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Balakrishnan Vs. State of Kerala

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Court : Kerala

Decided On : Jan-14-2015

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Balakrishnan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN WEDNESDAY, THE14H DAY OF JANUARY201524TH POUSHA, 1936 Crl.Rev.Pet.No. 917 of 2004 (D) ---------- AGAINST THE

JUDGMENT
IN CRL.A4552000 of ADDL.SESSIONS COURT-III, KOZHIKODE DATED1512-2003 AGAINST THE

JUDGMENT
IN CC2191998 of J.M.F.C.-I,THAMARASSERY DATED2509-2000 REVISION PETITIONER/APPELLANT/ACCUSED.: ---------- BALAKRISHNAN, S/O.CHEKKUTTY, THARONKKANDY POYIL HOUSE, KEDAVUR AMSOM, CHAMEL DESOM. BY ADV. SRI.P.V.KUNHIKRISHNAN RESPONDENT/COMPLAINANT.: ---------- STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY

P.P.SRI. REJI JOSEPH THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON1401-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: K. RAMAKRISHNAN, J.

..... Crl.R.P.No.917 of 2004 ..... Dated this the 14th day of January, 2015.

ORDER

The accused in C.C.No.219/1998 on the file of the Judicial First Class Magistrate Court-I, Thamarassery is the revision petitioner herein.

2. The revision petitioner was charge sheeted by the Excise Inspector, Thamarassery Excise Range in Cr.No.26/1997 under section 55(a) of the Abkari Act.

3. The case of the prospection in nutshell was that, on 22.5.1997 at about 5.30 p.m, the revision petitioner was found to be in possession of 3 litres of illicit arrack in a can having capacity of 5 litres through a lane in front of Chinnappan's house in Punnathu Kollaru Thodi and found transiting the same in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(a) of the Abkari Act.

4. After investigation, final report was filed and it was taken on file as C.C.No.219/1998 on the file of the Judicial First Class Magistrate Court-I, Thamarassery. When the revision Crl.R.P.No.917 of 2004 2 petitioner appeared before the court below, particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 6 were examined and Exts.P1 to P6 and MO1 were marked on their side. After closure of the prosecution evidence, the revision petitioner was questioned under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for short) and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he was innocent of the same and he was falsely implicated in the case. After 313 examination of the revision petitioner, PWs 3 and 5 were recalled

and further cross examined under section 311 of the Code. No further evidence was adduced on his side in defence.

5. After considering the evidence on record, the court below found the revision petitioner guilty under section 55 (a) of the Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for six months and also to pay a fine of Rs.25,000/-, in default to undergo simple imprisonment for two months more. Aggrieved by the same, he Crl.R.P.No.917 of 2004 3 filed Crl.A.No.455/2000 before the Sessions Court, Kozhikode, which was made over to Third Additional Sessions Court, Kozhikode for disposal and the learned Additional Sessions Judge confirmed the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioner/accused before the court blow.

6. Heard the counsel for the revision petitioner and the learned Public Prosecutor.

7. The counsel for the revision petitioner submitted that the prosecution has not proved beyond reasonable doubt that the revision petitioner had committed the offence punishable under section 55 (a) of the Abkari Act and the evidence adduced is not sufficient to prove the same beyond reasonable doubt. The independent witnesses to seizure had turned hostile. Possession of arrack was prohibited only after 3.6.1997 and till then, it cannot be said that it is an illicit arrack. Further, for the purpose of attracting section 55 (a) of the Abkari Act, it must be proved by the prosecution that possession was for the purpose of import, export etc and mere possession will not be sufficient for attracting the offence under section 55 (a) of the Crl.R.P.No.917 of 2004 4 Act. It may not fall under section 58 of the Abkari Act prior to the prohibition, the prosecution must prove that the revision petitioner was in possession of the same knowing that it is illicit arrack and if such an allegation is absent in the final report, then offence under section 58 cannot be attracted and it may fall only under section 63 of the Act. The counsel for the revision petitioner relied on a decision of this Court reported in Josekutty v. State of Kerala (2013 (1) KLT434 in support of his case.

8. The learned Public Prosecutor supported the concurrent findings of the court below. He also submitted that it is not mere possession and the revision petitioner

was transiting the same and so the courts below were perfectly justified in convicting the revision petitioner for the offence alleged.

