

(2015) 02 KL CK 0128
In the High Court Of Kerala
Case No : Criminal Appeal No. 655 of 2014

Janardhanan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Arms Act, 1959 — Section 25(a)
Customs Act, 1962 — Section 108

Citation : (2015) 2 ILR Ker 272 : (2015) 2 KHC 167 : (2015) 2 KLJ 71 : (2015) 1 KLT 999

Hon'ble Judges : K. Abraham Mathew, J.

Bench : Single Bench

Advocate : Asha Babu, for the Appellant; Bindu Gopinath, Public Prosecutor, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Abraham Mathew, J.—The second accused in Sessions Case No. 977/2012 on the file of the Additional Sessions Judge-II, Kasaragod who has been convicted of the offence under Section 8 of the Abkari Act and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1 lakh with a default clause is the appellant. The prosecution case is that he had in his possession 3194 packets each containing 100 ml. of arrack which were found concealed in a secret chamber in his house. Heard Smt. Asha Babu learned counsel for the appellant and the learned Public Prosecutor.

2. On 21.12.2007 PW 3, Excise Officer attached to Kumbala Excise Range Office, was on patrol duty when he got the information that arrack was kept in the house of the appellant. PW 3 prepared a search memo and thereafter, he along with PW 1 S.I. of Police went to the house of the appellant, which was found locked. They broke open the front door and searched the rooms. In the room in the south-west they found a secret chamber on the floor which had been covered with a "kadappa" stone. There were seven plastic bags in the chamber. Six bags

contained 500 packets and the last one 194 packets. Three packets were opened. The contents was found to be arrack, the total quantity of which was 319.4 liters. There were Kannada writings on the packets. The contents of the three packets were mixed up and 290 ml. of arrack was taken as sample in a 375 ml. capacity bottle; it was sealed at the place of occurrence. Ext. P2 is the search list prepared by PW 3 and signed by PW 2 and PW 4. This, in brief, is the evidence given by PW 1 and PW 3. There are no contradictions in the evidence of PW 1 S.I. of Police and PW 3 Excise Inspector. There is no reason to disbelieve their evidence.

3. The seized articles were produced before the Assistant Excise Commissioner. He destroyed it complying with the directions in S. 53A Abkari Act. Ext. P8 is the inventory prepared for the Articles and Ext. P9 are their photos.

4. PW 2 is an attesting witness in Ext. P1 mahazar and Ext. P2 search list. As the learned counsel has submitted that once any benefit is obtained by playing fraud, the beneficiary cannot stake any claim to equities, since fraud vitiates the most solemn of the acts of whatever nature. Thus, the learned counsel has urged this Court to set aside Exhibit P2 order of the learned Tribunal and restore the findings of the third respondent as well as those of the Council of the respondent Corporation.

5. As could be seen, the solitary issue that is to be determined is whether consent letter of the landlord is a pre-condition for renewal of the license. In the present facts and circumstances, the additional issue that is to be determined is whether alleged production of a forged consent letter should result in cancellation of the license renewed in favour of the first respondent.

6. To appreciate the issue, it is essential to examine Section 492 of the Act, which, to the extent relevant, is as follows:

492. General provisions regarding licenses and permissions.--

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(3) Where any person intending to obtain a license or permission for the first time and where the applicant is a person other than the owner of the premises in question, he shall, along with the application produce the written consent of the owner of the premises and the period of the license shall not exceed the period, if any, specified in the consent.

(4) Where the applicant seeking renewal of a license or permission in respect of the trade or business licensed in the premises mentioned in sub-section (3) is a person different from the original licensee or not the legal heir of the original licensee the consent of the owner shall be required.

