

Hassan Vs. State of Kerala

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SooperKanoon Citation : sooperkanoon.com/727913

Court : Kerala

Decided On : Jun-22-1989

Reported in : 1989CriLJ1962

Judge : M.M. Pareed Pillai and; P.K. Shamsuddin, JJ.

Appellant : Hassan

Respondent : State of Kerala

Judgement :

P.K. Shamsuddin, J.

1. The appellant is the first accused in S.T. No. 18/86 on the file of the Special Court for Trial of Offences under Essential Commodities Act, Trichur. By its judgment dt. 27-6-1986, the lower Court convicted the appellant for the offence under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 r/w Section 3 of the said Act and Clause 3 of the Kerala Edible Oil Seeds, Edible Oils, Vanaspati and Baby Food Dealers Licencing Order, 1975 and sentenced him to undergo simple imprisonment for a period of 3 months and to pay a fine of Rs. 1,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one month. The lower Court acquitted accused 2 to 5 though they were also charged along with the appellant for the above offence.

2. According to the prosecution, on 3-11-1983 at about 9.20 p.m., the appellant and four others transported unauthorisedly 461.200 K.Gms. of palm oil in a jeep bearing registration No. KLI 1146 and the jeep was stopped and searched at Thidanad by P. W. 5, the Assistant Sub-Inspector of Police, Thidanad and it was found that the appellant was in possession of the above quantity of palm oil The second accused is the son of the appellant, the third accused was the driver of the jeep and accused 4 and 5 were the passengers found in the jeep.

3. The prosecution examined P.Ws. 1 to 5 and produced Exts. P1 to P7 to prove its case. In his statement under Section 313, Cr. P.C. the appellant submitted that he purchased the coconut oil from four or five cultivators from Thodupuzha and brought them to Erattupetta for transporting to Kanjirappilly, that when the vehicle reached Erattupetta it developed some mechanical trouble and he hired another jeep for transporting the oil to Kanjirappilly, that when the jeep reached Petta Junction, two persons were given a lift by the driver and the jeep proceeded further and that at Thidanad, the Assistant Sub-Inspector of Police stopped the vehicle and took the oil into custody. The 2nd accused stated that he heard about his father's arrest and went to the Police Station and it was then that he was also made an accused. The 3rd accused stated that he was the driver of the jeep, which was hired by accused 1 and 2 and he was made to understand that what was sought to be transported by the 1st accused was coconut oil and that the 3rd accused was not connected with the offence in any way. Accused 4 and 5 stated that they had nothing to do with the oil in the jeep and they boarded the jeep for going to Kanjirappilly on payment of Rs. 3A, as fare.

4. P.W. 1 is the witness to Ext. P1 mahazar prepared at the time of seizure of the oil. But he turned hostile. P.W. 2 was examined to prove the weight of the oil, but he also turned hostile. His earlier version to the Police that the oil was weighed was denied by him and he was cross-examined with reference to his statement before Police.

5. P.W. 5 testified that he is the Assistant Sub-Inspector of Police, Thidanad during the relevant period and that on 3-11-83 he stopped the jeep bearing registration No. KLI 1146 which was driven by the 3rd accused and besides the driver, there

were four persons in the jeep. He further stated that on examination he found 21 tins, 3 cans and one bottle of palm oil. The accused had no bills or other documents and in the circumstances, he seized the articles as per Ext.P1 Mahazar. He also stated that the total quantity of the oil was 461.20 Kg. and that since there was no convenience to keep the articles in the Thidanad Police Station, he gave a requisition to the Sub-Inspector of Police, Palai requesting to keep the articles in Palai Police Station. He also made investigation in the case. In the course of cross-examination, he testified that he did not send the sample of articles for chemical examination since he was satisfied that what was contained in the cans and tins and bottle was palm oil. He further deposed that though initially the, appellant represented to him that what was contained in the containers was coconut oil, later he admitted that it was palm oil

6. P.W. 3 is the Sub-Inspector of Police, Palai. He deposed that as per the direction of the Collector, he entrusted with the Unit Manager of Kerala State Civil Supplies Corporation 451.20 Kg. of palm oil, which is the subject matter in the case on 22-12-1983 and he obtained Ext.P2 receipt. He further stated that he did not weigh the articles when he received it from P.W. 5. He kept the articles in tact and later he weighed the oil entrusted to him before handing over the article to P.W. 4.

7. P.W. 4 is the Unit Manager of Kerala State Civil Supplies Corporation Depot and he stated that he obtained 451, 20 Kg. of palm oil on 22-12-1983 as per the direction of the Collector and Ext. P2 is the receipt given by him. In the course of cross-examination, he stated that he had experience as Unit Manager the articles brought to the Unit and therefore he smelt and tasted the oil and was satisfied that it was palm oil. He further testified that it is only through the Civil Supplies Corporation, the palm oil is distributed and palm oil is an edible oil.