9. The case of the prosecution as emerged from the prosecution witnesses is as follows: On 22.5.1997, while PW1 along with PW3 and others were doing patrol duty and when they reached the place of occurrence, they saw the revision petitioner coming with MO1 cannas and on seeing the excise party, he tried to go away Crl.R.P.No.917 of 2004 5 from that place. So he stopped him and in the presence of Pws 2 and 4, he had taken MO1 cannas and examined the contents of the cannas by smelling and tasting and satisfied that it was arrack and he convinced the same to the witnesses as well. Thereafter he had taken the sample from the contents of the cannas and sealed the same and affixed label on the sample bottle containing the signatures of the revision petitioner, witnesses and himself and he had also sealed MO1 cannas and labelled the same also in the same fashion and seized the sample as well as the cannas as per Ext.P1 mahazer in the presence of witnesses Pws 2 and 4 and came to the excise office and prepared Ext.P2 arrest memo and thereafter he registered Ext.P4 occurrence report. The investigation was undertaken by PW5. He sent the forwarding note along with Ext.P5 requisition letter to court for sending the sample for analysis and it was sent for analysis from court and Ext.P6 report was obtained which showed that it contained 20.06% by volume of ethyl alcohol instead of 42.86% by volume ethyl alcohol as required to be present in arrack sold under the Government monopoly. He completed the investigation and submitted final report. Crl.R.P.No.917 of 2004 6 10. Though Pws 2 and 4, the independent witnesses, admitted their signature in Ext.P1, they denied having seen the actual seizure. PW1 had deposed about the manner in which he had seized the articles and prepared the mahazer and arrested the revision petitioner. This was corroborated by PW3, the excise guard, who accompanied him. Further, Ext.P6 chemical analysis report shows that it was illicit arrack not in conformity with the percentage of alcohol to be present as in the case of government arrack which was permitted to be sold in the government authorized depots.

11. In the decisions reported in Rajeevan v. Excise Inspector (1995 (1) KLT38, Purushan v. State of Kerala (2002 (2) KLT661 and Surendran v. Excise Inspector

(2004 (1)KLT404, it has been observed that for the purpose of attracting section 55(a) of the Abkari Act, it must be proved by the prosecution that mere possession is not sufficient and it must be intended for the purpose of import or export as the subsequent words transport, transit or possession must be read ejusdem generis with words import and export mentioned in the section. Further it was also observed in the same decisions that for the purpose of attracting the offence under Crl.R.P.No.917 of 2004 7 section 58 of the Abkari Act, it must be alleged and proved by the prosecution that the article seized was illicit liquor and the revision petitioner was in possession of the same knowing that it is illicit liquor. This aspect has been considered by a Division Bench of this Court in the decision reported in Josekutty v. State of Kerala (2013 (1) KLT434 and observed that, if the accused cannot be convicted for the offence under section 55 (a) of the Abkari Act in view of the dictum laid down in the decision reported in Surendran v. Excise Inspector (2004 (1) KLT404 followed in the subsequent decisions, he cannot be convicted for the offence under section 58 of the Abkari Act unless it is alleged and proved by the prosecution that the accused was in possession of the article with the knowledge that it was illegally obtained arrack and not licit arrack obtained from the government depots as possession of arrack or sale of arrack is not prohibited till 3.6.1997 until possession and sale has been prohibited and sections 8(1) and (2) of the Act has been incorporated in the Act making it an independent offence and further in the same decision it has been observed that if the offence is not fall under section 55(a) or 58 of the Abkari Act, then for the possession of illicit arrack without the knowledge, Crl.R.P.No.917 of 2004 8 he can be convicted only under section 63 of the Abkari Act for possession of excess quantity as at that time a person was entitled to possess only 1.5 litres of arrack. So, under the circumstances, though the evidence will go to show that the revision petitioner was in possession of the arrack which does not confirm the standard provided for arrack sold by the government and even if it is assumed to be illicit arrack in the absence of any allegation in the final report or in the occurrence report that he was in possession of the same knowing that illegally obtained arrack and evidence was adduced on that aspect, the conviction entered by the court below for the offence under section 55(a) of the Abkari Act cannot be said to be legal and he cannot be convicted for the offence under section 58 of the Abkari Act in view of the dictum

laid down in the decision reported in Josekutty's case (cited supra) as well. So, at the most, the revision petitioner can be convicted for the offence under section 63 of the Abkari Act as it stood at that time. So the conviction entered by the court below under section 55(a) of the Abkari Act is set aside and the same is converted to one under section 63 of the Abkari Act and he is convicted thereunder and sentenced Crl.R.P.No.917 of 2004 9 to pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for three months.

12. So, the revision petition is allowed and the order of conviction and sentence passed by the court below under section 55(a) of the Abkari Act is set aside and the same is modified as follows: The revision petitioner is found guilty under section 63 of the Abkari Act and he is convicted thereunder and sentenced to pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for three months. Two months time is granted to the revision petitioner to pay the fine. Till then, execution of he sentence is directed to be kept in abeyance. office is directed to communicate this order to the concerned court immediately. Sd/- K. RAMAKRISHNAN, JUDGE. cl /true copy/ P.S to Judge Crl.R.P.No.917 of 2004 10

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