

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 228 of 2006 ()

AGAINST THE JUDGMENT IN SC 53/2005 of ADDL. SESSIONS COURT
(ADHOC)-II, KALPETTA DATED 25-01-2005

APPELLANT(S)/ACCUSED.:

PRATHEESH, S/O.PADMANABHAN, OZHARAMOOLA,
CHEETIYALATHUR, NOOLPUZHA, SULTHAN BATHERY.

BY ADV. SMT.K.V.RESHMI

RESPONDENT(S)/COMPLAINANT AND STATE.:

1. THE EXCISE INSPECTOR,
S.BATHERY EXCISE RANGE, (CRIME NO.27/2003).
2. THE STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ami/

P.BHAVADASAN, J.

Crl.A.No.228 of 2006

Dated this the 11th day of December, 2015.

J U D G M E N T

The accused was put in dock for the offence punishable under sections 55(a), 8(1) and (2) of the Abkari Act. He was found guilty and accordingly the court below convicted and sentenced him to undergo simple imprisonment for one year and to pay a fine of Rs.1 lakh and in default to undergo 3 months simple imprisonment.

2. The incident which give raise to this case occurred on 20.4.2003. On that day, when Pws.1 and 2, who were Forest officials at the relevant time, were on patrol duty, they happened to see the accused coming with a white can. No sooner than he saw the officials, he dropped the can and proceed. Though chased, he could not be apprehended. PW1 claims familiarity with the accused person and on examination of the contents of the can, it was found to be arrack and it was sealed and labelled. PW1 seems to have

prepared Ext.P1 mahazar. It appears that Pws.1 and 2 after detection of the offence had produced the contraband article before PW4 who was then functioning as the Forest Officer and he in turn handed it over to the Excise Inspector. It may be noticed that the initial detection was done by the Forest Guards and finally, the Excise Inspector took over the investigation and produced the property before the court and completed the investigation and laid charge before the court.

3. The court, before which the final report was laid, took cognizance of the offence and on finding that the offence is exclusively triable by a court of Sessions, the case was committed to the Sessions court, Kalpetta, which made over the case to the Additional District and Sessions Judge, Kalpetta, for trial and disposal. The latter court on receipt of the records and appearance of the accused, framed charge for the offences punishable under Sections 55(a) and 8(1) and (2) of the Abkari Act. The accused was found not

guilty and claimed to be tried. The prosecution therefore examined Pws.1 to 5 and Exts.P1 to P6 were marked. MO1 was identified and marked. After the prosecution evidence is over, the accused was questioned under section 313 of Cr.P.C. and he, not only denied his involvement in the incident, but also claimed that he was falsely implicated in the incident with ulterior motive. On a finding that he could not be acquitted under section 232 of Cr.P.C., he was asked to enter on his defence and Dws.1 and 2 were examined and Exts.D1 to D3 were marked from the defence side.

4. The court below, considerably influenced by the evidence of Pws.1 and 2 and also the fact that Ext.P1 mahazar contains all the necessary details, has held that it could not be said that the case was a fabricated one. The court below went on to hold that the guilt of the accused is proved and therefore imposed the sentence as already mentioned.

5. Assailing the conviction and sentence, the learned counsel for the appellant raised a contention that there is no material to show that the Forest Guards are empowered as the Abkari Officers under the Kerala Abkari Act. A reference was also made to the definition of 'Abkari Officer' that comprised in Section 3(2) of the Act and it was contended that the Abkari Officer or any Officer is a person who is lawfully appointed or invested with powers under Sections 4 or 5. The definition of 'Forest Guard' does not find a place in the definition. The notification also does not authorise a 'Forest Guard' to exercise the power of Excise Inspector or otherwise. If that be so, according to the learned counsel for the appellant, the detection and preparation of the mahazar was done by an incompetent person and therefore the proceedings cannot survive. For the above proportion, reliance was laid down to a decision reported in **Haridas vs. State of Kerala (2015 (1) KLT 958)**.

6. The learned Public Prosecutor on the other hand tried to sustain the conviction imposed by the court below, emphasising the competency of evidence of Pws.1 and 2 with regard to the seizure of the contraband article and the sample taken by them. The learned Public Prosecutor submits that the lower court has chosen to accept their versions by holding that there is no discrepancies in their versions. In short, the contention is that the entire evidence has been considered by the court below.

7. The first in the foremost issue that arises for consideration is whether the Forest Guards can be treated as an 'Abkari Officer' or as the Officer as contemplated under the Act. There are two Government notifications, of 1967 and 2009. Both the notifications do not empower Forest Guard to act as an 'Abkari officer'. Coming to Section 4 of the Act, it begins by saying that the Government by notification in the Gazette appointed certain persons to exercise the powers and perform the duties. Nothing is

shown before this Court by virtue of any of the notifications issued under Section 4, empowering the Forest Guards to act as Abkari Officers. Section 5 also, deals with conformant of duties and powers under the Act to an Abkari Officer. It may not be out of context to refer to Section 5A also. It says that the Government has the power, by notification, to confer power of Officers of the choice of the State. As already stated, in none of the notifications ie., either in the notification of 1969 or of 2009, the entry regarding the Forest Guard is seen made.

8. In the decision reported in **Haridas vs. State of Kerala (2015 (1) KLT 958)**, it is held as follows :

"6. PW5 deposed before the court that he had conducted the investigation of the case as directed by the Assistant Excise Commissioner, Pathanamthitta. The Assistant Excise Commissioner had no authority to empower P.W.5 to conduct the investigation of the case. Such power must be conferred on P.W.5 by a notification issued by the Government of Kerala under S.4 of the Abkari Act. In the absence of such a notification, the investigation conducted by P.W.5 cannot be accepted to be a legal one even if it was done as directed by the Assistant Excise Commissioner,

Pathanamthitta.

7. Since the investigation of the case had been conducted by an incompetent officer, the court below had no jurisdiction to take cognizance of the offence alleged in the complaint filed based on such investigation. Consequently, the court below could not have framed charge against the appellant as it was without jurisdiction. The trial which followed after framing the charge must be treated as non est in the eye of law as it was done without jurisdiction. As the trial was conducted without jurisdiction by the court below, it cannot end either in conviction or in acquittal. Therefore, the conviction and sentence passed by the court below against the appellant are liable to be set aside. He is entitled to be discharged in this case."

From the above decision it is clear that the investigation or filing of final report by an incompetent officer is non est and proceedings cannot be continued or initiated on that basis. The principle laid down in the decision cited supra is squarely applicable to the facts and circumstances of this case. No material is produced before this Court to show that the Forest Guard who detected the offence is competent to do so. In the light of the said facts and circumstances of the case, the search and seizure and the investigation becomes questionable and there is no relevance to the materials

collected by Pws.1 and 2.

9. For the above reasons, this appeal is allowed and conviction and sentence imposed by the court below is set aside and it is held that the accused is not guilty of the offence. He stands acquitted of all the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN,
JUDGE.

ami/15/12/15

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P.A. to Judge