

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

WP(C).No. 8704 of 2010 (K)

PETITIONER:

B.N.MOHANKUMAR, AGED 33 YEARS,
S/O.B.S.NARAYANA GOWDA, BYDARAHALLY,
K.R.NAGAR(PO), MYSORE DISTRICT, KARNATAKA STATE.

BY ADV. SRI.JOBI JOSE KONDODY

RESPONDENTS:

1. THE ADDITIONAL COMMISSIONER OF EXCISE,
(ENFORCEMENT), THIRUVANANTHAPURAM.
2. THE DEPUTY COMMISSIONER OF EXCISE,
WAYANAD, EXCISE DIVISION OFFICE, MUTTIL(P.O),
KALPATTA, WAYANAD DISTRICT.

BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
20-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 8704/2010

PETITIONER'S EXHIBITS:

EXT. P1 A TRUE COPY OF THE ORDER DATED 30.7.2009 ISSUED BY THE RESPONDENT TO THE PETITIONER

EXT. P2 A TRUE COPY OF THE JUDGMENT DATED 7.8.2009 IN WPC 22513/2009 OF THIS HON'BLE COURT

EXT. P3 A TRUE COPY OF THE SHOW CAUSE NOTICE DATED 21.08.2009 ISSUED BY THE SECOND RESPONDENT TO THE PETITIONER

EXT. P4 A TRUE COPY OF THE REPLY TO EXHIBIT P3 SUBMITTED BY THE PETITIONER DATED 18.09.2009 BEFORE THE SECOND RESPONDENT

EXT. P5 A TRUE COPY OF THE ORDER NO.W54046/2009 DATED 31.10.2009 PASSED BY THE SECOND RESPONDENT

EXT. P6 A TRUE COPY OF THE APPEAL MEMORANDUM DATED 8.12.2009 FILED BY THE PETITIONER BEFORE THE FIRST RESPONDENT

EXT. P7 A TRUE COPY OF THE ORDER NO.58/APL/2009/AC(X) DATED 10.2.2010 PASSED BY THE FIRST RESPONDENT REJECTING EXHIBIT P6 APPEAL FILED BY THE PETITIONER

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.8704 of 2010 K

Dated this the 20th day of November, 2015

JUDGMENT

The petitioner, belonging to the State of Karnataka, lent his car bearing Reg.No.KA-45/M 414 to five of his friends. Those friends wanted to go to a place in Tamil Nadu—apparently holidaying en route in the State of Kerala, the God's Own Country.

2. On the very same day, i.e. 13.06.2009, the Excise officials intercepted the vehicle at the Excise Check Post near Wayanad and found seven bottles of Indian Made Foreign Liquor and three bottles of Whisky, apart from four bottles of Brandy.

3. The authorities have registered Crime No.32/2009 for the alleged offence under Section 55(a) of the Kerala Abkari Act and arrested the driver alone who, in any event, later got acquitted.

4. As far as the vehicle is concerned, initially it was subjected to seizure and later released to the petitioner on his providing the bank guarantee in terms of Exhibit P2 judgment of this Court. Finally, through Exhibit P5, the Deputy Commissioner of Excise exercising his powers under Section 67B of the Act confiscated the vehicle. Aggrieved, though the petitioner filed a statutory appeal, the Additional Commissioner of Excise through Exhibit P7 confirmed the order of the primary authority. Eventually the petitioner has approached this Court.

5. The learned counsel for the petitioner has strenuously contended that the driver is a freelancer hired by the petitioner for the specific purpose. In elaboration, he has submitted that though admittedly the driver is from Karnataka, the Excise official, at the time of registering the crime, recorded his statement in Malayalam, a language unknown to him. The learned counsel has also brought to my notice the fact that the five inmates of the car have not

been made accused, nor have they been made to give statements concerning the alleged offence.

6. Be that as it may, the fact remains that in the course of time the driver has earned an acquittal.

7. The learned counsel has eventually contended that the petitioner has no knowledge of the alleged crime and that he is entitled to the benefit under Section 67C of the Act.

8. The learned Government Pleader, in response, has submitted that the petitioner has not discharged his burden under Section 67C of the Act. According to him, the burden to be discharged under the said provision is positive, requiring cogent evidence from the owner of the vehicle. In other words, a passive denial that the owner has no knowledge about the alleged crime cannot amount to fulfilling the obligation under Section 67C of the Act. Thus justifies the learned Government Pleader both Exhibits P5 and P7 orders passed by the authorities concerned.

