IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

CRL.A.No. 115 of 2005 ( )

AGAINST THE JUDGMENT IN SC 352/2003 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC,FAST TRACK-I, PATHANAMTHITTA DATED 15-01-2005 (CP 73/2002 of J.M.F.C., ADOOR)

APPELLANT(S)/1ST ACCUSED:

MATHAI, S/O.MARKOSE,
CHELLAKOTTU VEEDU, ARUKALICKAL PADINJARU MURI
ENADIMANGALAM VILLAGE, ADOOR TALUK.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.PRASUN.S

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

R1 BY ADV. SRI. GITHESH.R., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-05-2015, ALONG WITH CRA. 212/2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

C.R.

P.D. RAJAN, J.

Crl.Appeal Nos.115/2005 & 212/2005

Dated this the 25th day of May, 2015

JUDGMENT

These appeals are preferred against the conviction and sentence in S.C.No.352/2003 of Additional District and Sessions Judge (Adhoc), Fast Track-I, Pathanamthitta for offence punishable u/s.55(a) and (g) of Abkari Act. The appellants are accused 1 to 3 in the above case and they were sentenced to undergo rigorous imprisonment for a period of 4 years and to pay a fine of ₹1 lakh in default, simple imprisonment for two years each for the offence punishable u/s.55(a) of the Abkari Act, and to undergo rigorous imprisonment for two years and to pay fine of ₹1 lakh, in default, simple imprisonment for two years each for

the offence punishable u/s.55(g) of the Abkari Act.

2. The facts necessary for the indictment were that on 13.8.1999 at 1 p.m., when the Excise Inspector and Party of Adoor Excise Range Office were on patrol duty, they got reliable information that the appellants were manufacturing illicit arrack in Chellakottu Veedu, House No.XI/454 of Ezhamkulam Panchayath. On the basis of that information, they arrived at the place of occurrence and detected the offence. After completing investigation, they laid charge before Judicial First Class Magistrate Court, Adoor, from where it was committed to Sessions Court, Pathanamthitta for trial.

3. To prove the offence, the prosecution examined PWs 1 to 5 and admitted Exts.P1 to P10 in evidence and marked Mos 1 to 4 series as material objects. The incriminating circumstances brought out in evidence were

denied by the accused while questioning u/s.313 Cr.P.C. Appellants were heard u/s.232 Cr.P.C. DW1 and DW2 were examined in support of their defence and Ext.D1 was marked while cross examination of PW1. The trial Court, after analysing the oral and documentary evidence, convicted the accused.

4. The learned counsel appearing for the appellants contended that the search and seizure were conducted by the Excise Inspector, violating the benevolent provisions of Code of Criminal Procedure. Two respectable independent witnesses of the locality had not participated in the search. Their presence is necessary, because the ownership and possession of the searched house is vested in another person. The offence was detected in a place where large number of people reside. In such a situation, presence of independent witnesses is

necessary to prove search and seizure. There is no evidence to show that the house was in possession of the first accused (appellant in Crl.Appeal No.115/2005). Actually, the house was in possession of one Markose, who was not arrayed as an accused in this case. There was no independent evidence to prove search and seizure.

5. While dealing with search and seizure, it is clear that PW5 conducted search on 13.8.1999, at 1 p.m., on the basis of reliable information, while conducting patrol duty. His evidence shows that he conducted an urgent search in Chellakottu Veedu, house No.XI/454 of Ezhamkulam Panchayath with the Excise party, at that time 2nd and 3rd appellants were found distilling arrack in the kitchen and they seized 15 litre of boiling wash and 500ml of illicit arrack. The house was in the possession of the first accused for which they prepared Ext.P1 mahazar. After

seizure of the arrack and wash, he registered a crime and occurrence report. Ext.P8 is the occurrence report. Ext.P9 is the property list and Ext.P6 is the search list. Appellants were arrested and Exts.P7, P7(a) and P7(b) are the arrest memos prepared in this case. They were produced before Court as per Ext.P10 remand application. PW1, who was the Assistant Excise Inspector, accompanying the Excise Inspector throughout the search and seizure, supported the evidence of PW5. Analysing the oral evidence of PW1 and PW5, it is found that after recording the reasons and ground of belief, they seized arrack and wash from house No.XI/454 of Ezhamkulam Panchayat, without obtaining a warrant from Magistrate.

6. In urgent cases, it may not be possible for the officer to obtain warrant from a Magistrate or Excise Commissioner for conducting a search. Normally, if an

Abkari officer decides to search a place u/s.31, he will record his reasons in writing. Houses must not be searched, unless there is a definite reason to believe that certain contraband articles kept in it, to which an offence is known or alleged to have committed, will be found there. The wordings of the clause contemplate that the officer himself has to be convinced with the information and it is necessary that he should record his reasons in writing and forward the same to the Magistrate, which explains that it will be a check upon irresponsible searches, since S.36 directs that all searches under this Act shall be made according to Code of Criminal Procedure. In a Criminal case, the question often arises whether the Excise and Police under the Act have acted legally in exercise of its powers or discharge of its duties. The law prescribes certain important formalities to be complied with, when a

police or excise officer goes to make a search, without a search warrant issued by any Magistrate. Failure to record the reasons never vitiates the search, but that violation of the provision is a serious matter. The irregularity in search and seizure does not make the evidence in admissible. This principle was held in **Pooran Mal** v. **Director of Inspection (investigation) of Income Tax, New Delhi and others** [AIR 1974 SC 348] and **Prathap Singh and another** v. **Director of Enforcement Foreign Exchange Regulation Act and others** [AIR 1985 SC 989]. In this case, PW5 prepared Ext.P5 search memorandum and forwarded it to the Court before conducting search. Therefore, substantial procedural compliance has been done in this case.

