

Gaurav Kumar Bansal vs Union Of India And Ors on 9 September, 2014

Equivalent citations: 2015 AIR SCW 1923, 2015 (2) SCC 130, 2015 (3) AIR BOM R 380, AIR 2015 SC (CIV) 1409, (2014) 7 MAD LJ 242, (2014) 6 ALLMR 425 (SC), (2014) 10 SCALE 372, 2015 (1) SCC (CRI) 834, 2014 (144) AIC (SOC) 5 (SC), 2014 (3) KLT SN 58.2 (SC), 2015 (109) ALR SN 18 (SC), AIR 2015 SUPREME COURT 2062

Author: Adarsh Kumar Goel

Bench: Adarsh Kumar Goel, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 536 OF 2012

GAURAV KUMAR BANSAL ... PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

W I T H
WRIT PETITION (C) NO. 26 OF 2014

RAJNI SINGH ... PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

J U D G M E N T

Adarsh Kumar Goel, J.

1. These petitions seek directions to the Government of India to intervene and expedite release of Indian Seamen held hostages by the Somalian Pirates in the international waters on 29th March, 2010, 2nd March, 2012 and 10th May, 2012 and to frame anti-piracy guidelines. Writ Petition (C) No. 536/2012 described as PIL, is claimed to be by way of legal aid to the captivated seamen at the instance of relatives of the victims, while Writ Petition (C) No. 26/2014, also described as PIL, has been filed by the wife of one of the captivated seamen. Thus, though described as PIL, both the

petitions seek enforcement of rights of individual seamen who are held hostages at high sea.

2. Case of the petitioner is that three merchant vessels have been hijacked in the high sea and out of the crew members held captive by the pirates, eight persons continued to be detained by them. It is the duty of the Government of India to take necessary steps to secure their release. Representations have been made to the Government authorities, but effective steps have not been taken to secure their release. Piracy is illegal as per UN Conventions on the Law of the Sea (UNCLOS). It is the fundamental duty of the Member States to cooperate in preventing incidents of piracy. International Maritime Organisation (IMO) is a UN specialised agency for safety of shipping and prevention of marine pollution by ships. As per information available on the website of IMO, armed pirates hijacked cargo ship "ICEBERG-1" (Flag State Panama) in International Waters of East Africa and took 24 crew members (6 are Indians) hostage and sailed the ship to Somali coast on 29th March, 2010, at 9.30 hrs. On 10th May, 2012, at 9.23 am, pirates hijacked Tanker Ship "Symrni" (Flag State Liberia) at Arabian Sea and took 26 crew members (11 Indians) hostage. On 2nd March, 2012, at 12.19 hrs, Somalian pirates hijacked Chemical Tanker "Royal Grace" (Flag State Panama) at Arabian Sea and took hostage 22 crew members (17 Indians) and sailed the ship towards coast of Somalia. Indian seamen were employed through East India Shipping Agency, Mumbai (Report No.5).

3. It has further stated by the petitioner that the Admiralty Offences (Colonial) Act, 1849 provided for prosecution for offences at sea. Suppression of unlawful acts against Safety of Maritime, Navigation and Fixed Platform on Continental Shelf Act (hereinafter referred to as SUA Act) 2002 has been enacted by Indian Parliament and contains provisions for dealing with the illegal activities which endanger the safety of maritime navigation and the safety of persons and property on the sea. Union of India has failed to protect the life and liberty of concerned Indian citizens in spite of being approached for the purpose.

