

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 100 of 2006 ()

AGAINST THE JUDGMENT IN SC 294/2004 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZHA.

APPELLANT(S)/ACCUSED:

DEVASSIA, S/O.DEVASSIA,
PANAMOTTIL HOUSE, KALKOONTHAL VILLAGE,
ERATTAYAR KARA,
THULASIPARA BHAGOM.

BY ADVS.SRI.K.M.KURIAN
SRI.P.VIJAYAKUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY S.I. OF POLICE, KATTAPPANA,
BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 100 of 2006

Dated this the 17th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months.

2. According to the prosecution on 4.6.2002, at about 7.45 p.m. while P.W.6 was questioning an accused in a case, according to him, he received reliable information that the accused in this case is engaged in illicit distillation. He prepared Ext.P10 search memo and sent it to court and proceeded to the site. The house of the accused was searched. From the kitchen Aluminium utenzils, a hose pipe and a plastic sheet were recovered. On examination of the

surroundings of the house, from the western side a jar containing 30 liters of wash was found. While the articles were being seized, the accused reached the spot and he was arrested. P.W.6 took samples from the can and he had the mahazar Ext.P1 prepared. He claims that he affixed labels on the sample bottle as well as on the balance contraband article seized containing the signature of accused, himself and the witnesses. After having seized the materials and arrested the accused as per Ext.P2 arrest memo. He reached the Station and registered crime as per Ext.P6 FIR. He had the articles seized sent for chemical examination and obtained Ext.P9 report. He completed investigation and laid charge before court.

3. The court before which the final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thodupuzha. The said

court made over the case to Additional Sessions Court (Adhoc) II, Thodupuzha for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence punishable under Section 55(g) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 6 examined and had Exts.P1 to P10 marked. M.Os. 1 to 7 were identified and marked. The defence had Exts. D1 and D2 marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He would say that he has been falsely implicated. According to him, he and his wife were residing in House No. 444 in Ward No.7.

5. On evaluation of the evidence in the case, the court below found that there is convincing evidence to show

that the house and the surroundings from where the contraband article was seized belongs to the wife of the accused and since the accused was engaged in the act of illicit distillation, he is responsible for the same. Holding so, he was convicted and sentenced as already mentioned.

6. Assailing the conviction and sentence, the only point urged by the learned counsel for the appellant is that there is absolute want of evidence to show that the appellant is in actual possession or the appellant is the owner of the building from where the articles were alleged to have been seized. Learned counsel went on to point out that going by the seizure mahazar Ext.P1, the House No. shown is 6/349. Learned counsel pointed out that going by the evidence furnished by P.Ws.4 and 5, it cannot be said that the property is in the name of the wife of the accused. True Ext.P4 shows that the property where the incident took place stands in the name of Mariyamma Devasia, W/o. Tomy and it is claimed

that the accused is also known as Tomy. Learned counsel pointed out that the prosecution had produced no documents from the Village Office to show the said fact. As far as P.W.5 is concerned, who issued Ext.P5 certificate, he says that for election purpose new house numbers were given. But in cross examination, he said that the Register so maintained is not authentic and cannot be relied on.

7. Learned counsel relied on the decision reported in Radhakrishnan v. State of Kerala (2009(1) KHC 469) and contended that even assuming that the property stands in the name of Mariyamma Devasia, he could not be found fault with for the seizure of the contraband article and distillation.

8. Learned Public Prosecutor pointed out that the evidence of P.Ws. 4 and 5 taken along with Exts.P4 and P5 and also Ext.P1 shows the complicity of the accused and those documents weighed with the court below to find the accused guilty. According to the learned Public Prosecutor, no grounds

are made out to interfere with the finding of the court below.

9. The prosecution case is that on the date of incident P.W.6 got intimation that in the house of the accused illicit distillation is being carried on. He claims to have reached the place and seized the articles which were produced before court. He was accompanied by P.W. 3.

10. The main question involved in this case is whether the prosecution has proved that the accused is either the owner of the house or was in possession of the property at the relevant time. For the above purpose, prosecution relies on the evidence of P.Ws. 4 and 5 and also Exts. P4 and P5. P.W.4 is the Village Officer who issued Ext.P4 document. His evidence is worth mentioning. He, in his chief-examination says that he had verified the records and found that the property stands in the name of Mariyamma Devasia, w/o. Tomy and says that he had issued Ext.P4 certificate. In cross-examination he admitted that no mutation had been

carried out and patta still stands in the name of somebodyelse. It is also deposed by him that the property could not have been transferred as per the conditions by which pattayam was given. He conceded that no documents kept in the village office will show that Mariyamma Devasia was the owner of the property. Pattayam stands in the name of Elikutty Peruprayil. Tax is paid in her name.

11. It is significant to notice that P.W.4 did not find it necessary to mention the survey number, the description of the property and simply says that the place where the incident took place belongs to the wife of the accused. At any rate, there is nothing which prevented the prosecution from producing the document which is referred to by P.W.4 to show that in fact there had been a transfer. The evidence of P.W.4 shows that the property could not have been transferred by the vendor and there were no records in the Village office to show that wife of the accused is holding the property.

12. Coming to the evidence of P.W.5 who issued Ext.P5, he says that during the election period there was reallocation of wards and consequently the house No. 4/86A was renumbered as 6/349. Surprisingly enough, in cross-examination he says that the documents based on which he issued the certificate is not authentic. It is only for election purpose. The voters list could have been produced. Thus, it could be seen that the two persons who issued Exts.P4 and P5 though say that there are documents to show the occupation and ownership of Mariyamma Devasia, the Investigating Officer did not deem it necessary to obtain those documents to show that the property in fact stands in the name of Mariyamma Devasia. Even assuming that Mariyamma Devasia is the owner, the role of the petitioner is not clear. Whatever that be, it is significant to notice that P.W.4 says that the Investigating Officer did not ask him to produce the documents relating to the building therefore, he did not

produce the same. This means that there are documents with the authorities concerned to show that there was a transfer and Mariyamma Devasia is holding the property. But those documents have not been produced. That means that the best evidence has been withheld. This Court is unable to agree with the finding of the court below that the prosecution has established that the property in which the incident took place belongs to the accused. Exts.P4 and P5 too are not authentic. It is for the prosecution to prove that the property belongs to the accused and his wife. No such attempt was made by the prosecution and in the light of the fact that there was no convincing evidence to show that the building Number 4/86A and 6/349 are one and the same, it will be hazardous to enter a finding that the accused is guilty on the basis of such evidence.

For the above reason, this Court is unable to sustain the order of conviction. This appeal is allowed, the conviction

and sentence passed by the court below are set aside. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.