7. The learned Public Prosecutor contended that in Ext.P6 search list, the 1st accused admitted his signature,

which is sufficient to prove the alleged seizure of the articles. No enemity was alleged against the Excise officials and they had detected the offence, as a part of their official duty and therefore, there is no reason to doubt the search and seizure.

8. In this background, the second question is whether the search and seizure and the articles seized have been substantiated by any independent evidence. PW1 and PW5 are the Excise Officers. PW4 is an independent occurrence witness, who was present at the time of conducting search, deposed that on 13.8.199 at 1 p.m., he did not see the search and seizure conducted by PW5 in the house of A1. He denied the signature in Ext.P1 and Ext.P6 search list. This witness was declared as hostile by the trial Court. According to PW1 and PW5, they participated in the search and they put their signature in Ext.P1 mahazar. The

mandatory direction in Cr.P.C was that before making search, the officer or other person shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality, if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. The first and foremost purpose of making seizure mahazar and search list during the course of search and seizure is to make a record of things in the presence of witness, which are seen and heard by them. The purpose is to convey to the Excise officer about the thing seen and heard by them. Second purpose is that when the witness enter in the witness box in the court at the time of trial, the mahazar should serve as an "aide memoire" which they had seen and heard. It is

true that independent witnesses were not available in this case which is clear from the evidence of PW4. Independence is insisted in order to ensure fairness in a search. If the witness admits his signature in Ext.P1, that itself is a strong ground to believe that he had participated in the search and subsequently turned hostile. Where no attempt was made by the searching officer to obtain respectable witnesses of the locality for search, it would not be a search in the manner provided by law. Therefore I am of the opinion that prosecution failed to follow the mandatory provisions of S.36 of the Abkari Act and 100(4) of the Cr.P.C.

9. The person in possession of materials for the manufacture of liquor other than toddy or other articles or materials mentioned creates a legal fiction under S.64 and presumes that he has committed the

offence, if he fails to account the possession satisfactorily. Possession is a mental state and Section 64 of the Act gives statutory recognition to that culpable mental state. Appellants disputed the possession and ownership of the house. To prove the possession and ownership of the house, prosecution examined the Secretary of Ezhamkulam Grama Panchayath as PW2. His evidence shows that as per the request of the Excise officials, he verified the Panchayath assessment register and issued Ext.P2 ownership certificate. According to Ext.P2, the house No. 454 in ward No.XI is owned by Markose Chellakottu veedu, Arukalickal Padinjaru Muri of Enadimangalam Village and he is not an accused in this case. Instead of that, his son, 1st accused (appellant in Crl.A.No.115/2005) was arrayed as an accused. No evidence has been produced by the prosecution to prove

that the house is in the possession of the 1st accused. When there is no evidence that the 1st accused was the owner and in possession of the house, the legal fiction created u/s.64 of the Act will go and the burden is upon the prosecution to prove the possession and ownership. The evidence of the defence witness DW1 shows that the second and third accused were taken away by the Excise Party in the year 1999. DW1 stated that 1st accused was taken away from a soap factory by the Excise Party where 40 people are working. There was a trade union dispute and due to this enmity, a false case had been foisted against him. Even though such a defence contention was taken, no documentary evidence has been produced to prove the labour dispute. In the absence of such evidence, I cannot accept that defence version.

10. In this context, I may refer the decision of

the Apex Court in **Ghuran Yadav** v. **State of Bihar** [AIR 1971 SC 1641], in which accused claimed benefit of doubt on the ground of lack of legal evidence about ownership of the house. In **Ghuran Yadav 's case (supra)** it was held as follows:

> "4.On going through the record and examining the evidence which we have just discussed we are clear that there is no legal evidence on the record on which we can sustain the conclusions of the courts below that it was the appellant's house which was searched.
> 5. Normally this Court, of course, does not examine for appraisal under Art.136 of the Constitution the evidence on questions of fact decided by the courts below. But when there are reasons to think that the conclusions may be based on no evidence, then this Court not only entitled but it has an obligation in the larger interests of justice to examine the evidence to see if there is legal evidence on which those conclusions can be sustained. In this case, we find that there is no legal evidence on which the courts below could base their conclusions. The appeal accordingly succeeds and allowing the same, we acquit the appellant.

Therefore, in the absence of any evidence on record to show that the appellant in Crl. Appeal No.115/05 is the owner of the house or is in possession of the house, I am of

the opinion that there is no legal evidence on record to show that it was his house, which was searched. The trial Court failed to appreciate that legal position, while convicting the appellants, which needs interference. Therefore, the conviction and sentence passed by the trial Court us/s.55(a) & (g) of the Abkari Act are set aside. The appellants are set at liberty and they are acquitted.

Crl.Appeals are allowed.

P.D. RAJAN, JUDGE.

acd