hon'ble Supreme Court. In Navtej Singh Johar vs. Union of India , (2018) 10 SCC 1, it was observed as follows:

"523. International law today has evolved towards establishing that the criminalization of consensual sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination. These rights are recognised in international treaties, covenants, and agreements which India has ratified, including the UDHR, ICCPR, and the ICESCR. India has a constitutional duty to honour these



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internationally recognized Rules and principles. Article 51 of the Constitution, which forms part of the Directive Principles of State Policy, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

Of course, the petitioners having violated the visa conditions cannot demand that they must be allowed to return as a matter of right. But then, the authorities cannot arbitrarily deny the said request.

Since the petitioners have already been in prison for seventy days, there is a requirement to undertake a proportionality review. I am of the view that the prison term already undergone by them should be considered as sufficient punishment. When the petitioners have already paid the price for their misadventure, to insist that they should continue to remain in India in prison-like conditions till the proceedings are concluded grossly offends the principle of proportionality and fairness.

21. During times of armed conflict or emergency, the right to leave any country can be invoked. The current pandemic times are no different. The petitioners fortunately have not tested positive so far. The position may be different tomorrow. The lives of the petitioners may be in danger. Times may be uncertain but rights have to be certain. The petitioners are willing to bear the cost of transportation. They will coordinate with their embassies and consulates and arrange their return. All that the respondents need to do is to play a facilitatory role. Instead of doing so, if the respondents insist on detaining the petitioners and prosecuting them, it can only be characterized as unreasonable, unjust and unfair. I, therefore, hold that the continuance of the criminal prosecution against the petitioners herein would certainly amount to an infraction of their fundamental right under Article 21 of the Constitution of India and directing their closure on appropriate terms alone would secure the ends of justice. Since the petitioners have already suffered enough for their transgression of law and there is



prevalence of medical emergency, the petitioners are having the right to return to their native countries at the earliest opportunity."

18. Technically, it may seem that the petitioner had violated the provisions of the Foreigners Act, 1946 and the Foreigners Order, 1948, however, taking into consideration the facts of the case, it was a life and death situation for the petitioner and in such circumstances, without understanding the legal consequences, the petitioner, in the earnest desire to save his life, has reached the nearby hospital where he had taken treatment and immediately after the treatment, he had returned back to the Vessel. It is not a case of sneaking illegally and the petitioner had passed through the Security gates and there is no hidden/concealed/covered or veiled conduct in reaching the hospital. The petitioner was allowed to go through the main gate by the authorities and when he was returning back, he had been detained by the very same authorities. Therefore, in the opinion of this court, the petitioner cannot be termed as a criminal and this court is of the further opinion that the continuation of the prosecution would only amount to abuse of process of law.

19. In view of the facts and circumstances of the case and also taking into consideration the case of the petitioner in a sympathetic manner, this Court is of the opinion that though there is a prima facie material available to show that the offence has been made out as against the petitioner, the further proceedings in P.R.C.No.18 of 2021 pending committal on the file of the learned Judicial Magistrate Court-II at Ponneri can be quashed invoking Section 482 of Cr.P.C.

20. At this juncture, the learned counsel for the petitioner would submit that no other cases are pending against the petitioner and also the passport of the petitioner is in the custody of the learned Judicial Magistrate No.II, Ponneri. Hence, he would pray that a direction may be issued to learned Judicial Magistrate No.II, Ponneri to return the passport of the petitioner so as to enable the petitioner to leave or get deported from India at the earliest.

21. Taking into consideration the peculiar facts of the present case and the submissions made by the learned counsel, the further proceedings in P.R.C.No.18 of 2021 pending committal on the file of the learned Judicial Magistrate Court-II at Ponneri is quashed and the learned Judicial Magistrate No.II, Ponneri is directed to return the passport of the petitioner to the 1st respondent, who, in turn, shall hand over the same to the petitioner, who is now lodged in the Special Camp for Foreigners at Trichy. Further, the respondents are directed to take



expeditious steps to deport the petitioner within a period of three weeks from the date of receipt of a copy of this order.

22. The Criminal Original Petition stands ordered accordingly. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

rgi/nr/ssk.

To

1. The Judicial Magistrate No.II, Ponneri
2. The Secretary to Government,
Ministry of Home Affairs,
Union of India, New Delhi.
3. The Chief Immigration Officer,
Foreigners Regional Registration Office,
Tamil Nadu, Puducherry and
Andaman & Nicobar Islands,
No.26, Shastri Bhawan, Annexe Building,
26, Haddows Road, Nungambakkam,
Chennai - 600 006.
4. The Inspector of Police,
E-3, Minjur Police Station,
Minjur, Tiruvallur District.
5. The Public Prosecutor,
High Court, Madras.

+2cc to Mr.S.Vasudevan, Advocate, S.R.No.28762,29043

+1cc to Mr.R.Rajesh Vivekananthan, Advocate, S.R.No.2905

Crl.O.P.No.25550 of 2021 &
Crl.M.P.No.14126 of 2021

AJS(CO)
CT 06/05/2022