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(9) Subject to the provisions in this Chapter regarding buildings and private markets and subject to such sanction as may be required for the refusal of a

license or permission, any license or permission granted under this Court or any rule or bye-law made thereunder, may, at any time, be suspended or revoked by the Secretary if any of its restrictions, limitations or conditions is evaded or infringed by the grantee, or if the grantee is convicted of a breach of any of the provisions of this Act or of any rule, bye-law or regulation made thereunder in any matter to which such license or permission relates, or if the grantee has obtained the same by misrepresentation or fraud."

7. Indeed, a perusal of the above provision makes it manifestly clear that at the time of obtaining license afresh, in terms of sub-section (3) thereof, consent of the landlord is quite essential. If we examine sub-section (4) thereof, it specifies that at the time of renewal, if the person seeking renewal is different from the original licensee or is not the legal heir of the original licensee, only under those circumstances is the requirement of obtaining the consent letter from the landlord essential.

8. It is to be observed that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from.

9. Possession is a question of fact. The concept of possession has been considered by the Apex Court in *Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others*, :

"13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of "possession". Much of this difficulty and confusion is (as pointed out in *Salmond's Jurisprudences*, 12th Edition, 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control: (See Dias and Hughes, *ibid*).

14. According to Pollock and Wright "when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing".

15. While recognizing that "possession" is not a purely legal concept but also a matter of fact; *Salmond* (12th Edition, page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it".

16. In *Gunwantlal* (*ibid*), this Court while noting that the concept of possession is

not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognized that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed: "In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

10. Even where members of the family of an accused reside with him in the house from which a contraband article is seized there may be circumstances from which the court can reach a conclusion that the article was in his conscious possession. It is unreasonable to say that invariably in all cases in which a seizure is made from a house in which several persons reside one of them cannot be held to be in conscious possession of it. In Assistant Collector of C. Ex. Vs. K.I. Pavunni, a wooden box containing gold biscuits kept buried in the courtyard of the house of the accused was discovered by customs officers. It was smuggled gold. The accused was the owner in possession of the premises. The spot where gold was found buried was only 2 ft. from the wall of the prayer room in the house of the accused. There was a window near the spot. The court acted upon these facts to hold that the contraband was in the conscious possession of the accused. The learned Judge has made the following observation: "In some cases, even the very fact of possession of the place of concealment would help the court in drawing inference regarding the mental state of the person in possession of that place, if situations in those cases would justify such inference".

11. The conviction was confirmed by the Supreme Court in K.I. Pavunni Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, . It is true that in that case a statement given under S. 108 of the Customs Act also was accepted as valid. The learned counsel for the appellant very vehemently argued that since the appellant was in judicial custody at the time of seizure by no stretch of imagination it can be held that he was in conscious possession of the articles. Absence of an accused at the place of occurrence at which the seizure was made is no reason to hold that he was not in conscious possession of the contraband article. He may leave the place after its concealment or he may happen to be in custody of competent authorities in connection with some other incident as it happened in this case. His absence at the time of seizure does not warrant a conclusion that he was not in possession of it. But where there is reason to believe that concealment took place during his absence the conclusion can be different. Once relationship between a person and a thing is established his intention to possess it is a matter for inference. It depends upon the facts and circumstances of each case.

12. In the case on hand the contraband articles were found concealed in a secret chamber made on the floor of the house. It was a permanent construction. The chamber had been covered with a "kadappa" stone. Only the owner could have made the construction. I have already entered a finding that the house from which the articles were seized was in the ownership and possession of the appellant. The irresistible conclusion is that he alone constructed the secret chamber. The purpose is crystal clear. I have no doubt that he was in possession of the seized articles. The learned Sessions Judge rightly convicted him of the offence under Section 8 of the Abkari Act. No interference is called for. The appellant has been sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1 lakh and in default of payment of fine to undergo rigorous imprisonment for a further period of six months. It is not in dispute that the appellant was involved in other abkari cases also. He was in judicial custody when the seizure was made in this case. Having regard to this fact and the fact that the quantity seized is huge and it was brought from Karnataka by no stretch of imagination it can be said that the sentence is harsh.

In the result, this appeal is dismissed.