

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 1781 of 2005 ()

AGAINST THE JUDGMENT IN SC 645/2002 of ADDL.DISTRICT COURT (ADHOC)-II,
ALAPPUZHA, DATED 30-09-2005

&

AGAINST THE ORDER/JUDGMENT IN CP 69/2002 of J.M.F.C-i,
HARIPAD.

APPELLANT(S)/ACCUSED:

CHANDRAN, S/O. BHARGAVAN,
VELAMTHOPPIL, ERIKKAVU MURI, WARD NO.V,
KUMARAPURAM PANCHAYATH, KUMARAPURAM VILLAGE,
ALAPPUZHA.

BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN

RESPONDENT(S)/COMPLAINANT::

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.1781 of 2005

Dated this the 15th day of September, 2015

JUDGMENT

Accused in S.C.No.645/2002 on the file of the Additional Sessions Court(Fast Track-II), Alappuzha, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Karthikappally Excise Range in Crime No.10/2001 of that Excise Range, under Section 8(1) & (2) and 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 14.02.2001 at about 11.30 a.m., the accused was found to be in possession of 5 liters of arrack, found transitting the same along the Panchayath road on the eastern side of the saw mill of one Maniyamma, situated about 1.50 meters on the western side of Koottamkaitha bridge along the Danappady-Koottamkaitha road in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 8(1), (2) and Section 55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Haripad, and the case was taken on file as C.P.No.69/2002, thereafter it was committed to the Sessions Court, Alappuzha, by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the case was taken on file as S.C.No.645/2002 by the learned Sessions Judge and it was originally made over to the Additional Assistant Sessions Court, Alappuzha, for disposal and later it was again withdrawn and made over to Additional Sessions Court (Ad hoc-I), Alappuzha, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of the Abkari Act was framed (that ought to be under Section 8(1) and (2) of Abkari Act) and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 4 were

examined and Exts.P1 to P4 and MO1 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence and he has been falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused to enter on his defence, but no defence evidence was adduced on his side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted him there under and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of ₹1,00,000/-, in default to undergo rigorous imprisonment for three months. Set off was allowed for the period of detention already undergone

by him in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. The counsel for the appellant also submitted that the accused is no more. In view of Section 394 of the Code of Criminal Procedure, since fine is also form part of the sentence that will not abate on the death of the accused. Though in the decision reported in **Pradeep v. State of Kerala (2013(4) KLT (SN)135 (CaseNo.144)**, the Division Bench of this court has observed that, on the death of the accused, even if there is fine, if the legal heirs did not come on record to prosecute the appeal, it will abate. But in the decision reported in **State of Andrapradesh v. Narasimhakumar [2006(3) KLT 505 (SC)]**, the Hon'ble Supreme Court has held that, an appeal from a composite order of sentence containing the substantive imprisonment with fine does not abate on the death of the accused. The reason given by the appellate court was that, in the case of

fine, the legality of the sentence can be gone into by the court and if fine is imposed even on the death of the accused, it can be realised from the estate of the deceased and that was the reason why in the case of appeal against conviction including sentence of fine on the death of the accused, appeal will not abate and will have to be decided on merit. This decision was not brought to the notice of the Division Bench when the above appeal in Pradeep v. State of Kerala cited (supra) was disposed of.

6. The counsel for the appellant is prepared to argue the case on merit even on the death of the accused. So, heard the counsel for the appellant Sri.A. Sanal Kumar and learned Public Prosecutor Sri.Jibu P. Thomas appearing for the State.

7. The counsel for the appellant submitted that, since the arrest and seizure was made by an incompetent officer, namely Assistant Excise Inspector, the detection is bad and once the detection is bad, no conviction can be

based on such seizure and so the court below was not justified in convicting the appellant for the offence alleged.

8. On the other hand, learned Public Prosecutor submitted that though the seizure was made by the Assistant Excise Inspector, the investigation was conducted by a competent officer an Abkari officer under the Act and as such the conviction entered is perfectly justified.

