IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No. 931 of 2006

AGAINST THE JUDGMENT IN SC 560/2003 of ADDL.SESSIONS COURT (FAST TRACK - I), ALAPPUZHA DATED 05-04-2006

APPELLANT/ACCUSED:

KRISHNANKUTTY, S/O.THEVAN,
PUTHUVELILPUTHEN VEEDU, VALLIKUNNAM MURI,
VALLIKUNNAM VILLAGE.

BY ADVS.SRI.T.S.HARIKUMAR
SRI.BASANT BALAJI
SRI.R.GOPAN

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.931 OF 2006

Dated this the 16th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) 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 simple imprisonment for six months. Set off as per law was allowed.

2. The prosecution case is that while PW1 was functioning as Preventive Officer, Mavelikkara Excise Circle Office, he along with other officers including PW2 had set out for routine patrol duty and when they were about to reach the house of one Deepalayam Krishna Pillai, they happened to see the accused coming along holding a bag in his right hand. Seeing the Excise Officers, he tried to conceal himself. He was intercepted and the bag was seized. On opening the same, it was found to contain a plastic bottle of 1½ litres capacity containing some sort of liquid.

PW1 opened the same and by taste and smell, the contents were identified as arrack. The accused was arrested and a sample of 200ml in a bottle of 375 ml capacity was taken. That was sealed and labeled. He also prepared Ext.P1 mahazar. He then says that he took the article and accused to the Mavelikkara Range Office and entrusted the same to PW4.

3. PW4 was functioning as Assistant Excise Inspector. He was in charge of office on that day. He says that he received the accused, contraband articles and records relating to Crime No.1/2002 detected by PW1 and he would say that based on the occurrence report Ext.P2, he had the accused produced before court along with list of property Ext.P3. He had also made a requisition to the court for sending the sample for chemical analysis. The forwarding note is Ext.P4.

4. Further investigation was done by PW5. He recorded the statement of witnesses, obtained chemical analysis report Ext.P5, completed the investigation 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, Alappuzha. The said court made over the case to Additional Sessions Court Fast Track-1, 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) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

6. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P5 marked. M.O.s 1 and 2 were got identified and marked.

7. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein 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. Obviously impressed by the evidence given by PWs 1 and 2 along with Ext.P1 mahazar, a contemporaneous document,

court below found that there is sufficient evidence to come to the conclusion that the prosecution has succeeded in establishing the case against the accused. Holding so, accused was convicted and sentenced as already mentioned. The said conviction and sentence are assailed in this appeal.

10. Learned counsel appearing for the appellant contended that this appeal has to succeed on a very short ground. The person to whom PW1 handed over the accused and property was Assistant Excise Inspector who claims to have in charge of the station at the relevant time. There is no evidence in that regard. If PW4 was an Assistant Excise Inspector, he was an incompetent officer to act under Sections 40 to 53 of Abkari Act. Any action by such an incompetent authority is without jurisdiction and will be non est. It is therefore contended that the conviction cannot stand.

11. Learned Public Prosecutor, on the other hand, contended that there is no ground to doubt the evidence of PWs 1 and 2. They gave uniform version regarding the incident and there is nothing brought out in their cross examination to show

that they had any ill motive against the accused. Going by the evidence of PWs 1 and 2 and also the contemporaneous document Ext.P1 which contains the entire details, it may not be proper to say that there was no proper detection of offence.

12. As admitted by the prosecution and as found by this Court in the decisions in ***Subrahmaniyan*** *vs* ***State of Kerala*** (2010 (2) KLT 470) and in ***Sasidharan*** *vs.* ***State of Kerala*** (2012 (2) KLT 392), any act done by an incompetent officer is non est in law. At the relevant time, the matters were governed by the notification of 1967 and going by that notification, Assistant Excise Inspector was not an empowered or authorised officer to exercise the powers under Sections 40 to 53 of the Abkari Act.

13. In the case on hand, the definite case of PW1 was that after detection, they went to the Range Office and handed over the articles, accused and documents to PW4 who received the same. PW4 who is only an Assistant Excise Inspector though claims to have been charge of the office there is no evidence regarding the same. The records show that he had prepared the

occurrence report, property list and also forwarding note.

14. In the decision in ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470), it was held as follows:

> "13. On a reading of S. 50, it is crystal clear that the court can take cognizance only upon a valid report filed by "competent officer after investigation of the case as provided under S. 50 of the Act". S.40 deals with procedure on arrest and seizure. S.41 deals with disposal of persons arrested. Going by various provisions of the Act, it can be seen that wide powers are given to "Abkari Officers" and "Abkari Inspectors". Besides that, S.50 is more particular that, only "report of Abkari Officer" gives jurisdiction to a competent Magistrate and only on such report, the Magistrate can take cognizance. In the present case, PW1 who was working as an Assistant Excise Inspector was not given powers under the above provisions to effect seizure and investigation. He was also not competent due to absence of conferment of powers under S.50, to file "Report" or complaint. A trial conducted based upon a report of an incompetent officer will render as "*non est*."......".