4. On 14th February, 2014, time was given to the learned counsel for the Union of India to file an affidavit setting out the protocol, procedure and process followed by the Government of India in matters like the present where an Indian national is missing either on the high seas or elsewhere and also to set out the details and efforts made in locating and rescuing one of the missing persons. Accordingly, affidavit has been filed on 7th March, 2014 by the Under Secretary, Ministry of Shipping, Government of India, stating that since the year 2008, the pirates operating from Somalia have become a serious menace for the safety of maritime traffic as well as the crew members in the gulf of Aden and Western Arabian Sea and as a consequence thereof, Indian seafarers have also suffered at the hands of the said pirates. Ten Indian seafarers are held captive by the said pirates, seven of whom are ex-Asphalt Venture, one ex-MT Albedo, while the whereabouts of one Dheeraj Tiwari ex-MY Iceberg and one Rajbhar Rajoo Prasad ex-MT Albedo are not known. MV Asphalt Venture was hijacked on 29th September, 2010 with fifteen Indian crew members on board. The ship was released on 16th April, 2011 with eight Indian crew members and seven crew members were held back as hostages and they continue to be under the custody of the pirates at unknown location. MV Albedo was hijacked on 26th November, 2010 with crew members which included two Indians; one of the Indian crew members died. The said vessel sunk off on 7th - 8th July, 2013, but one Indian seafarer is reported to be safe. The Indian crew members were employed by the foreign owned registered vessels through recruitment and placement service provider at Mumbai. The

Government of India has urged the ship owners and employers to initiate measures for the release of Indian seafarers and also raised the subject of continued captivity of Indian seafarers during the meetings held under the IMO and Contract Group on Piracy off the Coast of Somalia (CGPCS). In case of foreign owned and foreign registered ships, the Government is severely constrained to take measures for release of seafarers held captive by Somali pirates. It has been further stated in the above affidavit that Government of India has put in place an institutional structure for crisis management to ensure advance preparedness and quick response to counter such unlawful acts. This set up has the Cabinet Committee on Security (CCS) for taking major policy decisions, a Committee of Secretaries for Anti Piracy and Hijack at Sea (COSAPH), chaired by Cabinet Secretary which has the executive responsibility for hands on crisis management. The issue of captivity of Indian seafarers and their release has been taken up in the meetings of Inter-Ministerial Group of Ministers (IMG), a body reporting to COSAPH set up under the Ministry of Shipping and headed by the Additional Secretary, Ministry of Shipping, to address issues of hijacking of merchant ships involving Indian seafarers. The IMG has members representing all concerned Ministries and agencies like the Ministry of External Affairs (MEA), the Ministry of Defence (MOD), the Ministry of Home Affairs (MHA), Intelligence Bureau (IB), the Cabinet Secretariat, and the Directorate General of Shipping (DGS). This Group of Officers has been meeting regularly to appraise the developing situations and review the efforts and measures being taken by the various agencies within their concerned areas of mandated responsibilities for securing the release of Indian hostages who have been in captivity of Somali pirates. Respondent No.2, Ministry of External Affairs, as part of this IMG, has been closely co-ordinating in securing early release of the Indian hostages of MV Asphalt Venture and MV Albedo. The Government of India has consistently taken up the issue of Indian seafarers of MV Asphalt Venture and MV Albedo, including with the Somali Ambassador in New Delhi. Separately, the High Commission of India in Nairobi, Kenya, which is concurrently accredited to Somalia, has consistently taken up the issue of the Indian hostages of MV Asphalt Venture and MV Albedo with the authorities in Somalia since the occurrence of the incidents. Recently, High Commissioner of India in Nairobi wrote a letter to the President of the Puntland State of Somalia on 14th October, 2013 seeking information on the Indian hostages of MV Asphalt Venture and MV Albedo. However, no definite response has been forthcoming from the Somali Government in this regard. Again, High Commissioner of India in Nairobi visited Mogadishu from 21st - 22nd January, 2014 and met the Somali President, Prime Minister and Principal Secretary, Foreign Affairs and International Cooperation, and handed over the list of Indian hostages of MV Asphalt Venture and MV Albedo and requested for providing any information on them and for assistance in securing release of Indian seafarers in the custody of the Somali pirates. However, no response has been received in this regard so far.