9. The case of the prosecution as emerged from the prosecution witnesses was that, on 14.02.2001 at about 11.30 a.m., PW1, the Assistant Excise Inspector along with PW3 Preventive Officer were doing patrol duty. When they reached the place of occurrence, they saw the accused coming with MO1 cannas and on seeing the Excise party, he found perplexed and they stopped him and PW1 took MO1 cannas from him which contained five liters of liquor. On examination, he was satisfied that it was arrack and so he took sample and sealed the sample and affixed label and also sealed the cannas and labeled in the same fashion and

seized the same as per Ext.P1 mahazar in the presence of PW2 and another. He arrested the accused and prepared Ext.P2 arrest memo and thereafter he went to office and registered Ext.P3 occurrence report as C.R. No.10/2001 and prepared Ext.P4 thondy list and produced the accused along with the articles before court. Investigation in this case was conducted by PW4. He questioned the witnesses and recorded the statement. On the basis of the requisition given by PW1, the sample was sent for chemical examination and Ext.P5 report obtained, which shows that the sample contained about 31.14% by volume of ethyl alcohol and he completed the investigation and submitted final report.

10. PW2 is the independent witness to the seizure. Though he admitted the signature, did not admit the seizure witnessed by him. PW1 is the Assistant Excise Inspector who detected the crime and seized the article and arrested the accused. In each part of his chief examination

he had no case that while he was in charge of Excise Inspector, he was doing patrol duty, but only on the later part of the chief examination he had mentioned that, since he was in charge of the Excise Inspector, he registered the crime, but there is no document produced before court that he was holding full additional charge of the Excise Inspector at the time when the detection was made. Only an Abkari Officer empowered under the Act alone can arrest and effect seizure and conduct investigation and file final report in respect of offences committed under the Abkari Act. Assistant Excise Inspectors are not notified as Abkari Officers till 08.05.2009 by virtue of a notification issued by the Government as SRO No.361/2009, till then, only those persons who are notified as Abkari Officers as per notification in SRO No.234/1967 alone were entitled to arrest, effect seizure and conduct investigation of Abkari cases under the Abkari Act. Though there was another notification issued in the year 1997, authorizing the Sub

Inspector of Police who is in charge of the police station to exercise the powers of Abkari Officer under the Abkari Act, even then Assistant Excise Inspectors were not included in that notification also.

10. The question as to whether by virtue of subsequent notification in 2009, the act committed by the Assistant Excise Inspectors prior to that can be validated has been considered by this court in the decision reported in **Sasidharan v. State of Kerala (2012(2) KLT 392)** and held that, that will not ratify the act committed by an Assistant Excise Inspector prior to that notification, as they were not notified as Abkari Officers entitled to exercise the powers of Abkari Officers under the Act, which includes power of seizure, arrest, investigation and filing of final report. Since the seizure made by the Assistant Excise Inspector is bad in law, then no conviction can be based on such illegal seizure made by an officer who is not authorized to effect seizure. So under the circumstances, in

this case since the seizure was made by the Assistant Excise Inspector who is not an Abkari Officer authorized to exercise the powers of Abkari Officer under the Abkari Act, the arrest and seizure made by him is not valid and consequential conviction relying on that seizure is also bad in law and that benefit must be given to the accused. So the order of conviction and sentence passed by the court below against the appellant for the offence alleged on the basis of the illegal seizure and arrest made by the Assistant Excise Inspector is unsustainable in law and the same is liable to be set aside and the appellant is entitled to get acquittal of the charge levelled against him giving him that benefit. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under

Section 55(a) of abkari Act are hereby set aside. Since the appellant is no more, the bond executed by him will automatically stand discharged. The fine amount if any deposited by him shall be returned to the legal heirs, on making necessary application before the court below to the satisfaction of that court.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge