

C.A. Alex Vs. The Excise Commissioner and Others

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Court : Kerala

Decided On : Jan-20-2016

Judge : Dama Seshadri Naidu

Appeal No. : W.P. (C) No. 26099 of 2011 (J)

Appellant : C.A. Alex

Respondent : The Excise Commissioner and Others

Judgement :

1. Heard the learned counsel for the petitioner and the learned Government Pleader, apart from perusing the record.
2. The petitioner, the owner of a motor vehicle, assails Ext.P5 order of confiscation passed by the second respondent, who, in fact, confirmed the initial order of confiscation in Ext.P3 by the third respondent.
3. The facts in brief are that, on 21.07.2010, the petitioner's vehicle while being used by another person, namely one Mr. Shijo, was intercepted and seized by the fourth respondent on the allegation that it was used as an escort vehicle for another vehicle carrying certain contraband. In fact, Crime No. 27 of 2010 for the offence under Section 55(a) of the Act was also registered.
4. In the course of time, the third respondent, exercising his powers under Section 67B of the Abkari Act (the Act), confiscated the petitioner's vehicle through Ext.P3

order. Aggrieved, the petitioner filed a statutory appeal and invited Ext.P4 order from the second respondent, who confirmed the third respondent's Ext.P3 order of confiscation. Further aggrieved, the petitioner has approached this Court.

5. Smt. Neethu G. Nadh, the learned counsel representing the learned counsel for the petitioner, has strenuously contended that the petitioner, though the owner of the vehicle, is not the accused in Crime No. 27 of 2010. According to her, the petitioner let out his motor vehicle, a Maruti car, to the said Shijo on 27.02.2010 on the strength of Ext.P2 agreement. She has further contended that at no point of time had the petitioner any knowledge concerning the alleged offence committed by the person who hired the petitioner's vehicle.

6. Having placed reliance on Assistant Excise Commissioner v. Paulson (2009 (1) KLT 959) and Nazer v. State (1996 (1) KLT 321), the learned counsel has submitted that the petitioner be given the benefit of Section 67C (2) of the Act because he has neither knowledge of nor complicity in the alleged crime, concerning which the petitioner's vehicle was confiscated.

7. The learned Government Pleader, on the other hand, has strenuously opposed the petitioner's claims and contentions. He has submitted that the authorities could clinchingly establish that the inmates of the mini-lorry carrying the contraband and those of the petitioner's vehicle, all through, had been in constant touch while the contraband was carried.

8. The learned Government Pleader has further submitted that despite the petitioner's initial plea before the third respondent that he let out the vehicle to the accused on the strength of an agreement, he miserably failed to produce it before the primary authority. According to him, Ext.P2 ought to have been fabricated only as an afterthought.

9. Placing reliance on Subair v. Assistant Excise Commissioner (2008 (1) KLT 493) and Sajin v. Assistant Excise Commissioner (2009 (2) KLT 389), the learned Government Pleader has submitted that the use of vehicle as an escort to another vehicle actually carrying the contraband is a composite ingredient of the transaction. In that sense, according to the learned Government Pleader, it can

safely be concluded that the petitioner's vehicle has also been used for carrying the contraband.

10. Eventually, the learned Government Pleader has contended that the petitioner has further grossly failed to discharge his burden under Section 67C of the Act that despite his best care and caution, some third party has put his vehicle to an illegal use. Thus urged the learned Government Pleader this Court to dismiss the writ petition.

11. Indeed, the facts are not in dispute. As can be seen from the record, the petitioner's vehicle was not actually used for carrying contraband; however, it was allegedly used as an escort.

12. A perusal of Ext.P3 order reveals that the petitioner, despite his plea that he let out the vehicle on the strength of an agreement, could not produce a copy of the said agreement before the primary authority. The fact, nevertheless, remains that the petitioner did produce before this Court Ext.P2, the alleged agreement, the veracity of which however is assailed by the respondents.

13. Further pertinent is the fact that in Ext.P3 order of the primary authority, it is recorded that the Investigating Officer could gather information that the inmates of the mini-lorry carrying the contraband and those in the petitioner's vehicle had been in constant touch during the course of committing the alleged crime.

14. The singular plea of the learned counsel for the petitioner is that the petitioner's vehicle has not been used for committing any offence per se. It is, of course, her additional contention that the petitioner had no knowledge of or complicity in the alleged crime.

15. As has been rightly contended by the learned Government Pleader, in the absence of producing at the earliest point of time the alleged agreement between the petitioner and the accused in the crime despite pleading to that effect, in the ordinary circumstance, the adjudicatory authority would be justified in drawing an adverse inference against the petitioner's innocence which the third respondent did.