8. The Special Court mainly relied on the evidence of P.W. 4 to come to the conclusion that what was contained in the containers seized was palm oil and there was 451.2 Kg. of palm oil in 21 tins, 3 cans and 1 bottle. The lower Court also noted that cocount oil also in an item included in the schedule to the order and therefore there is no escape from the liability. It further found that there is no

evidence to show that accused 2 to 5 were also in possession of the oil and the prosecution evidence only establishes that the appellant is the owner and possessor of the oil.

9. This appeal initially came up before Thomas, J. for hearing and after hearing the counsel, the learned Judge doubted the correctness of the decisions in Kunhikannan v. Assistant Sub-Inspector of Police, 1985 Ker LT 484 and CrL R.P. No. 275/85 and felt that those decisions required reconsideration. It is in the above circumstances, the matter came before us.

10. Learned Counsel for the appellant challenged the finding of the lower Court. He raised the following contentions : (1) There is no evidence to show that what was seized was palm oil; (2) There is no evidence as to the quantity of the oil; Even if the quantity alleged by the prosecution is correct, no offence is committed as the appellant is a dealer; (3) P.W. 5 (he Asst. S.I. of Police was incompetent to effect seizure and therefore the seizure and further trial is illegal and incompetent, and (4) The defence contention has not been properly appreciated by the Court below.

11. Before considering the above contentions of the learned Counsel for the appellant, it will be convenient to quote Clause (3) of the Kerala Edible Oil Seeds, Edible Oils, Vanaspati and Baby Foods Dealers' Licensing Order 1975 which is hereinafter referred to as the 'order' for short. The above order was framed by the Government of Kerala in exercise of the powers conferred by sub-sees. (1) and (2) of Section 3 of the Essential Commodities Act. Clause (3) of the order reads as follows:

3. Limit of possession by persons other than dealers : A person other than a dealer shall not keep in his possession at any time more than 20 Kgs. of, hydrogenated vegetable oil or 10 Kgs. of other notified foodstuffs in all:

Provided an establishment may keep with it quantities of hydrogenated vegetable oil and notified foodstuffs in excess of the limits mentioned in the clause if it declares its intention in writing so to do to the Taluk Supply Officer and agrees to abide by the decision of the Taluk Supply Officer in regard to the quantity which

may be kept by it.

Clause 2(d) lays down that 'notified foodstuffs' means any one or more of the foodstuffs specified in Sch. I to the order and includes products of such foodstuffs. Item 2 of Sch. I to the order relates to edible oils. Coconut oil, groundnut oil, gingelly oil, mustard oil and other edible oils are included in item 2. There cannot be any doubt that Palm oil is an edible oil. Therefore it comes within the purview of CL 3 of the Order. There is no substance in the contention of the learned Counsel that since palm oil is not mentioned by name, it has to be treated as an item not being included.

12. We shall now deal with the submission of the learned Counsel that there is no evidence that what was contained in the containers is palm oil. Admittedly sample was not sent for chemical analysis and the learned Counsel submitted that in the absence of a report from competent person that what was contained in the containers is palm oil, the conviction cannot be sustained. In support of this Contention, the learned Counsel cited before us a few decisions.

13. In *State of Andhra Pradesh v. Madiga Boosenna* : 1967 CriLJ1398 , the accused was charged for the offence of transporting liquor which was prohibited under Sections 4(1)(a) and 3(9) of the Andhra Pradesh (Andhra Area) Prohibition Act, 1937. The High Court acquitted the respondent on the ground that the prosecution had not established that it was arrack which was transported. The Supreme Court observed that there was only a general statement contained in the evidence of the witnesses that there was a strong smell of alcohol emanating from the tins, and since there was no other satisfactory evidence to establish that the article was one coming within the definition of the expression 'liquor', the High Court was justified in acquitting the respondent in the absence of a better proof furnished by a technical person.

14. Learned Counsel also relied on a decision of the Division Bench of this Court in *State of Kerala v. Sreedharan* 1965 Ker LT 1002. It was also a case coming under the provisions of Section 8(1) of Prohibition Act. The lower Court acquitted the accused on the ground that there was no evidence to establish that what the bottles contained was liquor. In the appeal filed by the State against the order of

acquittal, this Court held that the lower Court was correct in holding that it was not safe to rely on the smell alone in finding that the liquid contained in the bottle was liquor within the meaning of the Act.

