

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 4TH DAY OF JUNE 2015/14TH JYAISHTA, 1937

CRL.A.No. 1847 of 2009 ()

AGAINST THE JUDGMENT IN CC 398/2006 of J.M.F.C., KOYILANDY

APPELLANT(S):COMPLAINANT

NARAYANA VARIAR
S/O.KUNHUNNI VARIAR
63 YEARS, PADINHARE VARIATH
VANMUKAM AMSOM, CHINGAPURAM DESOM
KOYILANDI THALUK

BY ADVS.SRI.A.SUDHI VASUDEVAN
SMT.K.PUSHPAVATHI

RESPONDENT(S):ACCUSED

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1. K. BALAN, S/O.KUNHIKANNAN
55 YEARS, KALLERI, PURAKKAD AMSOM
KOZHIPURAM DESOM, KOYILANDI THALUK
KOZHIKODE DISTRICT.
 - 2.SECRETARY, THIKKODI GRAMA PANCHAYATH
THIKKODI
KOZHIKODE DISTRICT.
 - 3.STATE OF KERALA
REP. BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA,
KOCHI-31

R1 BY ADV. SRI.K.LAKSHMINARAYANAN
R2 BY ADV. SRI.R.PARTHASARATHY
R2 BY ADV. SMT.SEEMA
R3 BY PUBLIC PROSECUTOR SRI.T.Y. LALIZA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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CRL.APPEAL No.1847 OF 2009

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Dated this the 4th day of June, 2015

JUDGMENT

This appeal is directed against judgment dated 10.2.2009 in C.C.398 of 2006 passed by the Court of Judicial First Class Magistrate, Koyilandy. The appellant herein was the complainant therein. He filed the complaint alleging commission of offences under sections 21 and 22 of the Air (Prevention and Control of Pollution) Act, 1981 (for short the 'Act') read with section 37 of the Act, by the first respondent. Cognizance was taken thereon and it was taken on file and numbered as C.C.398 of 2006. On appreciation of the evidence adduced by the parties, the learned Magistrate arrived at the finding that the appellant/complainant had failed to establish commission of aforesaid offences by the accused/first respondent and consequently, acquitted him under section 255(1) of the Code of Criminal Procedure. It is aggrieved by the same that the captioned

appeal has been filed by the complainant/appellant.

2.The case of the complainant/appellant was that he and his family are residing at Vanmukam amsom, Chingapuram Desom in Koyilandy. He is a sexagenarian and was leading a peaceful retirement life. While so, the first accused constructed a flour mill by name 'Kalleri Flour Mill' near to his house without prior sanction and operated it from 13.2.2004 without obtaining license and consent to operate. Rice, wheat, coriander, chilly, turmeric etc. are being ground in the mill. Owing to such activities of the first respondent, the surrounding area got polluted in such a manner that it affected the health of the public at large. It is specifically stated in the complaint that the appellant had conducted the flour mill in such an objectionable manner from 13.2.2004 to 14.9.2004. It is with such allegations that the complaint was filed by the appellant herein.

3.To bring home the charge against the first respondent, the

appellant got himself examined as PW1 besides getting examined PWs 2 and 3. Exts.P1 to P23 were also marked on his side. After the closure of the evidence of the complainant/appellant, the first respondent-accused was examined under section 313, Cr.P.C. He denied all the incriminating circumstances put to him. On the side of the first accused, Exts. D1 and D2 were got marked. However, he had not adduced any oral evidence. Evidently, the appellant herein who was examined as PW1 deposed in tune with his averments in the complaint. He would depose that without obtaining prior sanction from the authorities, the first respondent established the flour mill in question and operated it from 13.2.2004 till 14.9.2004 without getting license from the panchayat. He also deposed that the first respondent had not obtained registration with SSA, sanction from the District Medical Officer and consent to establish and consent to operate from the Pollution Control Board. He further deposed to the effect that the flour mill was being operated using 10 HP motor and owing to the sound and dust pollutants emanating from the flour mill, himself and

