IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 382 of 2006 (F)

AGAINST THE JUDGMENT IN SC 188/2005 of ADDL. SESSIONS COURT (ADHOC)-I, KOTTAYAM DATED 05-01-2006

APPELLANT/ACCUSED:

REJIMON, S/O.VARGHESE,
KANAKKALIL VEEDU, PAMPADY VILLAGE.

BY ADV. SRI.V.K.SUNIL

RESPONDENT/COMPLAINANT:

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

BY SRI. C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.382 OF 2006

Dated this the 30th day of September, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of Kerala Abkari Act. He was found guilty. 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 under Section 8(2) of Abkari Act. Set off as per law was allowed.

2. Incident in this case occurred on 18.11.2002. On that day, while PW1, Circle Inspector of Excise Enforcement and Anti Narcotic Special Squad, was on patrol duty along with other officers, they happened to see the accused coming along the road carrying a plastic bag with him. Seeing the Excise Officials, when he tried to escape, he was intercepted and the bag in his possession was seized. On opening the bag it found to contain a bottle of 1.5 liters capacity and the bottle contained a liquid. By taste and smell, it was revealed that the liquid was arrack.

Accused was arrested. PW1 claims to have taken samples of the seized article and then sealed and affixed label on the same containing the signature of the accused, his and the witnesses. The balance quantity of contraband article was also sealed and labeled. PW1 claims to have prepared Ext.P1 mahazar at the spot. He then says that he handed over the article and the accused to the Range Officer at Pampady. PW4, Assistant Excise Inspector who claims to have been in charge of the Excise Inspector since the Excise Inspector was on Sabarimala duty, received the article and the accused and prepared Ext.P2 occurrence report. He conducted a good portion of the investigation and he claims that he produced the article and accused before court on the next day. Subsequent investigation was done by PW5 who, after completing the investigation, laid charge before court.

3. Cognizance of the offence was taken by the court before which final report was laid and the said court, finding that the offence is exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kottayam under Section 209 Cr.P.C

after following necessary procedures. The said court made over the case to Additional Sessions Court (Ad hoc)-I, Kottayam for trial and disposal. The latter court framed charge for the offences punishable under Sections 8(1) and (2) of Abkari Act, to which, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P5 marked. M.Os 1 and 2 were got identified and marked. Exts.C1 and C1(a) were marked as court exhibits.

5. After the close of the prosecution evidence, 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 stated that he is innocent. He also stated that when he went to the Excise Office for putting his signature in compliance of a conditional order of bail granted in another case, he was falsely implicated in this case.

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. On appreciation of the evidence in the case, court below found the evidence of PWs 1, 4 and 5 to be convincing enough taken along with Ext.P1 document and also chemical analysis report evidenced by Ext.P3 and held the accused guilty. Conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that there is nothing to indicate that the article seized from the possession of the accused is arrack. Learned counsel relied on the definition of liquor, arrack and Indian Made Foreign Liquor as contained in the Abkari Act. It is contended that the prosecution has not proved that the article seized from the possession of the accused was arrack. Further it is contended that PW4 was only an Assistant Excise Inspector and he had conducted a major portion of the investigation and at the relevant time the competent officer was the Excise Inspector or officer above the rank of Excise Inspector and the Assistant Excise Inspector was incompetent to conduct investigation in the case.

9. Learned counsel appearing for the appellant contended

that true, PW4 says that he was in charge of the Station since the Excise Inspector had gone for Sabarimala duty. But there is no document to establish the said fact. Learned counsel also pointed out that arrest memo has not been marked in the case so also the forwarding note. Apart from the incompetency of PW4, the above infirmities make the prosecution case doubtful especially in the light of the explanation offered by the accused at the time of questioning under Section 313 Cr.P.C. It is therefore contended that the accused is entitled to acquittal.

10. Learned Public Prosecutor, on the other hand, very vehemently opposed the contentions of the appellant and pointed out that evidence is clinching enough to show that the article was seized from the possession of the accused. Evidence of PW1 and also the contemporaneous document Ext.P1 will sufficiently show that the prosecution version is correct. Reliance placed on the definitions has no relevance in the context and it is clear from the evidence of PW1 that article which was in the possession of the accused was nothing but arrack. That would be clear from the chemical analysis report also.

11. According to the learned Public Prosecutor, PW4 was in charge of the Station at the relevant time as the Excise Inspector was on Sabarimala duty and if that be so, relying on the decision in ***Joy*** *vs.* ***State of Kerala*** (2010 (3) KLT 20), it is contended that the Station House Officer is competent to conduct search and seizure and also to conduct investigation of the crime. Final report was laid by a competent officer. None of the infirmities pointed out by the learned counsel for the appellant is sufficient to vitiate the conviction and sentence.

12. PW1 is the detecting officer. He would say that on 18.11.2002 while he was conducting patrol duty along with other officers, he happened to come across the accused carrying a plastic bag in his hand. On seeing the excise officers, he tried to escape from the spot. It was effectively prevented and the bag in his possession was seized. The plastic bag contained a 1½ litre bottle and on examination of the contents by taste and smell, it was revealed that it was arrack. The accused was arrested on the spot and Ext.P1 mahazar was prepared. PW1 says that he handed over the article and accused to the Range

Officer, Pampady.

13. PWs 2 and 3 are two independent witnesses who are examined by the prosecution. They turned hostile to the prosecution. However, PW3 admitted his signature in one of the relevant documents but he denied of having seen the actual seizure. PW2, on the other hand, denied his signature on Ext.P1 and denied of having seen the seizure. Ext.P1 is the mahazar said to have been prepared by PW1. It gives narration of what had transpired at the spot.