15. In *Francis v. State of Kerala* 1965 Ker LT 1034 the above decision was followed. The article involved in that case was ganja. On scrutiny of the evidence of P. Ws. 1 and 2 it was revealed that their conclusion that the article was ganja was not based on their knowledge about ganja and therefore the Court held that it was not safe to rely on their evidence.

16. Another decision of the Supreme Court relied on by the learned Counsel is *State of Maharashtra v. Hansraj Depar Parle Oil Centre* 1977 Cri LJ 833. This was also a case of appeal against acquittal. The article involved was vanaspati. The Court found that the prosecution case rested on vague recollection of the Rationing Inspector and the Sub-Inspector of Police as to what was sold by the respondent and in the circumstances, the acquittal was correct in view of the unsatisfactory nature of prosecution evidence to establish that the respondents were dealers in vanaspati and that they had kept vanaspati in their shops.

17. In the instant case, the position is different. Besides the evidence of P. W. 5 that he was satisfied that what was seized was palm oil, there is the evidence of P. W. 4 Unit Manager of Civil Supplies Corporation, who had experience of six years in the field, that he smelt and tasted the substance and found that what was contained in the containers was palm oil. It may also be noticed in his connection that coconut oil also is an item, which comes within the purview of Clause 3 of the order and therefore even if the article is coconut oil the appellant is liable to be proceeded against for violation of the order. In the circumstances the prosecution has no reason to describe the article as palm oil unless P.Ws. 4 and 5 were fully satisfied that what was contained in the tins, cans and bottle was palm oil. It is true that there is no charge against the appellant for possession of coconut oil exceeding 10 Kg. but we have mentioned this aspect only to highlight the point that unless P.Ws. 4 and 5 were fully satisfied that the article was palm oil there was no reason for them to describe the item as palm oil. We have not understood the decisions cited by the learned Counsel to mean that in all cases where

substance was not sent for chemical analysis, there cannot be any successful prosecution of the offenders, for an offence coming under the order. If the Court is satisfied that the evidence adduced by the prosecution is good enough to reach the conclusion that the item involved is an offending article as alleged by the prosecution, there is no bar in basing conviction on such evidence. In the instant case, we are of the view that the evidence of P.Ws. 3, 4 and 5 is quite acceptable to come to the conclusion that what was contained in the containers was palm oil. No suggestion was put to these witnesses in the course of cross-examination that what was seized by P.W. 5 and kept in the custody of P.W. 3 and finally entrusted to P.W. 4 is not palm oil but coconut oil. No doubt it is desirable to send the article for chemical examination and the authorities will be well-advised to follow that course.

18. The next contention raised by the learned Counsel is that the prosecution has not established the weight of oil seized and in the absence of such a positive evidence, the lower Court was not justified in convicting the appellant. This contention also is without any foundation. P.W. 3 the Sub-Inspector of Police, Palai, stated that the article seized was weighed before handing over the same to the Kerala State Civil Supplies Corporation and it weighed 451.200 Kilogrammes. We do not find any reason to reject the evidence of P.W. 3 on this aspect. P.W. 2 was examined by the prosecution to prove that at the instance of Police, palm oil was weighed. But he turned hostile and gave evidence that he did not weigh the palm oil. Thereupon, he was cross-examined with reference to his earlier version to the Police, marked as Ext.P6, in which he stated that he weighed the article and found it weighed 461.200 K.Gms. We are satisfied that he gave evidence in the Court at variance with his earlier version to the Police to help the appellant. We do not find any reason to disbelieve the evidence of P.W. 3 that he weighed the article and found it weighed 451.200 K.Gms. P.W. 5 also stated that the articles were entrusted to the Sub-Inspector of Police after weighing. No doubt 451.200 K.Gms. is short by 10 K.Gms. of the quantity mentioned in Ext. P1. The learned Counsel for the appellant submitted that this difference was not explained by prosecution and that for that reason the evidence of the prosecution relating to quantity has to be rejected. Having regard to the total quantity found in the possession of the appellant and the limit of possession prescribed in Clause 3 of

the order, we are of the view that this variation is very minor and does not affect the prosecution case. There is no suggestion in the cross-examination of P.W. 3, P.W. 4 and P.W. 5 that the article seized weighed only less than 10 K.Gms. In his statement under Section 313, of the Cr. P.C., the appellant had no case that the article weighed only less than 10 Kilogrammes, Therefore there is no force in this contention also.

