

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

WP(C).No. 33648 of 2011 (E)

PETITIONER : -

PAREED MUSALIYAR,
AGED 50 YEARS, S/O.KHADER, METTOLIL,
KOTTAPPURAM, ALANGADU, ERNAKULAM DISTRICT.

BY ADVS.SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN

RESPONDENTS : -

1. STATE OF KERALA,
REP.BY THE SECRETARY, EXCISE DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM -695001.
2. ADDITIONAL EXCISE COMMISSIONER,
(ENFORCEMENT), THIRUVANANTHAPURAM -695 001.
3. DY.EXCISE COMMISSIONER,
OFFICE OF THE DY.EXCISE COMMISSIONER,
MALAPPURAM.- 676 505.
4. DY.SUPERINTENDENT OF POLICE-CBCID,
KOZHIKODE (CBCID CRIME NO.493/CR/HHW-III/KKD/2010)
PIN-673 004.

BY GOVERNMENT PLEADER SRI. G. GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

EXHIBIT P1 : COPY OF THE REGISTRATION CERTIFICATE OF VEHICLE
BEARING REGN. No. KL-07-BC-4141.

EXHIBIT P2 : COPY OF THE SEIZURE MAHASSAR DATED 30.11.2010.

EXHIBIT P3 : COPY OF THE ORDER PASSED BY THE THIRD RESPONDENT
DATED 30.03.2011.

EXHIBIT P4 : COPY OF THE RECEIPT OF TREASURY SAVING BANK.

EXHIBIT P5 : COPY OF THE ORDER PASSED BY THE THIRD RESPONDENT
DATED 26.04.2011.

EXHIBIT P6 : COPY OF THE APPEAL MEMORANDUM SUBMITTED BEFORE THE
SECOND RESPONDENT BY THE PETITIONER DATED 08.06.2011.

EXHIBIT P7 : COPY OF THE ORDER PASSED BY THE 2nd RESPONDENT DATED
14.10.2011.

EXHIBIT P8 : COPY OF THE COMMUNICATION ISSUED BY THE THIRD
RESPONDENT DATED 30.11.2011.

RESPONDENTS' EXHIBITS : NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 33648 of 2011

Dated this the 16th day of October, 2015

JUDGMENT

In relation to a hooch tragedy, the respondent authorities registered a crime in Crime No.361/2010 on the file of Wandoor Police Station for the offence under Sections 302, 307, 201 read with Section 34 IPC and Section 57(A) of the Abkari Act and investigated the crime.

2. During the course of the investigation, based on the alleged confession made by one of the accused in the crime, the Police seized the petitioner's vehicle, a Tempo Traveler bearing Registration No.KL7-BC-4141, though the petitioner himself is not an accused. Later, after the initial seizure, the authorities confiscated the vehicle, as part of which the third respondent passed Exhibit P5 order under Section 67B of the Abkari Act (the 'Act' for brevity).

3. Aggrieved, when the petitioner appealed against Exhibit P5, the second respondent, through Exhibit P6 order, negatived the petitioner's claim and confirmed the findings of the third respondent. The fact, however, remains that in the

light of the interim custody obtained by the petitioner initially after providing a cash deposit of Rs.3,00,000/-, the vehicle was in the custody of the petitioner by the time the appellate authority passed the order, and continued to be in his possession.

4. Assailing Exhibit P6 order in appeal rendered by the second respondent, the petitioner has filed the present writ petition.

5. The learned counsel for the petitioner, having drawn my attention to Exhibit P6 order in appeal, has strenuously contended that the impugned orders of both the primary authority and the appellate authority do not contain any reasons why the petitioner's vehicle has been confiscated. According to him, the order of confiscation has been confirmed in appeal on mere surmises and conjectures.

6. In elaboration of his submissions, the learned counsel has submitted that the confiscating authorities have not given the petitioner the benefit of Section 37(c) of the Act. Summing up his submissions, the learned counsel has singularly contended that in the absence of either active connivance or conscious knowledge on the part of the

petitioner as the owner of the vehicle, his vehicle, the source of his livelihood, could not have been confiscated.

7. In support of his submissions, the learned counsel has placed reliance on **Circle Inspector (Excise), Neyyattinkara v. Mukundan¹, Rajesh K. v. Sub Inspector of Police, Palakkad and Others², Ravichandran v. Excise Inspector³, and Asst. Excise Commissioner v. Paulson.⁴**

8. The learned Government Pleader, on his part, has submitted that the petitioner's vehicle was seized in connection with a crime which involved the loss of human life: the hooch tragedy. He has further submitted that mere assumption that the petitioner had no knowledge about the use of his vehicle for an illegal purpose could not exonerate him from the statutory consequences under the Act. Once it is established that the petitioner's vehicle has been used for transporting illicit liquor, the consequences have to follow, contends the learned Government Pleader.