14. Learned counsel appearing for the appellant contended that the conviction is solely based on the evidence of PW1 and Ext.P1 mahazar and that are too brittle evidence to warrant conviction. The independent witnesses have turned hostile and the prosecution should have at least examined one of the officers who had accompanied PW1 at the time of detection to ensure that the claim made by PW1 is true. For reasons best known to the prosecution, they refrained from doing so. There is no corroborative evidence therefore to support the version given by PW1.

15. The two independent witnesses to the transaction have turned hostile as usual to betray the prosecution. PW1 in detail speaks about detection of contraband article in the possession of the accused. He speaks about taking samples, sealing the bottle etc. He finally says that he arrested the accused and handed over the article and accused to the Range Officer at Pampady.

16. PW4, Assistant Excise Inspector, who was in charge of the Station conducted investigation of the case. He prepared the occurrence report Ext.P2. He claims to have questioned the accused and produced all the documents and accused before court on the very next day. PW5 is the officer who completed investigation and laid charge before court.

17. There is some substance in the contention raised by the learned counsel for the appellant that it would have been proper for the prosecution to examine at least one of the officers who had accompanied PW1 who claims to have detected the crime. In the case on hand, the accused had a definite case that he had obtained a conditional order of bail in a similar case and that infuriated the police who were awaiting for a chance. There is no

reason for not examining any other officer. Even though PW1 speaks about having arrested the accused, arrest memo is not seen produced so also the forwarding note said to have been prepared by PW1.

18. It is not necessary for the purpose of disposal of this case to go into the deeper question raised by the learned counsel for the appellant based on the definition of various terms in the Abkari Act and the contention that there is no evidence to show that the article seized is arrack. This appeal will have to succeed on a very short ground.

19. PW4, Assistant Excise Inspector, conducted a major portion of the investigation. He claims that he was in charge of the Station in the absence of Excise Inspector who had been deputed for Sabarimala duty. Learned Public Prosecutor relied on the decision in ***Joy*** *vs.* ***State of Kerala*** (2010 (3) KLT 20) and contended that the Station House Officer is competent officer in the absence of superior officer and therefore part of the investigation done by PW4 can be fully justified.

20. It cannot be disputed that at the relevant time

Assistant Excise Inspector was not a competent officer as per the notification to conduct seizure and investigation. This Court is not forgetting the fact that final report has been laid by PW5. This Court had occasion to consider the consequence of conducting an investigation by an incompetent officer in certain cases and in those cases this Court had held that the proceedings are non est and the accused is entitled to be acquitted.

21. In the decision in ***Sabu*** *vs.* ***State of Kerala*** (2007 (4) KLT 169), it was held as follows:

> "9. Yet another point to be considered is regarding the contention of the learned counsel appearing for the appellant that P.W.3 being an Assistant Sub Inspector of Police during the relevant time was not an authorized officer to detect or investigate the offence under the provisions of the Abkari Act. As per S.4 of the Abkari Act the Government of Kerala is empowered to authorize an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act. Sub-s.(2) of S.3 of the Abkari Act defines an Abkari Officer as follows:
>
> "**Abkari Officer**:-'Abkari Officer' means the Commissioner of Excise or any officer or other person lawfully appointed or invested with the

powers under Ss.4 or 5”.

10. The Government of Kerala had notified that all police officers above the rank of Sub Inspector of Police is empowered to discharge all the duties conferred on an Abkari Officer. In this context, learned counsel for the appellant brought to the notice of this Court G.O.(P) No.69/967TD dated 29.3.1996 (S.R.O. No.321/96). The said notification reads as follows:

> “In exercise of the powers conferred by S.4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department and all Revenue Officers and above the rank of Deputy Collectors to be Abkari Officers under their respective jurisdiction for the purposes of Ss.31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 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”.

11. In the light of the above provisions, this Court is of the view that the learned counsel appearing for the appellant was justified in taking the contention that PW.3 was not empowered to detect or investigate the offence. If so, the evidence of PW.3 corroborated by the evidence of PWs.4 and 5 would not prove any case against the appellant. PW.3 had not stated before the Court below that he

> was in charge of the police station and hence he was empowered to investigate the crime. Even if he was empowered as per the provisions of S.2(o) Cr.P.C., he cannot exercise the power conferred on an Abkari Officer. On this score also, the judgment of the Trial Court has to be set aside".

22. Of course, in his evidence, PW4 had stated that Excise Inspector was on Sabarimala duty and therefore he was in charge of the Station. An identical situation was considered in the decision in ***Unni*** *vs.* ***State of Kerala*** (2009 (2) KHC 661) and this Court had held that in the absence of any document to show that Assistant Sub Inspector was put in charge of the duties of Sub Inspector, mere ipse dixit of the officer cannot be accepted to hold that Assistant Sub Inspector was competent to investigate the case. In the said case, it was found that Assistant Sub Inspector has no authority as per the notification then in force to conduct good portion of the investigation and therefore entire proceedings were held to be vitiated. In the case on hand, there is nothing to show that Excise Inspector was on Sabarimala duty and PW4 had been put in charge of the Station and conferred with the duties of Excise Inspector. Even assuming it

to be so, it is doubtful whether he can act as an Abkari Officer as contemplated under the Act in the light of the fact that the officer gets power to do such acts as are necessary only under the notification issued by the Government. In the absence of marking of arrest memo, there is nothing to show that the accused was arrested. The forwarding note is also absent in the case.

23. In the light of the above facts, it becomes difficult to uphold the conviction and sentence. A major portion of the investigation was done by PW4 and therefore the proceedings is vitiated in law. The decisions of this Court stipulating the consequence in such cases have already been referred to. The findings of the court below cannot therefore be sustained.

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

Sd/-

P.BHAVADASAN
JUDGE

smp