IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Crl.Rev.Pet.No. 1603 of 2003 ( )

AGAINST THE JUDGMENT IN CRL.A.NO.1/2001 of ADDL.DISTRICT & SESSIONS COURT FAST TRACK (AD HOC-I), KOZHIKODE DATED 03-03-2003

AGAINST THE JUDGMENT IN C.C.NO.548/1997 of JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, KOZHIKODE, DATED 22-12-2000

REVISION PETITIONER(S)/APPELLANT/ACCUSED:
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SURESH, S/O.DAMODHARAN,
THEKKAYIL HOUSE, MAKKADA AMSOM,
KOZHIKODE

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:
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1. **THE EXCISE INSPECTOR, KOZHIKODE RANGE.**

2. **STATE OF KERALA, REP.BY PUBLIC PROSECUTOR,**
   HIGH COURT OF KERALA, ERNAKULAM.

   BY PUBLIC PROSECUTOR SMT.LISHA.M.G.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Bb

RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.1603 of 2003

Dated this the 11th day of August, 2015

O R D E R

This Criminal Revision Petition is preferred by the petitioner challenging the concurrent findings entered into against him by the courts below under section 55(a) of the Abkari Act.

2. The gist of the prosecution allegation is that on 15.10.1996 at 6.15 p.m., while PW1, the Excise Circle Inspector, was on patrol duty, he received information that Indian Made Foreign Liquor was kept in a Hotel by name 'Surabhi' at Kachery amsom. The petitioner was found sitting in the cash counter of the hotel, by PW1 and when the hotel was searched, 3 bottles of 500 ml capacity and 2 bottles of 375 ml capacity containing Indian Made Foreign Liquor was found placed near to the legs of the accused.

Sample was taken and the contraband materials were seized. The petitioner was arrested and the articles were taken into custody as per Ext.P2 mahazar. The case records and the contraband were produced before the Kozhikode Excise Range Office. Later, Crime No.66/1996 was registered and after investigation, a complaint was laid before the learned magistrate under section 50 of the Kerala Abkari Act.

3. The prosecution in its endeavour to prove its case, examined PWs 1 to 4 through whom Exts.P1 to P5 were marked. MOs 1 to 11 were produced and identified. The trial court found the petitioner guilty and he was sentenced to undergo Simple Imprisonment for a period of 2 years and to pay a fine for Rs.25,000/- and in default of payment of fine to undergo simple imprisonment for 6 months. Appeal preferred before the Court of Sessions was dismissed as per judgment dated 03.03.2003. It is against the above

concurrent findings that the petitioner is here in revision.

4. I have heard the learned counsel appearing for the petitioner as well as the learned Public Prosecutor.

5. The learned counsel appearing for the petitioner submitted that there is absolutely no justification in convicting the appellant under section 55(a) of the Act. According to the learned counsel, in order to apply section 55(a) of the Act, the prosecution has to plead and establish that the accused was found in possession of liquor in the course of import or export or in the process of movement through the State territory. According to the learned counsel, the evidence let in by the prosecution is grossly in sufficient to enter into such a conclusion. There is also no evidence to hold that the Indian Made Foreign Liquor alleged to have been recovered from the possession of the petitioner was not intended for sale in the State of Kerala.

It is also submitted that the prosecution has failed to prove that the hotel from where the Indian Made Foreign Liquor was seized had any connection with the petitioner.

6. Per contra, the learned Public Prosecutor has submitted that the learned magistrate as well as the appellate court has considered all these contentions raised by the petitioner and has held that the same is meritless. It was submitted that by exercising powers of revision, this Court cannot enter into a fresh appreciation of facts or the evidence let in by the prosecution witnesses. It was therefore submitted that there is no reason to interfere with the considered findings rendered by the courts below.

7. The question is as to whether in view of the evidence let in, the offence under section 55(a) of the Act is attracted as against the petitioner or not. It has come out in evidence that 3 bottles of 500 ml and 2 bottles of 375 ml

of Indian Made Foreign Liquor were found kept in MO1 Big shopper placed beneath the cash counter of hotel 'Surabhi' where the petitioner was sitting. This aspect has come out from the evidence of PW1, the Excise Inspector as well as PW2 the guard working the Kozhikode Excise Range during the relevant period. Ext.P2 mahazar, Ext.P1 search list and Ext.P5 Chemical Analysis Report would establish the fact that the items were seized by the Excise Officers and that the same was found to be Indian Made Foreign Liquor. They cannot be any objection with regard to this particular aspect. Therefore, in my view, the trial court as well as the lower appellate court was fully justified in accepting the evidence of PWs 1 and 2 and coming to the conclusion that the accused was found in possession of the Indian Made Foreign Liquor as alleged by the prosecution.