5. It is further pointed out in the affidavit that at the International level, pursuant to a United Nations Security Council resolution, a 'Contract Group on Piracy off the Coast of Somalia' (CGPCS) was established in January, 2009 to coordinate anti-piracy efforts of the International Community. India is a founder-member of the CGPCS and has been fully engaged in the efforts to share information, coordinate actions of the navies in combating piracy in the Gulf of Aden, raising public and merchant marine awareness and examining legal issues with respect to apprehended pirates. It has been further submitted that India chaired the CGPCS from September, 2012 to December, 2012 including the 13th Plenary Session held in New York on 11th December, 2012. India, during its

Presidency of the Security Council in November, 2012, organized an open debate on the subject of piracy on 19th November, 2012 following which a Presidential statement was adopted by the Council high-lighting the cause of the welfare of seafarers. Respondent No.2 is also coordinating with the UN and other international bodies like the Contact Group on Piracy off the Coast of Somalia (CGPCS) to seek coordinated solutions to the problem of combating piracy off the coast of Somalia. India has called for better coordination of international efforts for escorting merchant ships and patrolling in the region, preferably under the aegis of the United Nation. India has also become a member of International Contact Group (ICG) on Somalia in 2013.

It has been submitted that representative of respondent No.2 participated in the 15th Plenary Session of Contact Group on Piracy off the Coast of Somali (CGPCS) and Anti Piracy Week held in Djibouti from 10th

-15th November, 2013. During the visit, key contacts were made with all the stake holders, including NGOs dealing with piracy and hostage crisis, UNODC officials, officials from Somalia and its entities, i.e., Puntland and Somaliland. The delegation also sought assistance of all the stakeholders in securing early release of Indian seafarers of MV Asphalt Venture and MV Albedo.

India is a signatory to the United Nations Convention of the Law of Sea (UNCLOS), 1982, which defines piracy and pirates acts (Article 101). India does not presently have a separate legislation on piracy. Therefore, it was decided by the Government to prepare a comprehensive domestic legislation on piracy in line with the UNCLOS definition of 'piracy' at the earliest so as to ensure effective prosecution of the pirates and to act as a deterrent to pirates. For this purpose, the Piracy Bill 2012 was prepared by the MEA in consultation with the Ministries of Shipping, Defence, Home Affairs and Law & Justice and tabled, with the approval of the Cabinet, in the Parliament. Piracy Bill 2012 was listed in earlier sessions of Parliament but, due to paucity of time, it could not be considered. It is likely to be considered in the ongoing session of Parliament for which External Affairs Minister has already issued a notice.

India has been providing assistance to Somalia in its capacity building to enable it in combating piracy more effectively. It is not out of place to mention that India has contributed US \$ 3 Million towards augmentation of the African Union Mission in Somalia during 2011-2012.

Somalia continues to be impacted by Civil War, terrorism and the resultant instability and the State hitherto did not have full control over areas in Somalia from where the pirates operate. The new Federal Parliament was inaugurated on 20th August, 2012 ending the mandate of Somalia's eight year old Transitional Federal Government. The new political dispensation in Somalia is in the process of taking over effective control and, therefore, their role in securing release of seafarers under the custody of pirates is expected to gradually increase.

The subject of ensuring the safety and security of seafarers, sailing on the high seas, is being seriously taken up by the IMO and also at the meetings of CGPCS. Several measures have been recommended which include, following Best Management Practices (BMP-version 4) and deployment of armed guards on board merchant ships. Prudent ship owners follow such

recommendations which has resulted in no cases of hijacking by Somali pirates taking place during the last almost one and half year. Informatively, in the cases of MT Asphalt Venture and MV Albedo, armed guards were not deployed by their respective owners.

All the concerns of the families of Indian crew held captive by pirates are duly transmitted to the concerned agencies through the deliberations at the meetings of IMGO. The IMGO also reviews from time to time the possibility of offering financial assistance to the families of affected seafarers by way of granting ex-gratia payments wherever the ship owners/employers abdicate their responsibilities in order to somewhat ease the financial burden on the families of the captive seafarers. Respondent No.3 had granted ex-gratia payments to the Indian families of MV Albedo, in December, 2012. Further, the families of crew of MT Asphalt Venture have been paid their wages till 2013 under the orders of the Hon'ble High Court of Bombay.

