IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Crl.Rev.Pet.No. 3341 of 2004 (C)
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CRA 227/1998 of SESSIONS COURT,THALASSERY
CC 67/1997 of J.M.F.C.,KUTHUPARAMBA

REVISION PETITIONER(S)/APPELLANT/ACCUSED::
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V.CHANDRAN, S/O.KUNHIRAMAN,
KUTHUPARAMBA AMSOM, MOORIYAD DESOM.

BY ADVS.SRI.P.P.RAMACHANDRAN
SRI.SHEJI P.ABRAHAM

RESPONDENT(S)/COMPLAINANT::
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STATE OF KERALA,
(EXCISE INSPECTOR, KUTHUPARAMBA)
REP. BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SMT.M.G. LISHA

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**RAJA VIJAYARAGHAVAN.V. J**

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Crl.R.P.3341 of 2004

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Dated 10th August, 2015

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**ORDER**

1. In this revision petition filed under S. 397 and S. 401 of the Code of Criminal Procedure, the petitioner challenges the concurrent findings of guilt arrived at against him.

2. Facts in brief are as follows :

On 16.7.1996 at 11.00 am, the petitioner was found standing by the side of the road in front of the SBI, Kuthuparamba, carrying a polythene bag containing 8 bottles of Indian made Foreign Liquor having a capacity of 180 ml each, by the Preventive Officer, Kuthuparamba and his party. The contraband articles were seized and sample was taken from one of the bottles. Ext.P1 mahazer was prepared detailing all these aspects. Later Ext.P2 crime and occurrence report was prepared by the Excise Inspector and as per Ext. P3 forwarding note the sample seized was sent for analysis. Ext P4 chemical analysis report revealed that the sampled liquid contained ethyl alcohol. The petitioner was arraigned for trial on its basis.

3. PW1 to PW4 were examined and Exts.P1 to P6 were marked by the prosecution to prove its case. MO1 series bottles, seven in numbers, and MO2 bag were also identified. After the close of the prosecution evidence, the incriminating materials arising from the prosecution evidence were put to the accused u/s 313 of the Cr.P.C. He denied the circumstances and maintained his innocence. The petitioner asserted in his version that he was booked by the Excise

personnel while he was alighting from a bus, inside of which , some contraband article was found. On the side of the defence, DW1 was examined.

4. The trial Court accepted the prosecution case and found the appellant guilty under S 55 (a) of the Abkari Act and sentenced him to undergo R.I for 6 months and to pay a fine of Rs 25,000/ and in default to undergo SI for 3 months. His appeal for an acquittal before the Sessions Judge also did not find any favor and the same was dismissed confirming the findings of the learned Magistrate.

5. Heard the learned counsel appearing for the petitioner as also the learned Public Prosecutor.

6. Learned counsel appearing for the petitioner

emphatically submitted that the conviction entered into against the petitioner under S. 55 (a) of the Act cannot be sustained under law. According to him in order to make the possession culpable under S 55 (a) of the Abkari Act, the possession must have to be in the course of import, export, transport or transit. It was further argued that, the prosecution has no allegation in the charge or in the evidence that the possession was with the knowledge that the contraband article was unlawfully manufactured thus bringing out the offense outside the ambit of S. 58 of the Abkari Act. It is further contented that the petitioner was entitled to have in his possession 1.5 liters of Indian Made Foreign Liquor and the item seized from his possession was much below the said quantity.

7. The evidence adduced would reveal that the detection of MO1 series of bottles from the possession of the petitioner has been successfully proved by the prosecution by the evidence of PW1, the Preventive Officer. I find no reason to interfere with the findings of the Courts below that the petitioner was found in possession of MO1 series of bottles containing IMFL, that the sample was taken at the spot itself, and both the sample and MO1 series were sent over to the Lab and as per Ext.P4 chemical analysis report, the same has been established as IMFL.

8. Then the question is as to what is the offence committed by the petitioner.

9. As stated above the allegation against the petitioner is that he was found standing on the road

in front of the SBI, Kuthuparamba, carrying a polythene bag containing 8 bottles of Indian made Foreign Liquor having a capacity of 180 ml each. The ingredients of an offence under S.55(a) is the 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 IMFL in contravention of the Act or rule or order made under the Act. It has been held in **Surendran v. Excise Inspector ( 2004 (1) KLT 404 )**, **Purushan v. State of Kerala ( 2002 (2) KLT 661** ) and **Sabu V State of Kerala (2003 (2) KLT 173 )** that only possession of liquor in connection with or in the course of import , export or movement from one state to another or territories of this state is made penal under S 55 (a) of the Abkari Act. There is no case for the prosecution that the accused was transporting illicit liquor or that he has illegally imported the liquor or was in the course of export or transit . If that be the case offence under S. 55 (a) is not made out as against him .

10. The learned Public prosecutor submitted that the act committed by the petitioner would violate S. 58 of the Act .As rightly contented by the counsel for the petitioner S. 58 of the Act will also not apply in the facts of the instant case. In order to attract S.58 of the Act , there should be specific allegation that the petitioner without lawful authority was in possession of any quantity of liquor or any intoxicating drug knowing the same to have been unlawfully imported, transported or manufactured or knowing the duty tax or rental payable not have been paid thereof. I have

gone through the specific allegations against the petitioner and also the evidence of PW1 to PW4. There is no case for the prosecution that the petitioner was in possession of the Indian Made foreign liquor without lawful authority, knowing the same to have been unlawfully imported, transported or manufactured or knowing that the tax duty or rental payable under the Act has 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 S.58. The possession must be first without lawful authority and secondly with the knowledge that it has been either unlawfully imported or unlawfully transported or unlawfully manufactured. . **(**See **Josekutty V State of Kerala 2013 (1) KHC 241 ( DB)) .**If that be the case the petitioner cannot be convicted under S. 58 of the Act as well .

11. Faced with such a situation, the learned Public prosecutor submitted that S. 63 of the Act will squarely apply and he can be convicted under that section as has been held in **Josekutty** (supra). S.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 the Act and not otherwise provided for in the Act shall, on conviction be punished for each such willful Act or omission with fine which at the time was of commission of the offence may extend to rupees two thousand.

12. The violation pointed out by the learned public prosecutor is of Rule 11A of the Foreign Liquor Rules

which provides that no quantity of foreign liquor exceeding the quantity as notified by the Government under S.10 and S.13 shall be possessed or stored by any person within the state unless the same is covered by a permit issued by an officer to do so. The proviso says that a person can possess or store within the state a quantity of foreign liquor not exceeding the quantity notified by the Government under S 10 and 13 of the Act without a permit issued by the concerned authority. It will be profitable to note that as per S.R.O.No.326 of 1996/KG Ex Gazette No.505 dated 24.3.1996, w.e.f 1.4.1996, a person was entitled to have in his possession 1.5 litres of IMFL. The seizure was effected on 16.7.1996 and if that be the case, the quantity possessed by the petitioner is well within the limits. Hence, there is no question of the petitioner being convicted for the offence u/s 63 of the Act as well.

13. In the result, the Revision Petition is allowed. The conviction and sentence passed against the petitioner is set aside and the petitioner is set at liberty.

Sd/-

**RAJA VIJAYARAGHAVAN.V.**
**Judge**

Mrcs

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P.S.To Judge