the members of his family were finding it difficult to live peacefully and virtually, their health is adversely affected by its functioning. He would also depose that to abate the nuisance, he had instituted O.S.No.79 of 2004 before the Munsiff Court, Payyoli and Ext.P6 is the decree passed thereon. He would also depose that despite the decree passed by the Civil Court, the accused-first respondent continued to operate the flour mill without complying with the directions in the decree and that constrained him to file E.P.224/2005. A Commission was taken out and the Commission after inspection, filed Ext.P5 report dated 24.8.2005. The appellant has also produced Ext.P3 which is a copy of the report submitted by the Assistant Environmental Engineer attached to the PCB and also Ext.P4 which is a copy of the letter from the Assistant Environmental Engineer dated 11.8.2005. Ext.P7 is another report submitted by the Advocate Commissioner on 2.1.2006. He has also produced certain documents to show that the functioning of the flour mill creates health problems to his family and evidently, those documents pertain to a period after

the period in question. PW2, the Medical Officer would admit the issuance of Ext.P13 certificate. It is undated. He would depose that PW1 is allergic to dust and smell of grains would cause Asthma. PW3 was the Secretary of the Thikkodi Grama Panchayat during the period. Ext.P15 was got marked through him. During cross examination, he deposed that the mill in question started functioning after obtaining license. Later, he was recalled and re-examined and through him Exts.D1 and D2 were marked. Exts.P18, P19, P20, P21 and P22 were also marked through him. Ext.D1 is the certificate dated 31.10.2008 issued by PW3 to show that license was issued to the first respondent to operate the flour mill using 10 HP motor. Evidently, it is after analysing the oral and documentary evidence adduced by the parties that the trial court arrived at the finding that the complainant/appellant failed to establish commission of alleged offence by the first respondent-accused.

4.Before appreciating the evidence on record, I think it apropos

to refer to the relevant provisions as also the position of law. Evidently, the accusation against the first respondent herein is that by establishing and operating the flour mill without obtaining prior sanction as required under law, he violated the provisions under sections 21 and 22 of the Act and thereby made himself liable to be punished under section 37 of the Act. Section 21(1) of the Act in so far as relevant reads thus:-

“21.Restrictions on use of certain industrial plants--(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area.

Section 22 of the Act reads as follows:-

“22.Persons carrying on industry, etc., not to allow emission of air pollutants in excess of the standards laid down by State Board--No person operating any industrial plant, in any air pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board under clause (g) of sub-section (1) of section 17.

Section 37(1) of the Act reads thus:-

“37.Filure to comply with the provisions of section 21 or section 22 or with the directions issued under section 31A--(1)
Whoever fails to comply with the provisions of section 21 or section 22 or directions issued under section 31A, shall, in respect of each such failure, be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.”

5. Section 21(1) provides that no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area. The trial court took note of the fact that the entire Kerala State is declared as air pollution control area as per SRO No.1831/1993 dated 26.11.1993 in Kerala Gazette (extra ord.) No.8 dated 26.11.1993. Thus, in the light of such notification issued invoking the power under section 19 of the Act which

empowers the State to declare an area as air pollution control area there cannot be any doubt with respect to the fact that the area in question is also an air pollution control area. When once the said fact is found indisputable, to establish that the first respondent has violated the provisions under section 21 of the Act, the appellant was bound to adduce evidence to the effect that the first respondent had either established the flour mill in question without previous consent of the PCB or operated in an air pollution control area. True that in view of the fact that the entire Kerala State was declared as air pollution control area, for a successful prosecution, the appellant ought to have proved that the first respondent had established and operated the flour mill during the period 13.2.2004 to 14.9.2004 without previous consent of the PCB. Therefore, the question is whether the appellant had succeeded in proving that the first respondent herein established and operated the flour mill in question during the period between 13.2.2004 and 14.9.2004 lest there would not be any question of his committing the offence under section 22 of the Act. Now, I will

