IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 300 of 2006

AGAINST THE JUDGMENT IN SC 723/2003 of ADDL. DISTRICT & SESSIONS COURT FAST TRACK, ADHOC-II, KOZHIKODE.

APPELLANT(S)/ACCUSED:

RAJAN, S/O.KANARAN,
AROONITHARAMMAL KUTTIADI AMSOM,
OORATH DESOM.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT(S)/COMPLAINANT AND STATE:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 300 of 2006

Dated this the 21st day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act and was found guilty of the same. He was therefore convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for two months. Set off as per law was allowed.

2. As per the prosecution case, the incident occurred on 3.1.2000. On that day, P.W.1, then the Preventive Officer of the Excise Department, along with other officers had gone on patrol duty and when they reached near Kollotta bridge, they saw the accused coming along Santhinagar junction. He had a 2 ½ litre capacity can with him. Feeling suspicious about his conduct, he was intercepted and the can was seized. The can contained about two litres of arrack which was identified by smell and taste. The accused was

arrested. Sample was taken in a bottle having capacity of 180 ml. That was sealed. The balance quantity was also sealed. Both the sample as well as the balance quantity was labelled and the signatures of the accused, witnesses and P.W.1 were affixed. He also prepared Ext.P2 seizure mahazar. He returned to the station and registered Crime No. 1 of 2000 as per Ext.P3 occurrence report. By Ext.P4 remand report he had the accused produced before court on the same day itself. He prepared Ext.P5 property list and sent it to court. Properties were produced before the Magistrate on the next day. The requisition for chemical analysis was made by him as per Ext.P6 document and he received Ext.P7 report. P.W.4 took over investigation, completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court

committed the case to Sessions Court, Kozhikode under Section 209 Cr.P.C. The said court made over the case to Additional District and Sessions Court Fast Track, Adhoc-II, Kozhikode 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(a) 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 4 examined and had Exts.P1 to P7 marked. M.O.1 was identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., in which he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent and that he has been falsely implicated. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1 from the

defence side.

5. The court below greatly impressed by the evidence of P.Ws. 1 and 2 and also Ext.P2 seizure mahazar which contained all the details and also prompt production of the accused before the Magistrate felt that the prosecution has succeeded in establishing the case beyond reasonable doubt against the accused. Finding him guilty, conviction and sentence as already mentioned followed.

6. Shri. P.V.Kunhikrishnan, learned counsel appearing for the appellant contended that even assuming the arrest to be valid, subsequent proceedings taken by P.W.1 is without authority and the procedures that should be followed by virtue of Sections 40 to 53 of the Abkari Act are not within his competence and registration of the crime and the production of the accused before the Magistrate and preparation of forwarding note are without authority and those acts cannot be taken note of. Learned counsel invited

the attention of this court to the notification of the year 1967, i.e., S.R.O. 234/1967 Entry No. 12 which reads as follows:

12. Preventive officers of the Excise Department on duty within the Kerala State- to be Abkari Officers under their respective denominations for the purposes of Sections 31, 32, 34, 35, 38, 39, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the sections aforesaid.	Within their respective jurisdiction.

7. Learned counsel went on to point out that specific powers have been enumerated by the notification and the Preventive Officers are empowered to exercise only those powers. Their powers are considerably limited and they cannot exceed the powers conferred on them. The production of the accused and various subsequent matters before the Magistrate are conferred on Abkari Officer and those powers are not given to the Preventive Officer. Learned counsel also invited the attention of this Court to the definition of 'Abkari

Officer' as contained in Section 3(2), 'Abkari Inspector' as contained in Section 3(6) of the Abkari Act. It is contended on behalf of the appellant that even assuming that the Preventive Officer had the charge of an Excise Inspector in view of the specification in the notification, it is extremely doubtful whether the person who is acting for and on behalf of the Excise Inspector can exercise such powers as are enumerated under the notification which are confined to the Excise Inspectors. Learned counsel went on to point out that Excise Inspector being a delegatee cannot delegate his duties to Preventive Officers. It is therefore contended it is extremely doubtful whether the subsequent steps taken by P.W.1 subsequent to the arrest and bringing the accused before the office, in the light of the fact that when P.W.1 returned to the station with the articles, accused and the documents, the Excise Inspector was available, are valid. Those powers are not within the province of Preventive Officers. Act of registration of crime etc are without authority.

8. Learned Public Prosecutor tried to counter the above argument by pointing out that if that is the view taken, then it is practically impossible for the Excise Office to function. It may not be possible for the Excise Inspector to be always present in the station and he may have to go out of the station and may have to remain absent for some time and on such occasions if the power to exercise cannot be given to the Preventive Officers, it will cause considerable difficulties and a hazardous situation would be created. Such interpretation is not warranted and the learned Public Prosecutor tried to justify the conduct of P.W.1 in registering the crime, producing the articles before court etc.