19. The learned Counsel also contended that the appellant is a dealer and therefore he is entitled to keep possession of five quintals in view of CL 10 of the Order. Clause 10 lays down that no person shall carry on business as a dealer of the notified food stuffs except under and in accordance with the terms and conditions of a licence granted under this order if the stocks of notified food-stuffs in his possession exceed the quantities specified therein. In the case of edible oil, the licensee is required to take out a licence under the order to carry on business only if the stock of edible oil exceeds 5 quintals. The counsel submitted that the quantity of article seized was less than 5 quintals. At no point of time * the appellant had a case that he is a dealer. There is not even a suggestion to the prosecution witnesses that the appellant is a dealer. In his statement Under Section 313 Cr. P.C. also he does not claim to be a dealer. It is for him to prove that he is a dealer so as to bring his case within the purview of CL 10 of the Order. In the circumstances, there is no substance in this contention also.

20. Learned Counsel for the appellant next contended that the Asst. Sub Inspector of Police is incompetent to seize the articles and in the circumstances the trial is illegal and conviction is liable to be set aside. Learned Counsel invited our attention to Clause 19 of the Order dealing with-search and seizure. It lays down that only an officer of the Civil Supplies Department not below the rank of an Asst. Taluk Supply Officer, or any Officer of the Revenue Department not below the rank of a Deputy Tahsildar, or any police Officer not below the rank of Sub Inspector, or any other Officer of the Government authorised by the District Collector in this behalf, may with a view to secure compliance with the provisions of this Order or to satisfying himself that the said provisions have been complied with, has power to effect search and seizure. The learned Counsel submitted that the Assistant Sub Inspector of Police is below the rank of the Sub Inspector and therefore he

has no competence to effect search and seizure. In support of his contention the learned Counsel invited our attention to the decisions in Kunhikannan v. Assistant Sub Inspector of Police 1985 Ker LT 484 and Crl. R.P. No. 275 of 1985. It is admitted that there is a notification authorising the Assistant Sub Inspector of Police to exercise powers of the S. I. of Police. In the above decisions it was held that authorising or investing an Officer with the powers of a superior officer is one thing and rank is another thing, and since the Assistant S. I. of Police is an Officer below the rank of S.I. he was incompetent to effect a search. In the above decisions the accused were acquitted for the reason that seizure was illegal. As indicated earlier, the learned single Judge before whom this appeal came for hearing doubted the correctness of these decisions and it was for this reason that the matter was referred to a Division Bench. The learned Counsel for the appellant argued that Rule 19 speaks of Police Officer not below the rank of Sub Inspector and therefore the authorisation to the Assistant Sub Inspector by the Government to exercise the powers of Sub Inspector will not invest the Assistant S. I. of Police with power to effect search and seizure.

21. Section 13(2) of the Interpretation and General Clauses Act 1125 lays down as follows:

Where an Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him or to be in charge of the powers and duties of that office.

The Assistant Sub Inspector has been duly empowered to exercise all powers of Sub Inspectors in G.O.(MS) 217/73 dt. 19-12-1973. In view of Sub-section (2) of Section 13 of the Interpretation and General Clauses Act, such authorisation is sufficient to confer powers on the Assistant Sub Inspector to exercise the powers of seizure and search in accordance with Rule 19 of the order. The provisions contained in Section 13(2) of the Interpretation and General Clauses Act do not appear to have been brought to the notice of the learned single Judges who decided Kunhikanrjan's case (supra) and Crl. R.P. 275/1985. Further even if

search and seizure are illegal that will not vitiate the subsequent investigation, further trial and conviction.

22. A Division Bench of this Court to which one of us is a party {Shamsuddin J.) had occasion to 'consider this aspect. Following the decisions of the Supreme Court in *Balumal Jamnadas v. State of Maharashtra* : 1975 CriLJ1862 *State of Maharashtra v. Natwarlal* : 1980 CriLJ429 , *Dr. Pratap Singh v. Director of Enforcement, Foreign Exchange Regulation* : 1986 CriLJ824 and also the decision of this Court in *Assistant Collector of Central Excise v. Wilfred Sebastian* 1982 Ker LJ 670 : 1983 Cri LJ NOC 43, the Division Bench held in *Assistant Collector of Central Excise v. Vasanthakumar* 1988 (1) Ker LT 92 : 1988 Cri LJ 1217 that illegality of search will not affect the validity of the seizure or vitiate the evidence collected or subsequent trial. Unfortunately the above decisions were not brought to the notice of the learned single Judges who decided the cases relied on by the learned Counsel for the appellant. We are therefore of the view that Kunhikannan's case (1985 Ker LT 484) and Crl. R.P. No. 275 of 1985 have not correctly laid down the law on these aspects.

23. The learned Counsel finally argued that the first accused is a first offender and his antecedents are good and this is a fit case for application of Probation of Offenders Act. Though there is no bar in applying the Probation of Offenders Act, the court should be slow in applying the provisions of the Probation Act to economic and anti-social crimes. We are therefore of the view that there is no sufficient justification to invoke the provisions of the Probation of Offenders Act.

24. Criminal Appeal fails and is dismissed.