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.485 of 2006

AGAINST THE JUDGMENT IN SC 837/2003 of ADDL.SESSIONS COURT (FAST TRACK -II), ALAPPUZHA DATED 22-02-2006

APPELLANT/ACCUSED:

PURUSHOTHAMAN, S/O.NARAYANAN,
AGED 52 YEARS, KUZHIVILAYIL KIZHAKKATHIL,
THALIRADIMURI, VALLIKUNNAM MURI, VALLIKUNNAM
VILLAGE, MAVELIKKARA.

BY ADVS.SRI.R.REJI
SMT.SHIVA RAJARESHMI

RESPONDENT/STATE/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
REPRESENTING THE EXCISE INSPECTOR, EXCISE RANGE,
MAVELIKKARA.

BY SMT. S.HYMA, PUBLIC PROSECUTOR.

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.485 OF 2006

Dated this the 21st day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) and 55(a) of Abkari Act. He was found guilty and 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 three months. Set off as per law was allowed.

2. According to prosecution case, on 06.10.2002, while PW1 was working as Preventive Officer at Mavelikkara Excise Range Office, he set out for routine patrol duty along with other officers. While they had reached the Panchayath road leading to Adoor, about 50 metres from M.S. Bricks, accused was seen coming along with a black can. He was seen crossing the road. Seeing the Excise jeep, he tried to escape from the place and it was effectively prevented and the can was seized from his possession. It was found to contain about 1 litre of arrack. The

accused had a glass with him. He was arrested from the spot as per Ext.P1 arrest memo. About 200ml of contraband article was taken in a bottle having a capacity of 375ml as sample and the sample was sealed and labeled at the place itself and the label contained the signature of accused, witnesses and PW1. Ext.P3 mahazar was prepared at the spot. Thereafter they returned to the office where PW4 was in charge. After having received the accused, records and contraband articles, he registered crime as per Ext.P4 occurrence report. He had the property seized produced before court as per Ext.P5. He claims to have preferred a requisition for sending the sample for chemical examination.

3. Investigation of the case was done by PW5 who was the Excise Range Inspector. He recorded the statement of witnesses, obtained Ext.P6 chemical analysis report, completed the investigation and laid charge before court.

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

over the case to Additional Sessions Court (Fast Track-II), Alappuzha for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 8(1) and (2) and 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P6 marked. M.Os.1 and 2 were got identified and marked.

6. 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.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He examined DW1.

8. The court below, relying on the evidence of PWs 1 and 6 and the contemporaneous document namely, Ext.P3 coupled with the fact that the accused and the articles were promptly produced before court, found that the prosecution has succeeded in

establishing the case beyond reasonable doubt and held the accused guilty. The conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

9. Learned counsel appearing for the appellant pointed out that this appeal will have to succeed on a very short ground. Learned counsel pointed out that the forwarding note with specimen of sample seal is not seen marked in the case and that is fatal to the prosecution. The object and purpose of producing the forwarding note and law on the point has been settled, according to the learned counsel, as per the decision in ***Majeedkutty*** *vs.* ***Excise Inspector*** (2015 (1) KLT 624). In the absence of forwarding note, it is not possible for the court to come to a conclusion regarding the authenticity of the sample. On that short ground, according to the learned counsel, the accused is entitled to acquittal.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 6 are clinching enough to show that contraband was seized from the possession of

accused. It could not be said that there is no evidence regarding the contraband article being possessed by the accused. Once it is found that the accused was in actual possession of the same, other technicalities shall not stand in the way and this Court may not entertain a plea of this nature. The evidence regarding detection is confined to the oral testimony of PWs 1 and 6. Among them PW1 is the detecting officer and he gives detailed version of what transpired at the place of occurrence. He gets ample support from PW6. Apart from the said fact, the mahazar also says what had transpired. Then there is no reason to doubt the version given by the officers. Anyhow, according to the learned Public Prosecutor, the lower court has chosen to believe the evidence adduced and there is no reason as to why this Court should take a different view.

11. It is true that both PWs 1 and 6 give a consistent, cogent and convincing evidence regarding the contraband articles seized from the possession of accused. It is also true that even in spite of cross examination, they stood their ground and their evidence could not be effectively impeached. To that extent, the

prosecution may be right. But the detection of contraband alone is not sufficient to attract the provisions under the Abkari Act. It has to be established that the article seized is one of the articles, possession of which is banned or requires licence. In the case on hand, PW1 is definite that he has sent forwarding note containing specimen of sample seal. It is revealed from the records that no such document is available. Result is that there is no forwarding note as of now and the court is not in a position to compare the seal which is said to have been affixed on the sample. In the decisions in ***Majeedkutty*** *vs.* ***Excise Inspector*** (2015 (1) KLT 624) and in ***Krishnan*** *vs.* ***State*** (2015 (2) KLT SN 8), it was held that non production of forwarding note and non availability of specimen of sample seal in the forwarding note are fatal to the prosecution. If that be so, for the very same reason, the above decision taken also cannot stand scrutiny.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Sections 8(1) and (2) and 55(a) of Abkari Act are set aside and it is held that the accused is not guilty of the offences. He 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.