IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

Crl.Rev.Pet.No. 609 of 2003 ( )

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AGAINST THE JUDGMENT IN CRA 851/2001 of ADDL.DISTRICT & SESSIONS COURT, NORTH PARAVUR, DATED 04-02-2003

AGAINST THE JUDGMENT IN SC 24/2000 of COURT OFADDL.ASSISTANT SESSIONS JUDGE, NORTH PARAVUR, DATED 22.11.2001

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

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MUKUNDAN, S/O. BHARATHAN,
ITTITHARA HOUSE, VAVAKKAD,
MOOTHAKUNNAM, N.PARAVUR.

BY ADVS.SRI.MATHEW CHERIAN
SRI.H.SIVARAMAN

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

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KERALA STATE REPRESENTED BY EXCISE
INSPECTOR PARAVOOR RANGE IN CIME NO.22/97
REPRESENTED BY THE P.P., HIGH COURT OF KERALA.

BY ADV. PUBLIC PROSECUTOR SMT.LILLY LESLIE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 06-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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**V.K.MOHANAN, J.**
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**Crl.R.P.No.609 of 2003**
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**Dated this the 6th day of April, 2015.**

**O R D E R**

The accused in Crime No.22/1997 of Excise Range office, North Paravur, challenging the judgment of the court of Additional Assistant Sessions Judge-N.Paravur, dated 22.11.2001 in S.C.No.24/00 and the judgment dated 4.2.2003 in Crl.A.No.851/01 of the court of Additional District and Sessions Judge-N.Paravur, has come up in revision.

2. The prosecution case is that the accused sold illicit liquor, by standing on the northern side of a 'C' class shop attached to House No.XI/61 of Vavakkad, which belonged to the wife of one Bharathan by name Baby on 27.7.1997 at 5.30 p.m. and thus the accused has committed the offences punishable under section 55(a) and (i) of the Abkari Act. On the basis of the above allegation, Crime No.22/1997 was

registered in the Excise Range office, N.Paravur, and on completing the investigation, a complaint was filed, based upon which, C.P.No.12/1998 was instituted in the court of Judicial First Class Magistrate-Paravur, and subsequently by order dated 27.4.1999 in the above proceedings, the case was committed to the Sessions court, Ernakulam, wherein S.C.No.24/2000 was instituted and thereafter, the case was made over to the court of Additional District & Sessions Judge, N.Paravur. On the appearance of the accused, after hearing the prosecution as well as the defence, a formal charge was framed against the accused for the offences punishable under sections 55(a) and (i) of the Abkari Act and thereafter, during the trial, Pws.1 to 7 were examined and Exts.P1 to P7 documents were marked. MOs.1 to 4 were also identified and marked. No evidence whatsoever adduced from the side of the defence. The trial court finally found that the complainant/prosecution has not succeeded in proving the sale of illicit liquor as there is dearth of evidence to come to a conclusion that the accused has sold any liquor and consequently held that the prosecution has not succeeded in establishing its case against the accused under section 55(i) of the Abkari Act and thus found that the accused has not committed the offence punishable under section 55(i) of the Act and accordingly he was acquitted for the said offence. However, the learned Judge of the trial court has concluded that the accused has committed the offence punishable under section 55(a) of the Abkari Act and consequently he is convicted thereunder and sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/- and in default, he was sentenced to undergo simple imprisonment for one year.

3. Aggrieved by the above findings of the trial court and challenging the conviction and sentence imposed, the accused preferred an appeal before the Sessions court, Ernakulam. By judgment dated 4.2.2003 in Crl.A.No.851/01, the court of Additional District & Sessions Judge, N.Paravur, has held that the finding of the trial court that the accused has committed the offence punishable under section 55(a), is not legally sustainable, particularly in view of the decision reported in 2002(3) ILR Kerala 315 and further found that

the offence attracted against the accused is only under section 58 of the Abkari Act and thus he is convicted thereunder. Accordingly, the findings of the trial court and the conviction recorded under section 55(a) is altered into one under section 58 of the Abkari Act and in all other respects, the findings of the trial court are confirmed. Now it is against the above conviction and sentence, the sole accused in the above crime preferred this revision petition.

4. I have heard Sri.H.Sivaraman, the learned counsel appearing for the revision petitioner and Smt.Lilly Leslie, the learned Public Prosecutor.

5. The learned counsel for the revision petitioner vehemently submitted that the only allegation against the petitioner is that he was found in possession of Indian Made foreign liquor and the quantity of which will come only 2.205 ltr. (2,205 ml.) and hence the same cannot be treated as illicit possession so as to attract either section 55(a) or section 58 of the Abkari Act. The learned counsel has pointed out that as per the government orders as on the date of the occurrence, the accused is free to possess 1.5 ltr. of

IMFL and the quantity exceeding the same cannot be treated as illicit liquor, especially when the prosecution has no case that the accused has imported the same from outside the State or from any Foreign country and particularly when the prosecution has no case that, tax was not paid for the Indian made foreign liquor allegedly recovered from the possession of the accused. So, according to the learned counsel, the conviction recorded by the trial court as well as the appellate court is sustainable neither under section 55(a) nor under section 58 of the Abkari Act and is liable to be interfered with.

