**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR.JUSTICE P.BHAVADASAN**

**TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937**

**CRL.A.No. 699 of 2006 ( )**
**--------------------------**
**AGAINST THE JUDGMENT IN SC 11/2005 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC)-I, PATHANAMTHITTA DATED 28-02-2006**

**APPELLANT(S)/ACCUSED::**
**-------------------------------------------**

**SURESH, S/O. SREEDHARAN,**
**UTHIVILAKIZHAKKETHIL VEEDU, AIVELIKUZHI**
**PUTHUSRIBHAGAM, ERATHU VILLAGE, ADOOR TALUK.**

**BY ADV. SRI.M.V.S.NAMBOOTHIRY**

**RESPONDENT(S)/COMPLAINANT::**
**-------------------------------------------------------**

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

**BY PUBLIC PROSECUTOR SMT. LILLY LESLIE**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**ds**

**P.BHAVADASAN, J.**

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Crl.A. No. 699 of 2006

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Dated this the 15th day of December, 2015

**J U D G M E N T**

The accused was prosecuted for the offence punishable under Section 8(1) & (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of two years. Set off as per law was allowed.

2. The incident in this case occurred on 31.01.2000. On that day, PW1 was working as the Assistant Excise Inspector of Adoor Excise Range. Under his leadership, officers of Excise Department had gone on routine patrol duty including PW2. While they were patrolling at Puthusseribhagam, the accused was seen coming on a bicycle. He was asked to stop and got down from the cycle. When the accused came near the Excise Officers, strong smell of alcohol came from him. He tried to run away from

the place and when the officers attempted to prevent him from doing so, a packet fell from his waist. There was a sack being carried on in the bicycle. It was opened and it was found to contain a can of 10 litres capacity. It contained some sort of a liquid. By taste and smell, the liquid was identified as arrack. A sample of 180ml was taken in a bottle of 375ml capacity. The sample and the balance contraband article were sealed and labelled. The sack and the chappals left behind by the accused were also taken into custody and they were also labelled. Ext.P1 mahazar was prepared at the spot. PW1 then returned to the Excise Range Office and entrusted the accused, documents and the contraband article to the said office. PW5 received the documents and the accused. On the basis of those materials, registered crime No. 21/2000 as per Ext.P4 occurrence report. PW5 prepared the property list and prepared a requisition for sending the sample for chemical analysis. Ext.P5 is the report. Ext.P6 is the list of property and Ext.P7 is the requisition for chemical examination. Certificate obtained from the chemical analyst is Ext.P11. The accused was subsequently arrested. PW6 then took over investigation. He recorded statements of witnesses, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Pathanamthitta, under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District & Sessions Court (Adhoc), Fast Track-I, Pathanamthitta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) & (2) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 6 examined and had Exts.P1 to P11 marked. MOs 1 to 3 were got identified and marked.

6. After the close of prosecution evidence, the 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 he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. The court below, greatly impressed by the evidence of PWs 1 and 2 and also the drawing up of Ext.P1 mahazar which contained all the essential details spoken to by PW1 and the also the prompt production of the accused and the articles before court, came to the conclusion that the offence has been clearly established against the accused and accordingly, convicted and sentenced him as already

mentioned.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that this appeal will have to succeed on a very short ground. The most fundamental error is regarding the competency of the Detecting Officer. The learned counsel pointed out that as per the notification in force at the relevant time, only Officers of and above the rank of an Excise Inspector are empowered to detect, investigate and lay final charge before court. In the case on hand, PW1 was only an Assistant Excise Inspector and it was he who had detected the offence. If that be so, going by the decision reported in **Unni** v. **State of Kerala** (2009 (2) KHC 661), the entire proceedings is vitiated.

10. The learned Public Prosecutor had no answer for the above contention.

11. In the decision reported in **Unni** v. **State of Kerala** (2009 (2) KHC 661), it was held as follows:

"To prove the guilt of the accused for the possession of the contraband, that is, five litres of arrack in a jerry can, as alleged, the prosecution relied entirely on the evidence of two Police officers connected with the detection and seizure of the contraband, who were examined as PWs 1 and 2. PW 1, Asst. S.I. Of Police, who detected the crime and seized the contraband, had no authority to do so, is the attack raised by the learned counsel for the accused, relying on the notification of SRO No. 321/1996 and also the decision rendered by this Court in Sabu v. State of Kerala, 2007 (3) KHC 753: 2007 (4) KLT 169. If it was a case of accidental detection without prior information, then it could be stated that any police officer was expected to prevent the commission of any offence and taking the offender into custody. But this was a case, even according to the prosecution, PW 1, the Asst. S.I. of Police received prior information of sale of illicit arrack in the residential building of the accused. He proceeded to that spot, pursuant to that information indicated that he went there to have a raid of the building, and, search the place. When a raid over the residential building for detection of Abkari offence is involved, necessarily and inevitably the mandate covered by S.31 of the Act applies with full force. There is nothing in evidence to show that PW1 complied with the formalities for conducting search over the residential building of the accused. Immediately on getting information, he rushed to the spot and reaching there, found the accused with a jerry can beside the courtyard of his building, seized the contraband into custody and arrested him, is the prosecution case. As per S.4 of the Abkari Act, the Government had authorised only certain Officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Asst. S.I. of Police, as per the notification issued by the Government, is not authorised nor empowered to detect or investigate the abkari offences. Having regard to the fact that PW 1 went over to the residential building of the accused pursuant to information that sale of illicit arrack ws conducted there, prima facie, indicating that he went over to proceed with a search of that building, that too, without complying with the formalities, it follows that whatever acts performed by him pursuant to reaching the spot could not be taken as having been done with the sanction of law. No doubt, illegality or irregularity in a search will not by itself vitiate the evidence collected by the search and there is no bar in relying upon the evidence collected in such search to inculpate the accused. But in the given case, what has come out is that the prosecution at a later stage had developed a case that at the relevant time, PW 1, the Asst. S.I. of Police was in charge of the police station, and as such he was competent to detect a crime and seize the contraband. PW 1 has no such case when he was examined before the Court. So much so, the assertion of PW 4 that PW 1 at the relevant time was in charge of the S.I. of police since that officer was on leave cannot be given much value. So, there is much force in the submission of the learned counsel for the accused that PW 1 was not an authorised officer competent to detect and investigate an offence under the Abkari Act, and as such the detection made by him was unauthorised. The accused in the given facts is entitled to the benefit of doubt since PW 1 was not empowered to detect and investigate the crime. So much so, it has to be concluded that the conviction and sentence imposed against the accused are liable to be set aside, and I do so. The accused is found not guilty and acquitted of the offence under S. 55 (a) of the Abkari Act. Fine amount, if any, remitted by the accused shall be refunded to him. Appeal is allowed."

12. It is not disputed before this Court that PW1 was only an Assistant Excise Inspector at the relevant time and that he is not covered by the then existing notification. If that be so, the principle laid down in the above decision squarely applies to the facts of the present case and the entire proceedings based on the detection made by an incompetent officer has to fail.

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

Sd/-
**P.BHAVADASAN**
**JUDGE**

ds

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P.A. to Judge