16. In Subair (supra), the facts are that the mini-lorry carrying spirit was accompanied by a motor cycle belonging to the driver of the lorry; both the vehicles were confiscated. In that context, the owner of the vehicle therein contested the confiscation on the grounds that the Abkari Act does not provide for confiscation of any vehicle other than that carrying the contraband. Under those circumstances, a learned single Judge of this Court has held that the motor cycle escorting the lorry too is a device used by the perpetrators in carrying the contraband.

17. The learned single Judge in paragraph 10 of the aforesaid decision held:

Following the aforesaid Bench decision, a conveyance is said to be 'used' for carrying the contraband articles if the person who actually effects such transportation has, at least, some degree of actual, though minimal, control over the operation of the vehicle. In the case in hand, the petitioner is the first accused in the criminal case and was found to be driving the lorry carrying the contraband. He is the registered owner of the motor cycle which was found escorting the lorry. He also does not deny that he was the full owner and in complete control of the user of the motor cycle in question. The rider of the motor cycle escaped into the forest under the cover of darkness. The petitioner does not disclose the identity of the rider, may be because, he is privileged in that regard on account of being the accused in the criminal case. The petitioner does not have a case that the motor cycle that belongs to him was casually behind the lorry driven by him. The registration particulars of the lorry that was being driven by the accused, the writ petitioner were bogus. In the said circumstances, it can be safely concluded that the motor cycle that was escorting the lorry is a conveyance that was used in the carrying of the contraband in the lorry, by being used as an effective escorting vehicle in the act of carrying the contraband in the lorry. Such escorting is not segregable from the factum of carrying the contraband in the lorry. The act of escorting a lorry carrying a contraband, as in this case, is a composite ingredient of the transaction which can be called as used in carrying. The degree of control that the petitioner had over the operation of the motor cycle is such that he had complete control over the destination to which the lorry and the motor cycle escorting it were to reach and the route along which they should ply. Therefore,

the motor cycle cannot be taken out of the sweep of S.67B of the Act.

(emphasis supplied)

18. Further, in Sajin (supra), the liquor was seized while being taken to a vehicle parked nearby, ostensibly, with a view to transporting it using the said vehicle. In the said factual background, the owner of the vehicle has contended that the liquor was not seized from the vehicle and that the provisions of Abkari Act did not get attracted to the case on hand. In that context, another learned single Judge of this Court, placing reliance on Subair (supra), has held that it is a composite ingredient of transaction: used in carrying the contraband article.

19. In Nazer (supra), this Court, per a learned single Judge, has held that once it could not be established that the owner of the vehicle has any knowledge of or complicity in the crime, it cannot be presumed that he is guilty of the crime or lending a helping hand in precipitating the crime. According to the learned single Judge, the owner of the vehicle, under those circumstances, is entitled to the benefit of Section 67C (2) of the Act.

20. In Paulson (supra), the facts are that the police seized a lorry with Indian Made Foreign Liquor; one person was arrested on the spot. Four of the persons who engaged in loading the liquor, however, escaped from the scene using a getaway car, which was later seized and confiscated. In the said factual backdrop, having examined Section 67B of the Act, a learned Division Bench has held as follows:

It is very clearly mentioned that only vessel or other conveyance used for carrying the same can be seized and confiscated. The learned Judge found that even according to the case of the State, the vehicle never carried liquor and, therefore, it cannot be confiscated under S.67-B. . .

(emphasis supplied)

21. It is apposite to observe that Subair (supra) was decided on 03.01.2008; Sajin (supra) on 24.03.2009. On the other hand, Paulson (supra) was decided by a learned Division Bench on 06.01.2009. As a matter of sheer chronology, there was no occasion for Subair to be impacted by Paulson; at any rate, though Sajin was

subsequent, Paulson does not seem to have brought to the notice of the learned Single Judge.

22. Whatever be my predilection as regards the conflicting judicial dicta, propriety demands that I be bound by the judgment of the learned Division Bench.

23. Accordingly, essentially going by the ratio of Paulson (supra), which is a decision rendered by a learned Division Bench, I am of the view that Exts.P3 and P4 orders cannot be sustained. Further, since the petitioner's vehicle has not actually been used for committing the alleged offence, it may not assume any significance whether the petitioner has discharged his burden under Section 67 (C) of the Act as regards his alleged knowledge of or complicity in the crime.

24. In the facts and circumstances, I hold that Exts.P3 and P5 orders cannot be sustained; they are accordingly quashed. As a further consequence, the respondent authorities are directed to refund forthwith to the petitioner the amount deposited by him at the time of his securing the interim custody of the vehicle.

This writ petition is allowed as above. No order as costs.

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