9. After having heard learned counsel for the appellant and the learned Public Prosecutor and having perused the records and provisions of the Act, there seems to be some force in the submission of the learned counsel for

the appellant. To understand the position as contended by the learned counsel for the appellant, reference to the provisions is required. First among them being the definition of 'Abkari Officer' as contained in Section 3(2) of the Abkari Act which reads as follows:

> "3(2) Abkari Officer:- "Abkari Officer" means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Sections 4 or 5."

Section 3(6) defines 'Abkari Inspector' as follows:

> "3(6) Abkari Inspector.- "Abkari Inspector" means an officer appointed under Section 4, clause (d)."

Section 4 reads as follows:

> "4. The Government may, by notification in the Gazette:-
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> (a) The Government may appoint an officer to control the administration of the Abkari Department:- Appoint an officer, who shall be styled the commissioner of Excise and who shall, subject to the general control of the Government have Control of the administration of

the Abkari Department and of the collection of the Abkari Revenue or of both;

(b) May appoint any person other than the Commissioner to perform all or any of his duties:- Appoint any person other than the Commissioner of Excise to exercise all or any of the powers and to perform all or any of the duties of the Commissioner of Excise, subject to the control of the Government.

© May withdraw Abkari powers from Commissioner or other officer appointed under clause (a) or clause (b):- Withdraw from the Commissioner or other officer appointed under clause (a) or clause (b) any or all of his powers in respect of the Abkari Revenue;

(d) May appoint officer to take action under Sections 40 to 53:- Appoint officers to perform the acts and duties mentioned in Sections 40 to 53 inclusive of this Act;

(e) And subordinate officers:- Appoint subordinate officers of such classes and with such designations, powers and duties under this Act as the Government may think fit.

(f) May appoint any officer of Government or persons to act as above:- Order that all or any of the powers and duties assigned to any officer under clauses (d) and (e) of this section shall be exercised and performed by

> any Officer of Government or any person.
>
> (g) Delegate to any Abkari Officer all or any of their powers under this Act."

It may be noticed at once that Abkari Inspector means an officer appointed under Section 4 clause (d). It means those officers mentioned in Sections 40 to 53 inclusive of the Act. So that Abkari officers empowered to act under Sections 40 to 53 alone can qualify as Abkari Inspector.

Section 5 reads as follows:

> "5. The Government may, from time to time, make rules:- (1) Prescribing the powers and duties under this Act to be exercised and performed by Abkari Officers of the several classes; and
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> (2) regulating the delegation by the Government or by the Commissioner of Excise of any powers conferred by this Act or exercised in respect of Abkari Revenue under any law for the time being in force."

The notification issued in pursuance to the above provision, S.R.O. 234/1967 which was in force as on the date of incident in this case contained entry No. 12 which has already been quoted. One may look into entry No.8 in the above notification which reads as follows:

8. All officers of the Excise Department not below the rank of Excise Inspectors – to perform the acts and duties mentioned in Sections 40 to 53 inclusive of the Act.	Within the areas for which they are appointed.

Therefore, the distinction between entries 8 and 12 is conspicuous. Entry No.8 in the notification says that all officers of the Excise Department not below the rank of Excise Inspectors can perform the acts and duties mentioned in Sections 40 to 53 of the Act. Entry No.12 says that Preventive Officer can only exercise powers for the purposes of Sections 31,32, 34, 35, 38, 39, 53 and 59. Going by the scheme of the Act, Preventive Officer can take such steps so as to prevent the commission of crime, even arrest the accused without warrant. Their power ceases when they produce the articles and the accused before the Excise Inspector and thereafter they cannot proceed to exercise powers under Sections 40 to 53 of the Act.

10. In the case on hand, P.W.1 was only a Preventive Officer at the relevant time. He speaks about the detection of the offence along with the Excise Guard, who had accompanied him while on patrol duty. There is no inconsistency or contradiction in the evidence of P.Ws. 1 and 2 regarding detection, sampling, sealing, labelling etc. P.W.1 also goes to the extent of saying that he had produced the accused and the thondi articles before the Magistrate, prepared forwarding note etc. Those powers are not available to the Preventive Officer in view of the restricted powers under Entry No.12 as already mentioned.

11. One would not have had difficulty even in accepting the evidence of P.W.1 had the Excise Inspector was not available in the station. Here, P.W.1, the Preventive Officer says that when he returned to the station, Excise Inspector

was available in the station. If that be so, as per Section 40, P.W.1 has to necessarily entrust the accused and the articles to the Excise Inspector and P.W.1 could not have exercised those powers by himself.

12. Therefore, as rightly pointed out by the learned counsel for the appellant, the registration of the crime by P.W.1 may not have the sanction of law.

13. The above aspect has not been considered by the court below. Probably that was not urged before the court below. Powers of a Preventive Officer is considerably limited in scope. It is significant to notice that most of the powers under Sections 40 to 53 are not conferred on the Preventive Officer by virtue of 1967 notification. If that be the case, any act done by P.W.1 subsequent to the coming back to the office, in the light of the fact that he himself had stated that Excise Inspector was available, cannot be termed as legal.

For the above reason, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and the accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

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