

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

CRL.A.No.77 of 2009

AGAINST THE JUDGMENT IN SC 1076/2006 of ADDL.DISTRICT & SESSIONS
COURT FAST TRACK (ADHOC-II), KOZHIKODE DATED 01-01-2009

APPELLANT/ACCUSED:

C.BALAN, S/O.RARU, CHERUNARAKASSERY HOUSE,
CHENOTH, POST REC (NIT),
KOZHIKODE.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT/COMPLAINANT & STATE:

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

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
22-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.77 OF 2009

Dated this the 22nd day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8 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 six months. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 11.10.2004. PW1 was working as Assistant Excise Inspector at Kunnamangalam Range. On that day, while PW1 along with other officers were on patrol duty, by about 6.15 p.m, they happened to come across the accused on the REC-Kakkeri road with a can. He was intercepted and the can was seized. The can contained about 2 litres of arrack. 180ml of arrack was taken as sample, and the sample and the can were sealed and labeled.

The label contained the signature of PW1, accused and the witnesses. He claims to have prepared Ext.P1 mahazar. He returned to the office with the accused and the contraband article and entrusted them to the Excise Inspector.

3. PW5 was the then Excise Inspector to whom PW1 had entrusted the accused, contraband articles and documents. He registered the case under Ext.P3 occurrence report. He would say that the seized articles were produced before court on the same day were returned by the court directing him to keep them in office under safe custody and produce them on the next day.

4. PW6 would say that he was also functioning as Excise Inspector after PW5 has left the office and thereafter he was in charge of the investigation. He obtained Ext.P6 sketch, recorded statement of witnesses and laid charge before court.

5. 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, Kozhikode. The said court made over the case to Additional District and Sessions Court Fast Track

(Adhoc-II), Kozhikode for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 8 of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P6 marked. M.O.s 1 was got identified and marked.

7. 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.

8. 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.

9. The court below, greatly impressed by the evidence of PWs 1 and 5, came to the conclusion that the offence had been made out and found the accused guilty. The conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

10. Sri.P.V. Kunhikrishnan, learned counsel appearing for

the appellant contended that this appeal will have to succeed on a very short ground. The date of incident is 11.10.2004. On that day, according to learned counsel, Assistant Excise Inspector was not empowered to conduct search and investigate the case. The notification which was prevailing in 1967 did not extend to him. Relying on the decisions in **Subrahmaniyan vs. State of Kerala** (2010 (2) KLT 470) and in **Sasidharan vs. State of Kerala** (2012 (2) KLT 392), it is contended that if an incompetent officer detects an offence, that is of no use and no proceedings can be initiated in such a case. According to the learned counsel, the conviction cannot stand.

11. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 5 are clinching enough to show that the articles are seized from the possession of accused and that the recital in Ext.P1 mahazar support their evidence. However, learned Public Prosecutor has no answer to the competency of PW1 to act as a detecting officer.

12. As rightly pointed out by the learned counsel for the appellant, this appeal will have to succeed on a very short

ground. An 'Abkari Officer' and 'Abkari Inspector' are defined under the Abkari Act. The notification which empowered the officer with specific powers issued in 1967 was in force at the time of detection of offence. The said notification did not authorise the Assistant Excise Inspector to do any act under the Act. Any detection done by him and investigation conducted by him were considered to be invalid and conferring no right on them.

13. In the case on hand, as could be seen from PW1's evidence and also from the mahazar prepared, it could be seen that PW1 was only an Assistant Excise Inspector and if that be so, any act done by him cannot be accepted. Since PW1 was not competent to act as an Abkari Officer at the relevant time as could be discerned from the decisions cited above, the entire proceedings is vitiated.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 8 of Abkari Act are set aside and it is held that the accused is not guilty of the offence. 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

// True Copy //

P.A to Judge.