The seamen held hostages in March, 2010 have not been released till date is not correct as the MV Iceberg-I was captured on 29th March, 2010 and was subsequently released on 23rd December, 2012 along with all the 22 crew of different nationalities except Sh. Dheeraj Tiwari, Chief Officer whose whereabouts are not yet known and presumed to be still missing/unaccounted for since 8th September, 2011, during the captivity period. No other Indian national seafarer of MV Iceberg-I is currently in Somali pirate's custody since March, 2010 as contended by the petitioner. The remnant eight Indian crew that continue to be in Somali pirates captivity till date, are seven Indian crew ex-MT Asphalt Venture from 29th September, 2010 and one Indian crew of MV Albedo.

6. Counter affidavit has also been filed by the Ministry of External Affairs with almost similar stand. It may be worthwhile to reproduce the relevant statement made in the said affidavit:-

“It is submitted that India has been providing assistance to Somalia in its capacity building to enable it in combating piracy more effectively. It is further mention that India has contributed US\$ 3 Million towards augmentation of the African Union Mission in Somalia during 2011-2012. It is further submitted that Somalia continues to be impacted by Civil War, terrorism and the resultant instability and the State hitherto did not have full control over areas in Somalis from where the pirates operate. The new Federal Parliament was inaugurated on 20.08.2012 ending the mandate of Somalia's eight year old Transitional Federal Government. The new political dispensation in Somalia is in the process of taking over effective control and therefore, their role in securing release of seafarers under the custody of pirates is expected to gradually increase.”

7. In the affidavit filed on 11th April, 2013 in Writ Petition (C) No. 536 of 2012 steps taken in the matter have been stated as follows:-

“4. It is respectfully submitted that the Government has set up an Inter-Ministerial Group of Officers (hereinafter referred to as the “IMG”) headed by the Additional Secretary to the Ministry of Shipping to address issues of hijacking of merchant ships involving Indian seafarers. Furthermore, the IMG has members representing all

concerned Ministries and agencies and meets regularly to deal with the situation of Indian hostages who are in captivity of Somali pirates.

5. It is further submitted respectfully that Ministry of External Affairs and the Indian Missions abroad continuously seek the help of the concerned foreign governments to liaise with ship owners and persuade them to secure early release of Indian hostages held captive by Somali pirates.

6. It is respectfully submitted that Government's relentless efforts in securing release of Indian hostages on board the three merchant vessels, namely, MV Iceberg, MT Smyrni and MT Royal Grace – mentioned in this Writ Petition, have yielded significant results in the recent past that may be summed up as following”

(i) 22 seafarers, including 5 Indian Seamen on board MV Iceberg, hijacked on 29.03.2010, were rescued by the Puntland Maritime Police Force (hereinafter referred to as the “PMPF”) in a humanitarian rescue operation conducted on 23.12.2012 and subsequently arrived in India safely. These seamen were held hostage on board MV Iceberg since March, 2010. Only one Indian Seafarer on board MV Iceberg i.e. Shri Dheeraj Tiwari is still missing as he was not found onboard at the time of the aforementioned rescue operation. The Indian Government is making endeavours to ascertain his whereabouts.

(ii) It is respectfully submitted that two vessels namely MT Royal Grace and MT Smyrni were hijacked on 02.03.2012 and 10.05.2012 respectively. It is further submitted that MT Royal Grace and MT Smyrni along with multinational crew, including 28 Indians, were released by Somali pirates on March 8/9, 2013. The two ships reached Salalah port in Oman on March 13 and March 14, 2013 respectively.

