IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No.249 of 2006

AGAINST THE JUDGMENT IN SC 49/2004 of ADDL. SESSIONS COURT FAST TRACK - III, PALAKKAD DATED 27-01-2006

APPELLANT/ACCUSED:

PARANGODAN, S/O. CHAMI,
KUNNATH, CHERUMUNDASSERY DESOM,
AMBALAPPARA PANCHAYATH,
OTTAPALAM TALUK.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.249 OF 2006

Dated this the 15th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of Abkari Act and was found guilty of the said offence. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. The prosecution case in brief is that on 06.04.2000 while PW1 was functioning as Assistant Excise Inspector of Ottapalam Excise Range Office, in the evening on that day he had gone for patrol duty along with other officers. When they reached in front of the house of Kunnath Raghavan, they saw two persons going in front of them. A person was seen coming from the opposite side and three persons were seen talking to each other. PW1 noticed that the person who had come from the opposite side had a can with him. Seeing the Excise Officials when he panicked and

tried to turn away, he was intercepted and the can was seized. By taste and smell, the contents were identified as arrack. Ext.P1 arrest memo was prepared and the accused was arrested. Due intimation was given to his wife. The can was seized and PW1 claimed that he took 300ml of liquid as sample in a bottle having a capacity of 375ml and sealed and labeled the same as is required in law. The label affixed contains the signature of the accused and PW1. So also on the can. PW1 says that Ext.P2 seizure mahazar was prepared in which the signature of the witnesses were obtained and he also signed on the same. They returned to the Station and as PW1 holds the charge of Excise Inspector on that day, he prepared crime and occurrence report as per Ext.P3. On the next day, the accused, articles and the documents were produced before court. The property list prepared is Ext.P4 and forwarding note prepared is Ext.P5. Excise Inspector conducted investigation and laid charge before court.

3. The court before which charge 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 Sessions Court, Palakkad under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track-III, Palakkad for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 55(a) of Abkari Act, to which, he pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P8 marked. M.O.1 was got identified and marked.

5. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to adduce no evidence.

7. Based mainly on the evidence of PWs 1 and 2 who were on patrol duty and who had detected the offence and also the contemporaneous document namely, Ext.P2, the court below was

inclined to accept the prosecution evidence and held the accused guilty. The conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant raised a preliminary point for consideration. According to the learned counsel, going by the evidence on record, PW1 was the detecting officer and he had done all the necessary procedure with regard to detection of offence and registration of crime. He was only an Assistant Excise Inspector at the relevant time. Going by the notification then in existence, he was not an empowered officer to do any procedure with regard to detection of offence. In support of his contention, learned counsel relied on two decisions of this Court namely, ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470) and ***Sasidharan*** *vs.* ***State of Kerala*** (2012 (2) KLT 392). Accordingly, it is contended that in the light of the fact that the officer concerned was an incompetent person, the whole proceedings has to fail.

9. There is considerable force in the above submission.

This Court had occasion to consider an identical issue in the decision in ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470). Referring to a notification under S.R.O No.234/1967 which was in force at the time when detection in the case on hand was made, this Court had occasion to observe that only Preventive Officer or Excise Inspector had the authority to take action under the Act though the powers conferred on the Excise Inspector and Preventive Officer are slightly different in nature. The court observed that Assistant Excise Inspector had no authority to act under Sections 31, 32, 34, 35, 38, 39 and 53 of the Act. Assistant Excise Inspector was subsequently empowered to do such procedures by a notification under S.R.O.361/2009 dated 08.05.2009. There was no clause of it having a retrospective effect and if any detection is made before that date by any of the Assistant Excise Inspectors, that was without authority.

10. In the decision in ***Sasidharan*** *vs.* ***State of Kerala*** (2012 (2) KLT 392), it was held as follows:

> "It is argued since as per the notification in S.R.O. No. 234/1967 it was specifically mentioned that the acts and duties mentioned in sections 40 to

53 of the Act are to be performed by the officer not below the rank of Excise Inspector and since PW2 was only an Assistant Excise Inspector, the arrest of the accused, the seizure of the articles and sampling of the articles done by him were without jurisdiction. Since the illegality annexed to the main parts i.e., the arrest, seizure and sampling, that will go to the root of the matter and hence the cognizance taken and the trial conducted based on such a report are vitiated. Though as per S.R.O.No.234/1967, Preventive Officers were invested with the powers to be exercised under Sections 31,32,35,38, 39, 53 and 59, since the preventive officers are officers specifically named as per the aforesaid notification, the arrest of the accused and seizure of the articles and the production of the accused and property before the Magistrate by the Assistant Excise Inspector who's not a named or notified officer, are without jurisdiction as has been held by this Court in *Subrahmaniyan v State of Kerala* (2010 (2) KLT 470). The learned Public Prosecutor submits that the contention that even thereafter no notification was issued authorising and empowering the Assistant Excise Inspector to perform the duties under the Act cannot be countenanced in view of the subsequent notification- S.R.O.No.361/2009 dated 8.5.2009 as per which the Assistant Excise Inspector of the Range were empowered to exercise all the powers

and to perform all the duties of the Excise Inspectors subject to the control of the Excise Inspector. It was further made clear that all officers of the Excise Department not below the rank of Assistant Excise Inspector were empowered to perform the acts and duties mentioned in Sections 40 to 53 (both inclusive) of the Act. They were also empowered to exercise the duties under Sections 31,32,34, 35, 38, 39 and 53 of the Act and to exercise all the powers conferred and to perform all the duties assigned on Abkari Officers under the sections aforesaid. But that notification cannot come to the rescue of the prosecution in this case since this notification S.R.O. No.361/2009 came into force only with effect from 8.5.2009 whereas the offence in this case was detected on 19.6.2001. The incident in the case on hand took place long prior to the aforesaid notification. Hence, following the decision in *Subrahmaniyan's* case, it has to be held that PW2, the Assistant Excise Inspector was not empowered under the Act as it stood then, to perform the duties under the aforestated provisions. Therefore, only on this ground, this criminal appeal is allowed. But it is made clear that on and after 8.5.2009, the arrest of the accused, seizure of contraband, sampling, sealing and production of the accused and properties before Court, done by the Assistant Excise Inspector, would be well within his powers".

11. In the decision in ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470), it was held as follows:

> "13. On a reading of S. 50, it is crystal clear that the court can take cognizance only upon a valid report filed by "competent officer after investigation of the case as provided under S. 50 of the Act". S.40 deals with procedure on arrest and seizure. S.41 deals with disposal of persons arrested. Going by various provisions of the Act, it can be seen that wide powers are given to "Abkari Officers" and "Abkari Inspectors". Besides that, S.50 is more particular that, only "report of Abkari Officer" gives jurisdiction to a competent Magistrate and only on such report, the Magistrate can take cognizance. In the present case, PW1 who was working as an Assistant Excise Inspector was not given powers under the above provisions to effect seizure and investigation. He was also not competent due to absence of conferment of powers under S.50, to file "Report" or complaint. A trial conducted based upon a report of an incompetent officer will render as "*non est*."....."".

12. The case on hand stands on the same footing. There is no reason as to why the ratio laid down in the said decisions should not be applied to the facts of the present case.

In the result, applying the principles laid down in the decisions referred to above, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.