examine the evidence on record. It is to be noted that the precise case of the appellant herein was that without obtaining prior sanction, the first respondent herein established and operated the flour mill during the period 13.2.2004 to 14.9.2004. The learned counsel for the appellant would submit that the court below erred in not taking into account Exts.P3 and P4. Ext.P3 is the photocopy of the report filed by the Assistant Environmental Engineer. Ext.P4 is the photocopy of the letter from the Assistant Environmental Engineer dated 11.8.2005. Ext.P3 was produced before the Munsiff Court, Payyoli in O.S.No.79 of 2004. Learned counsel for the appellant submitted that the said report carried certification to the effect that the mill in question was found functioning without obtaining consent to operate from the Board. In the contextual situation, it is apposite to note that Ext.P3 report did not carry the date on which the inspection was made. When the precise contention of the appellant was that the mill in question was functioning during the period from 13.2.2004 to 14.9.2004 without obtaining prior sanction, date of inspection is a decisive,

relevant factor and obviously, the aspect is not discernible from Ext.P3 report in view of the evidence tendered by PW3 to the effect that the mill in question started its functioning after obtaining the requisite licence. It is to be noted in this context that the authority who prepared and submitted the said report was not examined as witness before the trial court. No evidence whatsoever was also adduced to show that it was without obtaining a consent to operate that the mill in question was established and operated. It is a fact borne out from the records that no such evidence was adduced before the trial court to the effect that it was established and operated during the period that too, without obtaining consent from PCB. There is absolute absence of any evidence to support the oral testimony of PW1 to the effect that the mill in question started its functioning on 13.2.2004. In fact, in a bid to establish the said fact, the appellant produced Ext.P6 judgment before the trial court. A scanning of the impugned judgment would reveal the reason for not relying on Ext.P6 by the trial court to arrive at the conclusion that the first respondent

has committed the aforesaid alleged offence. A perusal of the same would reveal that the trial court considered the question of admissibility of the said document in the light of the decision of this Court in **Rukhiya Beevi v. State of Kerala [2004 (2) KLT 938]** and also in the light of the provisions under sections 41 to 43 of the Indian Evidence Act. It is evident from the impugned judgment itself that the learned counsel for the complainant canvassed the said position relying on the decision of the Hon'ble Apex Court in **Bachittar Singh and another v. State of Punjab [2003 SCC (Crl.) 233]**. However, on perusing the said decision, it is evident that it did not deal with the subject involved in the case on hand. There cannot be any doubt with respect to the position that a judgment of a civil court is not always binding on the criminal court and of course it could be relied on subject to the satisfaction of the conditions under sections 41 to 43 of the Indian Evidence Act. At any rate, by mere production of such document, it could not be said that the same would form a conclusive evidence. Section 293, Cr.P.C deals with reports of scientific experts

which could be used in evidence in any enquiry, trial or in other proceedings under the Code. Sub section 4 thereunder would provide categories of experts falling under sub section (1) thereunder. After considering the said aspects, the trial court arrived at the conclusion that the commission report filed by the appellant herein would not fall under the said category. After considering Exts.P3 and P4, evidently, the trial court arrived at the conclusion that they could not be relied on to arrive at the conclusion that there was dust pollution or sound pollution. The trial court also took into consideration the decision of this Court in **Rukhiya Beevi's** case (supra) to hold that there could not be any presumption that any particular industry is an industrial plant coming within the definition under 2(k). In short, after careful scanning of the evidence, both oral and documentary, the trial court arrived at the conclusion that there was absolute absence of any material to hold conclusively that the first respondent established and operated the mill in question during the relevant period viz., 13.2.2004 to 14.9.2004. The learned counsel for the appellant argued

at length to drive home the contention that the said conclusion arrived at by the trial court is not based on proper appreciation of the evidence on record, but they are outcome of utter, perverse appreciation of evidence. I have no hesitation to hold that the counsel had failed in the said attempt as no evidence whatsoever was brought on record legally by the appellant to establish the accusation against the first respondent. There is no document legally brought on record which would reveal that the mill in question was established and operated without obtaining the requisite license or permits from the concerned authorities. When that be the circumstances, I cannot find any illegality or infirmity in the impugned judgment inviting an appellate interference. The long and short of the discussions is that this appeal is liable to fail and accordingly, it is dismissed.

Sd/-
C.T. RAVIKUMAR
(JUDGE)

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010