7. It is respectfully submitted that the 17 Indian crew members of MT Royal Grace and 11 Indian crew members of MT Smyrni were received at Salalah by officials from our Embassy and were extended all assistance. Their travel to India was facilitated by our Mission. 11 crew members of MT Smyrni safely arrived in India on March 18, 2012. 16 of the 17 Indian crew members of MT Royal Grace have safely arrived in India till date. At present, only 1 of the Indian crew members of MT Royal Grace (Captain) is on board along with 2 Nigerians, 1 Pakistani and 1 Bangladeshi as minimum manning requirement for the ship. He is expected to reach India once the replacement crew is arranged by the ship owner.

8. It is respectfully submitted that the Ministry of External Affairs (hereinafter referred to as the “MEA”), as part of the Government of India, has been making all efforts to deal with piracy and hostage crisis. The piracy issue is also taken up during all high level interactions with the Government of Somalia.

9. It is respectfully submitted that at the International level, pursuant to a United Nations Security Council resolution, a ‘Contract Group on Piracy off the Coast of Somalia’ (hereinafter referred to as

the “CGPCS”) was established in January, 2009 to coordinate anti-piracy efforts of the International Community. It is further respectfully submitted that India is a founder-member of the CGPCS and has been fully engaged in the efforts to share information, coordinate actions of navies in combating piracy in the Gulf of Aden, raising public and merchant marine awareness and examining legal issues with respect to apprehended pirates. It is further submitted that India chaired the CGPCS from September, 2012 to December, 2012 including the 13th Plenary Session held in New York on 11.12.2012. The Communique adopted by the CGPCS, inter-alia, highlighted the need for greater International Cooperation for securing the early release of hostages and their Welfare.

10. It is respectfully submitted that India during its Presidency of the Security Council in November, 2012 organized an open debate on the subject of piracy on 19.11.2012 following which a Presidential Statement was adopted by the Council highlighting the cause of the welfare of seafarers.

11. It is respectfully submitted that India is a signatory to the United Nations Convention of the Law of Sea, 1982 (hereinafter referred to as the “UNCLOS”) which defines piracy and pirate acts (Article 101). It is further submitted that India does not presently have a separate legislation on piracy. Therefore, it was decided by the Government to prepare a comprehensive domestic legislation on piracy in line with the UNCLOS definition of ‘piracy’ at the earliest so as to ensure effective prosecution of the pirates and to act as a deterrent to pirates. For this purpose, the Piracy Bill 2012 was prepared by the MEA in consultation with the Ministries of Shipping, Defence, Home Affairs and Law & Justice and tabled with the approval of the Cabinet in the Lok Sabha on 24 April 2012. The Bill was referred to the Standing Committee on External Affairs which presented its report to the Lok Sabha on 14 August 2012. Based on recommendations made by the Standing Committee and subsequent inter- ministerial consultations held with all concerned Ministries/Departments, Official Amendments to the Piracy Bill, 2012 were approved by Cabinet on 18 March, 2013.

12. It is submitted that, India has been providing assistance to Somalia in its capacity building to enable it in combating piracy more effectively. It is not out of place to mention that India has contributed US\$ 3 Million towards augmentation of the African Union Mission in Somalia during 2011- 2012.

13. It is further submitted that the MEA and the Indian Missions abroad have played an important role in release of Indian Hostages on board MV Suez, MV Fairchem Bogey, MV Savina Caylyn, MT Smyrni, MT Royal Grace and others.

14. It is respectfully submitted that Somalis continues to be impacted by Civil War, terrorism and the resultant instability and the State hitherto did not have full control over areas in Somalia from where the pirates operate. The new Federal Parliament was inaugurated on 20.08.2012 ending the mandate of Somalia’s eight year old Transitional Federal Government. The new political dispensation in Somalia is in the process of taking over effective control and therefore, their role in securing release of seafarers under the custody of pirates is expected to gradually increase.”

8. We have heard learned counsel for the parties.

9. Learned counsel for the petitioner submitted that this Court may issue directions to the Government of India to take up the matter at the international level and to secure the release of Indian citizens who have been held captive by the Pirates. Learned counsel for the Union of India, however, submitted that all necessary steps have already been taken and will continue to be taken as the Government of India is concerned with the issue of safety of its citizens and in the circumstances no direction is called for.

