IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

CRL.A.No.1012 of 2006

AGAINST THE JUDGMENT IN SC 210/2002 of ADDL. SESSIONS COURT (ADHOC)-III, KASARAGODE DATED 25-04-2006

APPELLANT/ACCUSED:

T.AMBU, S/O.KORAGAN, AGED 56 YEARS,
KUNIYERY VEETTIL, MULIYAR VILLAGE, KASARAGOD DISTRICT.

BY ADV. SRI.M.SANTHOSHKUMAR

RESPONDENTS/RESPONDENTS:
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1. EXCISE INSPECTOR, KASARAGOD EXCISE RANGE IN CRIME NO. 55 OF 2000.

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

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Crl. Appeal No.1012 OF 2006

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Dated this the 7th day of December, 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. Accordingly, he was convicted and sentenced to suffer simple imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months.

2. As per the prosecution case, on 12.10.2000, while PW1 was working as Assistant Excise Inspector attached to Excise Range Office, Kasaragod, he along with his team of officers had gone for patrol duty. They had stopped their vehicle at a place and was walking from that place to another place. On the way, they happened to come across the accused coming with a can. Feeling suspicious, he was intercepted and the can was seized. It contained about 3 liters of arrack. Ext.P1 arrest memo was prepared and the accused was arrested. PW1 says that he took sample of 300ml in a bottle having a capacity of 375ml and

sealed and labeled the same. On the label, signature of PW1, accused and the witnesses were obtained. Ext.P2 is the mahazar prepared by him. He returned to the station and registered Crime No.55/2000 under Section 55(a) of Abkari Act as per Ext.P4 occurrence report. He had the accused and the seized articles produced before court. Ext.P5 is the property list and Ext.P6 is the forwarding note submitted by him. Ext.P7 is the chemical analysis report received by him.

3. Investigation of the case was done by PW5. He recorded the statement of witnesses, 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, Kasaragod under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court (Adhoc) - III, Kasaragod for trial and disposal. The latter court, on receipt of records and on appearance of 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.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.1 was 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 chose to adduce no evidence.

8. The court below, acting on the oral testimony of PWs 1 and 2 and also the fact that Ext.P2 mahazar prepared at the spot sufficiently corroborates the versions given by PWs 1 and 2 taken along with the results of chemical examination, came to the conclusion that the prosecution has succeeded in establishing the case against the accused. 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 contended that this appeal will have to succeed on a very short ground. PW1, detecting officer, who prepared the mahazar, seized the articles, registered the crime and prepared the property list and forwarding note was only an Assistant Excise Inspector at the relevant time and going by the notification of 1967, he was incompetent to detect or investigate an Abkari case of this nature. As all the acts committed by him are illegal, nothing can survive. For the above proposition, learned counsel relied on the decisions in ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470) and in ***Sasidharan*** *vs.* ***State of Kerala*** (2012 (2) KLT 392). Accordingly, it is contended that the conviction and sentence cannot stand.

10. Learned Public Prosecutor, on the other hand, contended that the court below has acted on the evidence of PWs 1 and 2 and there is no reason as to why the principles adopted by the court below should not be adopted while dealing with his appeal also. If one is going by the evidence of PWs 1 and 2, according to the learned Public Prosecutor, there is no

contradiction in their evidence and the uniform version given by them establishes beyond doubt that the articles were seized as alleged by the prosecution. Further, reliance is also placed on Ext.P2 mahazar which had come into existence soon after the offence was detected. Learned Public Prosecutor pointed out that there was no possibility of fabrication of document since Ext.P2 contains true version of what had transpired at the place of incident. It is therefore contended that no interference is called for in the findings of the court below.

11. In spite of best efforts made to be convinced by the contention raised by the learned Public Prosecutor, this Court was unable to do so. Admittedly, PW1 was only an Assistant Excise Inspector at the relevant time. PW2 was the Preventive Officer. A reading of the evidence of PWs 1 and 2 show that it was PW1 who led the team, conducted search and seizure, prepared mahazar, property list and forwarding note and registered crime etc. Apart from that, a bit of investigation was also done by him. As rightly pointed out by the learned counsel for the appellant, Assistant Excise Inspector obtained the rights to act as an Abkari

Officer only under the notification in 2009. Till then, notification of 1967 governs the field. As per that notification, only an officer of the rank of Excise Inspector or above is authorised to conduct search, seizure etc. 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*."....."."

12. 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".

13. The principles are thus well settled. An Assistant Excise Inspector, till the notification of 2009, was incompetent to conduct search, seizure and investigate and register a crime as per the Abkari Act. He became competent only by virtue of the notification in 2009. If that be so, cognizance could not have been taken on a report filed by an Assistant Excise Inspector if all other proceedings are done by an Excise Inspector. The ground taken by the appellant seems to be well founded. It means that the act committed by PW1 has no authorisation in law. Therefore, the conviction and sentence will have to be necessarily interfered with.

In the result, 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 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.