9. Indeed, the facts are not in dispute. The vehicle as well as its inmates belongs to Karnataka. The driver has gone on record stating that at the behest of the inmates of the car he purchased those bottles of liquor in Karnataka. Presumably, the inmates of the car desired to have a stopover in this State on route to Tamil Nadu, spend their holiday, and then proceed further.

10. As can be seen from Exhibit P4 reply issued by the petitioner in response to Exhibit P3 show cause notice and also the subsequent proceedings either before the primary authority or before the appellate authority, he has consistently pleaded that he had no knowledge. On the other hand, he is said to have given strict instructions to the driver to abide by the law while taking the vehicle out. Of course, in Exhibit P7 order there is a very cryptic observation by the appellate authority that the petitioner has failed to discharge his burden and that a bare statement that he had no knowledge of or complicity in the alleged

crime is not sufficient to discharge the burden under Section 67C (2) of the Act.

11. Without much cavil, I am inclined to hold that the burden cast on the owner of the vehicle under Section 67C (2) of the Act is a positive one. As has been rightly observed by the appellate authority, a mere passive denial is not sufficient. But the totality of the circumstances give rise to, in my opinion, an unmistakable conclusion that the petitioner, the owner of a private vehicle, belongs to a different State; by no imagination can he be said to be deliberately indulging in transporting liquor of meagre quantity from Karanataka to Kerala through his driver or otherwise.

12. Indeed, it is common knowledge that persons going through Kerala to some other destination usually feel that they should spend their spare time in this scenic State. Thus giving in to their desire, they may in that process cross the line of law. Punishable it is, but can the owner of a

vehicle residing miles away be made to suffer on that count? In the present instance, if we assume that the driver, at the behest of the travelers or otherwise, purchased liquor meant, apparently, for personal consumption. Accepting the said sequence of events which are quite probable, it is hard to believe that the petitioner has any knowledge of, much less any complexity in, the offence alleged to have been committed by his driver.

13. This Court, in fact, has tellingly observed in **Ravichandran v. Excise Inspector**¹ that merely for the reason that the burden to establish the facts under Section 67C(2) of the Act are fastened on the owner, it cannot be said that the authorised officer is not bound to satisfy that the vehicle has been used for the commission of offence with the knowledge of the owner. It is profitable to extract the pertinent observation of the learned Single Judge, and it reads as follows:

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"2. [S]ection 67C of the Act prohibits confiscation, if the use of the vehicle for commission of the offence is without the knowledge or connivance of the owner or the person in charge of the vehicle, and if each of them had taken all reasonable and necessary precautions against such use. In other words, the power of confiscation can be exercised only if the authorised officer is satisfied that the vehicle has been used for commission of offence with the knowledge or connivance of the owner himself or the person in charge of the vehicle or that the owner or the person in charge of the vehicle had not taken all reasonable and necessary precautions against such use. An order of confiscation of a vehicle cannot, therefore, be made automatically for the reason that an offence has been committed making use of that vehicle. True, the burden to establish that the vehicle had not been used for commission of the offence with the knowledge or connivance of the owner or the person in charge of the vehicle and that both of them had taken all necessary and reasonable precautions against such use is on the owner of the vehicle. However, since the statute does not contemplate confiscation of a vehicle when the same is used for commission of an offence, without the knowledge and connivance of the owner or the person in charge of the vehicle, when they have taken all necessary and reasonable precautions against such use, merely for the reason that the burden to establish the facts referred to in Section 67C(2) of the Act are fastened on the owner, it cannot be said that the authorised officer is not bound to satisfy that the vehicle has been used for commission of offence with the knowledge or connivance of the owner himself or the person in charge of the vehicle or that the owner or the person in charge of the vehicle had not taken all reasonable and necessary precautions against such use. As such, even in the absence of any evidence from the owner, the authorised officer is duty bound to consider all the relevant aspects to satisfy that the vehicle has been used for commission of the offence with the knowledge or connivance of the owner himself or the person in charge of

the vehicle or that the owner or the person in charge of the vehicle had not taken all reasonable and necessary precautions against such use. The confiscation of a vehicle being a very serious matter involving drastic civil consequences and social stigma, the authorities are duty bound to exercise the power of confiscation with a high degree of care, caution and circumspection . . .”

In the facts and circumstances, I am of the considered opinion that the petitioner has, in fact, discharged his burden under Section 67C(2) of the Act and thus deserved release of the vehicle in his favour. Accordingly, the writ petition is allowed setting aside Exhibit P7, with a further direction to the respondent authorities to release the bank guarantee since the petitioner has already been in custody of the vehicle. No order as to costs.

Dama Seshadri Naidu, Judge

tkv