9. In elaboration of his submissions, the learned Government Pleader has contended that, to take benefit of

1 1975 KHC 129
2 2015(4) KHC 253
3 2015 (1) KLT 218
4 2009(1) KLT 959

Section 67C of the Act, the owner of the vehicle has to discharge a very heavy evidentiary burden. In other words, it is for the petitioner to explain that despite his best care and caution to ensure that the vehicle had not been put to any illegal use, somebody else without his knowledge had used, rather misused, the vehicle, in the first place.

10. Regarding the authorities relied on by the learned counsel for the petitioner, the learned Government Pleader would contend that the ratio laid down in those judgments does not apply to the facts of the present case.

11. Heard the learned counsel for the petitioner and the learned Government Pleader, apart from perusing the record.

12. Indeed, it is unfortunate that the rapacious and ruinous lure of lucre of certain unscrupulous persons has led to a liquor tragedy resulting in loss of human life. The enormity of an offence, still, calls for a sober application of the law. First, the petitioner's vehicle had not been seized *flagrante delicto*—in the very act of committing the offence. In other words, the petitioner's vehicle was not seized while it was actually carrying any alleged contraband.

13. In fact, the contention of the learned counsel for the petitioner that the vehicle was seized based on the confession of an accused in a crime with which the petitioner has nothing to do; the respondents have not contradicted it. A perusal of Exhibit P7 makes it manifestly clear that the second respondent has confirmed the order of the primary authority on the premise that the petitioner as the owner of the vehicle had failed to discharge his evidentiary burden—the burden that he had no knowledge of somebody else's putting his vehicle to an illegal use.

14. Indeed, the second respondent has held that the petitioner has grossly failed to establish that he has taken the best care and caution regarding the use of his vehicle. However, Exhibit P7, I am afraid, falls short of a speaking order. It has only recorded that the petitioner has failed to discharge his burden that he has no knowledge.

15. I, nevertheless, hasten to add that there is sufficient strength in the contention of the learned Government Pleader that the mere absence of knowledge cannot absolve the owner of a vehicle from the legal liability. In other words, as the use of the vehicle is within the special knowledge of the owner, the

burden is squarely placed on the said owner to establish that he has taken every care while using the vehicle or letting some other person use the vehicle. It is, thus, all the more essential to ensure that the vehicle is not used for any prohibited purposes. Accordingly, the statute employs the expression knowledge not in the negative sense, but in the positive sense: the lack of knowledge is despite the best effort.

16. When the facts in the present case are examined, it is indisputable that the petitioner's vehicle was seized only on the strength of the confession made by an accused in a crime in which the petitioner is not an accused. This Court in **Mukundan** (supra) has held that confiscation which follows a confession must be of a thing that belonged to the very person who confessed. According to the learned Division Bench, it will be strange to read the section as providing for confiscation of things belonging to a third person. In the present instance, the confiscation, without contradiction, has led to the confiscation of a third party's vehicle.

17. The ratios laid down in **Ravichandran** (supra), and **Rajesh K.** (supra) have underlined the importance of Section 67 C (2) of the Act.

18. In fact, **Ravichandran** (supra), a learned single Judge of this Court has adumbrated the scope of Section 67C of the Act to the effect that it 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 has taken all reasonable and necessary precautions against such use.

19. His Lordship goes on to observe that the power of confiscation can be exercised only if the authorized 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.

20. Further, **Ravichandra** (supra) tellingly observes that even in the absence of any evidence from the owner, the authorized 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 has not taken

all reasonable and necessary precautions against such use.

21. The confiscation of a vehicle, it is held, 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.

22. In **Rajesh** (supra), this Court has further observed that once it is not established that the owner of the vehicle has knowledge or that he has connived with the persons who are illegally transporting any contraband, merely because his vehicle was involved in the offence, the owner of the vehicle cannot be penalized.

23. In **Paulson** (supra), a learned Division Bench of this Court has held that the confiscation of a vehicle under Section 67B should be the vehicle that has been actually used for carrying the contraband. I do not see any direct application for the ratio of the said judgment to the case on hand.

24. As the record reveals, the vehicle was seized at a later point of time based on the confession of an accused. In the first place, it cannot be said with certainty that it is the same vehicle that has been used for any illegal purpose.

Assuming that it has been used, the entire basis was only a confession. This Court in **Mukundan** (supra), to repeat, has emphatically held that there should not be any confiscation of a third party's vehicle based on a confession of an accused.

Under these circumstances, I find merit in the contention of the learned counsel for the petitioner that Exhibit P7 is unsustainable. I, therefore, set aside Exhibit P7 and direct the respondents to release forthwith the cash security lying with them on account of the initial interim release of the vehicle. No order as to costs.

DAMA SESHADRI NAIDU
JUDGE

DMR/-