6. The learned Public Prosecutor stoutly opposing the above submission, submitted that impermissible possession of IMFL will come under the purview of illicit possession and therefore the lower appellate court is correct in convicting the revision petitioner for the offence under section 58 of the Abkari Act and no interference is warranted.

7. I have considered the arguments advanced by the learned counsel for the petitioner as well as the learned Public Prosecutor. I have carefully perused the judgment of

the trial court as well as the lower appellate court and the evidence and materials on record.

8. At the outset it has to be noted that the only allegation against the petitioner is that he was found in possession of 2.205 ltrs. of IMFL purportedly for the sale of the same. The trial court has found that the prosecution has failed to establish that the possession of such quantity of IMFL was for sale, especially when there was no evidence for the same. Consequently, the trial court while acquitting the revision petitioner for the offence under section 55(i), he is convicted under section 55(a) of the Abkari Act. Against the above order of acquittal, the State has not filed any appeal. In appeal, at the instance of the revision petitioner, the lower appellate court altered the conviction under section 55(a) into section 58 of the Abkari Act. Against the above order of the appellate court also, the State has not filed any appeal and thus both the findings and conviction recorded by the trial court as well as the lower appellate court became final. At this juncture, it is relevant to note that the prosecution has no case that the revision petitioner has imported IMFL

either from any Foreign country or from outside the State to the State of Kerala. The prosecution has also no case that, requisite tax for the IMFL found in possession of the petitioner, was not paid. So also, the prosecution has no case that the IMFL allegedly recovered from the possession of the petitioner was not meant for sale in the State of Kerala. It is also relevant to note that as per SRO No.326/96, which was in force w.e.f. 1.6.1996 onwards, an individual is permitted to possess 1.5 ltrs of IMFL. Thus, the entire facts and circumstances involved in the case and the prosecution allegation have to be examined in the above backdrops. Thus, even if the factual allegation of the prosecution is admitted as correct, the only conclusion that can be arrived is that the revision petitioner was found in possession of 0.705 ltrs of IMFL, in addition to the permissive quantity of 1.5 ltrs. When the prosecution has miserably failed to prove that the said possession of IMFL was for the purpose of sale, as rightly found by the trial court, no offence under section 55(a) is attracted against him. The prosecution has also no case that the IMFL allegedly found in possession of the petitioner was imported from outside the State or from any Foreign country and there is also no case for the prosecution that, requisite tax was not paid for the above said quantity of IMFL. So, according to me, section 58 of the Abkari Act is also not attracted against the revision petitioner and therefore the finding of the lower appellate court is liable to be set aside.

9. However, it is a fact proved by the prosecution, as rightly held by the trial court as well as the lower appellate court, that the accused/revision petitioner was in possession of 2,205 ml. of IMFL. However, as I have already observed that as on the date of offence, ie., on 27.7.1997, an individual is permitted to possess 1.5 ltr. of IMFL as per SRO No.326/96. Thus, the only inference that can be arrived is that, on the date of the alleged offence, the revision petitioner was found in possession of 2.205 ltrs. ie., 0.705 ltrs. exceeding the permissible quantity of 1.5 ltrs. of IMFL. A learned Single Judge of this Court has held in **Sabu & ors. Vs. State of Kerala**, reported in **ILR 2003(3) page 130** that, if a person was found in possession of excess of the

permissible quantity of IMFL, the offence would comes only under section 63 of the Abkari Act. Another learned Judge of this Court, in a decision reported in **Raman Vs. State of Kerala (2007(4) KLT 323)**, had set aside the conviction and sentence imposed by the trial court under section 55(a) of the Abkari Act and the accused therein was found guilty for the offence under section 63 of the Act only. Hence, I am of the view that, the petitioner herein is also entitled to get the benefits of those decisions and thus the findings of the lower appellate court and the conviction imposed on the revision petitioner under section 58 of the Abkari Act are set aside and he is found guilty under section 63 of the Abkari Act only.

In the result, this revision petition is allowed, setting aside the judgment of the trial court as well as the lower appellate court and the revision petitioner is acquitted of the offence punishable under section 58 of the Abkari Act. However, he is found guilty under section 63 of the Abkari Act and accordingly, he is sentenced to pay a fine of Rs.5,000/- and in default, he is directed to undergo simple imprisonment for 6 months. Accordingly, the revision petitioner is directed to pay fine within one month from today and in case of default of payment of the above amount within the stipulated period, the trial court is free to initiate coercive steps to realise the fine amount and to execute the sentence.

Sd/-
**V.K.MOHANAN,**
**Judge.**

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P.A. to Judge