

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No. 698 of 2006

AGAINST THE JUDGMENT IN SC 320/2005 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZHA DATED 16-03-2006

APPELLANT/ACCUSED:

SABU, S/O. JANARDHANAN, KUNNEL VEEDU,
RAJAKKADU KARA, RAJAKKADU VILLAGE.

BY ADVS.SRI.C.K.VIDYASAGAR
SRI.P.CHANDY JOSEPH

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.698 OF 2006

Dated this the 19th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months.

2. The incident in this case occurred on 04.06.2003. PW1, at the relevant time, was working as Sub Inspector of Police, Adimali Police Station. According to him, as per the direction received from his superior officer, he was asked to conduct raid in the Green Park Hotel, Rajakkadu. He prepared the search memo and had it sent to the court. He then proceeded to the spot and the owner of the hotel was present at the time when search was conducted in the hotel. It is stated that from a store room on the top, 8 bottles of 750 ml capacity containing liquor was seized. Five of them had the label Super Jackey XXX Rum and three of

them had the label Anand's Master's Brandy. By taste and smell, it was revealed that it was Indian Made Foreign Liquor. The accused was arrested. Two samples were taken of 180 ml each and the sample and the contraband was sealed and they were numbered as B1 and B2. The sample taken from the Rum bottle was numbered as A1 and A2. PW1 says that he had sealed and labeled the samples as well as the contraband articles. He prepared Ext.P2 report and handed over the accused, contraband articles and documents to Station House Officer, Rajakkadu.

3. PW3 is the officer who received the articles, accused and documents from PW1. He registered crime as per Ext.P6 First Information Report. He conducted the initial investigation of the case. The accused, articles and contraband were produced before court by him. He prepared the forwarding note Ext.P6 for sending the sample for chemical analysis. He recorded the statement of witnesses and obtained ownership certificate of the house from where the article was seized.

4. PW4 is also said to have conducted a portion of the investigation. He enquired about the ownership of the building

and obtained rent deed as per Ext.P10 mahazar. The investigation was completed by his successor in office who 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, Thodupuzha. The said court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha 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 the charge, accused pleaded not guilty and claimed to be tried.

6. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P12 marked. M.O.s 1 to 4 were 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. Presumably, relying on the evidence of PW1 and also Ext.P1 search list and impressed by the fact that accused, contraband articles and records were promptly produced before court, trial court felt that the prosecution has established its case beyond reasonable doubt. Finding that the accused is guilty of the offence under Section 55(a) of Abkari Act, court below convicted and sentenced him as already mentioned.

10. Sri.C.K. Vidyasagar, learned counsel appearing for the appellant raised two points for consideration. Learned counsel pointed out that the seizure was from a hotel and that too from a remote corner of the building. There is no evidence to show that the accused was in exclusive possession of the contraband so as to fasten liability on him. The more formidable ground urged by the learned counsel is the incompetency of PW1 to detect the offence to carry out any of the functions of Abkari Officer in respect of Rajakkadu Taluk. In support of his contention, learned

counsel relied on the decisions in **Saji @ Kochumon vs. State of Kerala** (2010 (3) KLT 471) and in **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18). If, as a matter of fact, appellant is entitled to succeed on the second ground, it is unnecessary to consider the first ground at all. It is no doubt true that PW1 is an Abkari Officer as contemplated under the Act. But, unfortunately, a notification then in existence specifies the territory within which an Abkari Officer can exercise his powers. PW1, at the relevant time, was Sub Inspector of Adimali Police Station. The place of occurrence is within Rajakkad Police Station over which PW1 had no jurisdiction at all. However, he would say that he acted under the orders of the superior officers and therefore the prosecution tried to sustain the detection and subsequent proceedings done by PW1. But, unfortunately for the prosecution, the law is otherwise. It is by now well settled that an Abkari Officer, as per the notification in 1967, can act only within his territorial limits and even if he is authorised by his superior officer, he cannot act outside his jurisdiction. If that be the law, obviously, detection and proceedings taken by PW1 is

non est in law. This aspect was considered in the decision in **Saji @ Kochumon vs. State of Kerala** (2010 (3) KLT 471) wherein it was held as follows:

"5. Sub-section (2) of S.50 of Kerala Abkari Act provides that as soon as investigation into the offence under the Act is completed, the Abkari Officer shall forward to a Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub-s.(2) of S.173 of Code of Criminal Procedure. Abkari Officer is defined under S.3(2), means Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under S.4 or 5. S.4 provide that Government may appoint an officer to control the administration of abkari department by notification in the gazette. Under clause (d) of S.4 Government may by notification in the gazette appoint officers to perform the acts and duties mentioned in Ss.40 to 53 (inclusive) of the Act. S.5 provides that Government may from time to time make rules prescribing the powers and duties under the Act to be exercised and performed by the Abkari Officers of the several classes and regulating the delegation by the Government or by Commissioner of Excise, of any powers conferred by the Act or exercise in respect of Abkari revenue in any law for the time being in force. S.R.O..321/1996 was issued in exercise of the

powers conferred by S.4 of the Act by the State Government. Under the S.R.O. Government of Kerala thereby appointed "all police officers on 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" to be Abkari Officers under the respective jurisdiction for the purpose of Ss.31 to 35, 38 and 40 to 53 and 59 of the Act and to exercise all the powers and discharge of all the duties conferred in Abkari Officer in the sections aforesaid. Therefore, by notification issued by the Government in exercise of the power provided under S.4, a Sub Inspector of Police in charge of law and order and working in the general executive branch of police department is appointed as Abkari Officer, within his respective jurisdiction to exercise the powers provided thereunder. The respective jurisdiction could only be the jurisdiction of that Sub Inspector. It can only be within the territorial limits of his police station. Therefore, Sub Inspector of Police, Edathwa is the Abkari Officer empowered by the Government to exercise the powers under Ss.31 to 35, 38 and 40 to 53 and 59 of Act. Therefore, the officer who is competent to file a final report as provided under S.50 is only the Abkari Officer namely, Sub Inspector of Police, Edathwa or an officer superior to him.

6.

7. The Division Bench of this court in *Varkey v. State of Kerala* (1993 (1) KLT 72) following the earlier Division Bench decision in *Prabhakaran v. Excise Circle Inspector* (1992 (2) KLT 860) held that when the Excise Inspector who filed the complaint has no authority to file the complaint, court has no jurisdiction to take cognizance or frame charge or try the accused and "the trial which followed the said charge must be treated as *non est*, because it was done without jurisdiction. The Full Bench of this court in *Abdul Rehman v. State of Kerala* (1995 (1) KLT 234 (F.B.)) upheld the decision. A later Division Bench in *Subash v. State of Kerala* (2008 (2) KLT 1047) held that when the Magistrate has no jurisdiction to take cognizance of the case on a report filed by a person other than an Abkari Officer as defined under S.50 of the Abkari Act, there is total lack of jurisdiction for taking cognizance of an offence if cognizance is taken on a final report not submitted by an Abkari Officer and it is not an irregularity covered by Chapter XXXV of Code of Criminal Procedure but a total illegality and therefore, the cognizance taken, trial conducted and the conviction and sentence are all illegal. It is followed by a learned Single Judge in *Subrahmaniyan v. State of Kerala* (2010 (2) KLT 470). In view of the legal position, it can only be found that cognizance taken on the final report submitted by PW7 the Sub Inspector of Police,

Veeyapuram who has no authority to file a final report in the case and the cognizance taken, charge framed and the trial and consequent conviction and sentence awarded against the petitioner are illegal and *non est*. Hence it can only be set aside.”

11. Again the issue was considered in the decision in **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18) wherein it was held as follows:

“In the light of the provisions of S.R.O No.321 of 1996 as interpreted by this Court in this ruling (2010 (3) KLT 471), a Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction only within the territorial limits of his police station. Therefore, PW6, the Sub Inspector of Police, Hemambika Nagar Police Station, had exceeded the limits of his jurisdiction by investigating the case on hand which was within the territorial limits of Kongad Police Station”.

12. There can be no doubt that even if PW1 is directed by his superior officer, an Abkari Officer cannot exercise powers envisaged under the Abkari Act beyond his jurisdiction and any exercise of such powers cannot be treated as valid in law. It was held in **Rajan A.N vs. State of Kerala** (2014 (3) KLJ 720) that only Abkari Officers, upon whom both power and jurisdiction are

vested, can file report and final report laid by an Abkari Officer having no territorial jurisdiction is illegal and the conviction entered by the trial court overlooking the incompetency of the Abkari Officer who laid the final report cannot be sustained.

13. The principles laid down in the above decisions apply to the facts of this case and if that be so, the appellant is entitled to succeed on this sole ground.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 55(a) of Abkari Act are set aside and it is held that the accused is not guilty of the said 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

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P.A to Judge.