8. The next question for consideration is whether the petitioner can be found guilty of the offence punishable

under section 55(a) of the Abkari Act. The ingredients of an offence under section 55(a) of the Act is import, export, transport, transit or possess liquor or any intoxicating drug in contravention of the Act or any rule or order made under the Act. The allegation as against the petitioner is limited to possession of illicit liquor in contravention of the Act or rule or order made under the Act. The evidence let in by the prosecution witnesses as well as the complaint was analysed carefully and it does not appear from the evidence that the possession in question was under the course of the import, export, transport or transit. If that be the case, there is no question of attracting section 55(a) of the Act in the light of **Rajeevan V Excise Inspector [1995 (1) KLT 38]**, **Purushan V State of Kerala [2002 (2) KLT 661]** as well as **Surendran Vs. Excise Inspector [2004 (1) KLT 404]**.

9. In **Surendran Vs. Excise Inspector, [2004 (1) KLT 404]**, a Division Bench of this Court has held that the

case shall fall within the ambit of section 55(a) only when a person is found to be in possession of liquor in the course of import, export, transport or transit of the goods. It is further held that in the case of possession is merely with the knowledge of the goods having been illegally imported or manufactured, the case would fall within the mischief of section 58.

10. The next question is whether section 58 of the Act can be attracted to the facts of the instant case. Under section 58, whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this Act not to have been paid therefor, shall be punishable provided therein. Therefore, to attract an offence under section 58 of the Act, the accused must be in possession of any quantity of liquor or any intoxicating

drug without lawful authority knowing the same has been unlawfully imported, transported or manufactured or knowing that the tax, duty or rental payable under the Act had not been paid. As is clear from the section, mere possession of any quantity of liquor or intoxicating drug by itself is not sufficient to convict a person for the offence under section 58. The possession must first be without lawful authority and secondly, with the knowledge that it has been either unlawfully imported or unlawfully transported or unlawfully manufactured. Possession of an unlawfully manufactured liquor is made punishable under section 58 of the Act if that possession is with the knowledge that it is unlawfully manufactured. Therefore, the essential ingredients of the offence are i) possession of illicit liquor, and that too ii) with the knowledge that it is unlawfully manufactured. In the absence of a specific allegation in the complaint/final report that the petitioner has been in possession of liquor knowing that it was unlawfully manufactured, he cannot be convicted for the offence under section 58 of the Abkari Act (See ***Josekutty Vs. State of Kerala, [2013 (1) KHC 241]).***

11. In the case on hand as well there is no allegation in the complaint and neither PW1 nor PW2 has given evidence that the petitioner has been in possession of MO of the Indian Made Foreign Liquor allegedly seized from him with the knowledge that it is unlawfully manufactured liquor. If that be the case, he cannot be convicted for the offence under section 58 of the Act.

12. But, still the petitioner is liable to be convicted as provided under section 63 of the Act. Section 63 provides that, whoever is guilty of any act or intentional omission in contravention of any of the provisions of the Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a

Magistrate, be punished for each such willful act or omission with fine each at the time of commission of the offence may extend to two thousand rupees.

13. By virtue of S.R.O.No.326/1996 - Kerala Gazette Extra Ordinary No.505 dated 29.03.1996 which came into effect on and from 01.04.1996, a person who was entitled to keep in possession 1.5 litres of Indian Made Foreign Liquor.

14. In the instant case, a quantity of 4 litres was found from the possession of the petitioner. In such circumstances, the petitioner could only be convicted and sentenced as provided under section 63 of the Abkari Act.

In the result, the revision petition is allowed in part. The conviction of the petitioner for the offence under section 55(a) of the Abkari Act by the Judicial First Class Magistrate-IV, Kozhikode in C.C.No.548/1997 is modified to under section 63 of the Kerala Abkari Act. The sentence is modified to a fine of Rs.2,000/-. The Judicial First Class Magistrate- IV, Kozhikode is directed to realise the fine from the petitioner.

The revision petition is disposed of as above.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE.

Bb

[True copy]

P.A to Judge