10. There is no manner of doubt that a welfare State is protector of life and liberty of its citizens not only within the country but also outside the country in certain situations. Concept of *parens patriae* recognises the State as protector of its citizens as parent particularly when citizens are not in a position to protect themselves. The Preamble to the Constitution, read with Directive Principles, under Articles 38, 39 and 39A enjoins the State to take all protective measures to which a Social Welfare State is committed. Interestingly, this doctrine has been recognised in India even before the Constitution came into force. Referring to this aspect, this Court, in *Charanlal Sahu vs. Union of India*[1] observed as under:-

“35.Thus the position is that according to Indian concept *parens patriae* doctrine recognized King as the protector of all citizens and as parent. In *Budhakaran Chankhani v. Thakur Prasad Shah* AIR 1942 Cal. 311 the position was explained by the Calcutta High Court at page 318 of the report. The same position was reiterated by the said High Court in *Banku Behary Mondal v. Banku Behary hazra* at page 205 of the report. The position was further elaborated and explained by the Madras High Court in *Medai Dalavoi T. Kumaraswami Mudaliar v. Meddi Dalavoi Rajammal* at page 567 of the report. This Court also recognized the concept of *parens patriae* relying on the observations of Dr. Mukherjea aforesaid in *Ram Saroop v. S.P. Sahi* at pages 598 and 599. In the "Words and Phrases"

Permanent edition, Vol. 35 at page 99, it is stated that *parens patriae* is the inherent power and authority of a Legislature to provide protection to the person and property of persons *non sui juris*, such as minor, insane, and incompetent persons, but the words "*parens patriae*" meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. (Emphasis supplied). *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term "*parens patriae*" differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the *parens patriae* theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The Preamble to the Constitution, read

with the Directive Principles, Articles 38, 39 and 39A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further.....”

11. This Court is assigned the role of sentinel on the qui vive for protection of rights of citizens and steps in, in exercise of power of judicial review for protection of Fundamental Rights of the citizens, if the State fails to perform its duty. At the same time, this Court cannot assume the role of the executive to oversee the sensitive issue of coordination with international agencies and bodies for securing release of Indian citizens who are held hostages abroad, when it is shown that the departments of the Government have not only taken cognizance of the problem but also taken, in right earnest, whatever steps could be possible. The issue of coordination at international level with foreign countries and international bodies has to be left to the wisdom of experts in the Government. It is not a case where the State has not shown any concern for its citizens, but where unfortunate situation has come about in spite of serious efforts. Handling of the situation requires expertise and continuous efforts. It has not been pointed out as to what particular direction can be issued in the circumstances. While safety and protection of the lives and liberty of Indian citizens is also the concern of this Court, the issue has to be dealt with at the level of the executive. From the affidavit filed on behalf of the Union of India, it is evident that steps have been taken at various levels, though without complete success.

12. It does appear that pirates operating from Somalia have become serious menace to the safety of maritime traffic in Gulf of Aden and Western Arabian Sea and three incidents involving Indian citizens are part of series of such events. Apparent cause is lack of effective Government, as pointed out in the affidavit filed on behalf of Government of India. It appears that recently there is some change on account of which situation might improve. Combating piracy is imperative for safety of seafarers as well as successful world trade. The issue is of international concern and as already noted, it is receiving the attention of Government of India at highest level. We do hope the Government of India will continue its efforts for protection of affected citizens.

13. In these circumstances, only direction which can be issued, at this stage, is that the matter may be periodically reviewed at the appropriate level and a nodal officer may be designated who may continue to coordinate and oversee the efforts on the issue and with whom the families of the victims can also have interaction for getting information or giving suggestions.

14. With the above observations and direction, the Writ Petitions are disposed of.

.....J. [T.S. THAKUR]J. [ADARSH KUMAR GOEL] New Delhi September 9, 2014

[1] (1990) 1 SCC 613