15. In the decision in ***Sasidharan*** *vs.* ***State of Kerala*** (2012 (2) KLT 392), it was held as follows:

> "It is argued since as per the notification in

S.R.O. No. 234/1967 it was specifically mentioned that the acts and duties mentioned in sections 40 to 53 of the Act are to be performed by the officer not below the rank of Excise Inspector and since PW2 was only an Assistant Excise Inspector, the arrest of the accused, the seizure of the articles and sampling of the articles done by him were without jurisdiction. Since the illegality annexed to the main parts i.e., the arrest, seizure and sampling, that will go to the root of the matter and hence the cognizance taken and the trial conducted based on such a report are vitiated. Though as per S.R.O.No.234/1967, Preventive Officers were invested with the powers to be exercised under Sections 31,32,35,38, 39, 53 and 59, since the preventive officers are officers specifically named as per the aforesaid notification, the arrest of the accused and seizure of the articles and the production of the accused and property before the Magistrate by the Assistant Excise Inspector who's not a named or notified officer, are without jurisdiction as has been held by this Court in *Subrahmaniyan v State of Kerala* (2010 (2) KLT 470). The learned Public Prosecutor submits that the contention that even thereafter no notification was issued authorising and empowering the Assistant Excise Inspector to perform the duties under the Act cannot be countenanced in view of the subsequent notification- S.R.O.No.361/2009 dated 8.5.2009 as per which the Assistant Excise Inspector of the Range were empowered to exercise all the powers and to perform all the duties of the Excise Inspectors subject to the control of the Excise Inspector. It was further made clear that all officers of the Excise Department not below the rank of Assistant Excise Inspector were empowered to perform the acts and duties mentioned in Sections 40 to 53 (both inclusive) of the Act. They were also empowered to exercise the duties under Sections 31,32,34, 35, 38, 39 and 53 of the Act and to exercise all the powers conferred and to perform all the duties assigned on Abkari Officers under the sections aforesaid. But that notification cannot come to the rescue of the prosecution in this case since this notification S.R.O. No.361/2009 came into force only with effect from 8.5.2009 whereas the offence in this case was detected on 19.6.2001. The incident in the case on hand took place long prior to the aforesaid notification. Hence, following the decision in *Subrahmaniyan's* case, it has to be held that PW2, the Assistant Excise Inspector was not empowered under the Act as it stood then, to perform the duties under the aforestated provisions. Therefore, only on this ground, this criminal appeal is allowed. But it is made clear that on and after 8.5.2009, the arrest of the accused, seizure of contraband, sampling, sealing and production of the accused and properties

> before Court, done by the Assistant Excise Inspector, would be well within his powers".

16. A reading of the above decisions leaves one in no doubt that at the relevant time Assistant Excise Inspector was not competent to act as Abkari Officer and he could not exercise the powers under Sections 40 to 53 of the Act. It is significant to notice that Section 40 reads as follows:

> "**40. Procedure on arrest and seizure**.- (1)(a) Any Officer arresting a person under Section 31, Section 34 or Section 35 shall him of the grounds for such arrest.
>
> (b) Where an Abkari Officer arrests without warrant any person other than a person suspected of, or accused of, any non-bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.
>
> (2) Every person arrested under Section 30 shall be produced before, an the article seized under that section shall be forwarded to, without unnecessary delay, the Magistrate or the Commissioner, as the case may be, by whom the warrant was issued.
>
> (3) Every person arrested under Section 31 or Section 34 or Section 35 shall be produced before,

> and article seized under section 34 shall be forwarded to, without unnecessary delay,-
>
> (a) to the Officer in charge of the nearest Police Station; or
>
> (b) <u>to the Officer empowered under section 5A, or to the Abkari Inspector</u>.
>
> (4) The authority or Officer before whom any person is produced under sub section (2) or sub section (3) shall, take expeditious steps as provided is section 41.
>
> (5) The authority of Officer to whom any article is forward under sub-section (2) or sub section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article". (emphasis supplied)

17. Obviously, Assistant Excise Inspector cannot be an Abkari Inspector as contemplated under clause (b) of Section 40 (3) of Abkari Act. He was not a notified officer under Section 5A at the relevant time. That means articles and accused could not have been produced before court and that could not have been received by him. Any action taken by him has no authority. This aspect has not been noticed by the court below and the incompetency of PW4 cuts the root of the prosecution case.

For the above reasons, this appeal is allowed and the conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence under Sections 8(1) and (2) of Abkari Act. 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.