(2010) 06 KL CK 0006

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 18497 of 2009

New India Assurance Co. Ltd. APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 21-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 451, 457
Kerala Abkari Act, 1077 — Section 55, 67B, 67C(2), 67F

Citation : (2011) 1 ILR (Ker) 426 : (2011) 1 KLT 429

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : K.K.M. Sherif and A.A. Ziyad Rahman, for the Appellant; Nisha Bose, Government Pleader, for the Respondent

Judgement

K.T. Sankaran, J.—What is the nature and extent of the burden of proof on the owner of the vehicle in a proceeding u/s 67C(2) of the Kerala Abkari Act, is the question involved in this Writ Petition.

2. KL-01-AE-7269, a Hyundai Santro car belonged to Achan Kunju @ Francis. Between 1 A.M. and 5 A.M. on 9.1.2008, the car was stolen from the car porch of the house of Francis. The matter was reported to the police on 9.1.2008 itself. A crime was registered. The experts of the Finger Print Bureau inspected the premises. Message was sent by the police to other police stations. Investigation was vigorously conducted. The details of the recently released convicts for the offence of theft, were also taken into account. Investigation was taken in that line also. Finally, the police concluded that the offence was undetected. A report dated 19.7.2008 was filed by the Circle Inspector of Police before the Magistrate''s Court having jurisdiction.

3. On 13.6.2008 the Excise Preventive Officer, Excise Range Office, Pathanamthitta and party seized a Santro car bearing registration No. KL-23-3016 at Alakode Junction for illegally transporting 420 litres of spirit. The driver of the vehicle, Sujayraj, was arrested. Another person (Binu), who was in

the vehicle, ran away and he could not be arrested. An abkari case was registered as CR No. 43/2008 of the Excise Range Office, Pathanamthitta under Sections 55(a) and 67B of the Abkari Act.

4. During the course of investigation of the case, the particulars of registration of the vehicle were verified with the registering authority. It was revealed that KL-23-3016 is a Hero Honda Motor Bike and not the Santro Car which was seized. The correct registration number of the Santro Car was found to be KL-01-AE-7269. That car belonged to Achan Kunju @ Francis. Proceedings u/s 67B of the Abkari Act were initiated by the Assistant Commissioner of Excise. Notice was issued to Achan Kunju @ Francis, the owner of the vehicle. He appeared before the Assistant Excise Commissioner, who is the authorised officer, and filed reply to the show cause notice. In the reply, it was stated that the vehicle in question was stolen from his car porch on 9.1.2008. Though a crime was registered by the police, the offender could not be apprehended. The relevant records in relation to the registration of the crime were produced before the authorised officer. The owner of the vehicle also stated that he had received compensation from the Insurance Company and that he has no right over the vehicle. The authorised officer did not issue any notice to the Insurance Company. However, Exhibit P6 order dated 31.10.2008 was passed by the authorised officer confiscating the vehicle u/s 67B of the Abkari Act.

5. The New India Assurance Company Ltd. filed an appeal before the Addl. Commissioner of Excise, Thiruvananthapuram challenging the order passed by the authorised officer. The Insurance Company contended that the owner of the vehicle had availed comprehensive insurance package in respect of the vehicle. On reporting that the vehicle was stolen and after satisfying that the vehicle could not be traced out and also taking into account all the relevant facts, the claim of the owner of the vehicle was settled for a sum of Rs. 2,10,000/-. Accordingly, the registered owner of the vehicle (Francis) issued irrevocable power of attorney dated 5.9.2008 in favour of the Insurance Company. The registered owner also executed another document dated 5.9.2009 subrogating all his rights over the vehicle in favour of the Insurance Company.

6. The appellate authority, namely, the Addl. Commissioner of Excise, Thiruvananthapuram did not accept the contentions put forward by the Insurance Company against confiscation. The contentions put forward by the Insurance Company u/s 67C(2) of the Abkari Act were rejected as per Ext. P7 order, finding thus:

The next issue to be considered is whether the RC owner has proved to the satisfaction of the Authorized Officer that, provisions of Section 67C(2) is applicable in this case.

Moreover mere absence of knowledge and connivance on the part of the R.C. Owner is not sufficient to prevent the confiscation Under/Section 67C(2) of the Abkari Act. The argument that the Appellant had no knowledge or connivance and he is innocent, is not adequate, as onus lies on him to prove the conditions prescribed Under/Section 67C(2).

7. The Insurance Company filed a revision before the Commissioner of Excise, Thiruvananthapuram, which was dismissed as not maintainable as per Exhibit P8 order dated 8.5.2009. It was held that the power of revision of the Excise Commissioner u/s 67F is only suo moto power of revision and an aggrieved party has no right to file a revision. The orders passed by the authorities, confiscating the vehicle, are under challenge in this Writ Petition.

8. The finding rendered by the Commissioner of Excise that no revision lies appears to be correct and therefore, the challenge against Exhibit P8 order need not be considered in this Writ Petition. However, the correctness or otherwise of Exhibit P6 order passed by the authorised officer and Exhibit P7 order passed by the appellate authority requires to be looked into in this Writ Petition.

9. Section 67B of the Abkari Act provides for seizure and confiscation of contraband articles as well as vehicles, utensils, animal, cart, vessel or other conveyance used for carrying the contraband. Section 67C provides for the procedure to be followed before confiscation and the matters to be proved by the owner of a vehicle to avoid an order of confiscation. For the sake of convenience, Sections. 67B and 67C are extracted below:

Section 67B: Confiscation by Abkari Officers in certain cases: (1) Notwithstanding anything contained in this Act or in any other law for the time being in force, where any liquor, intoxicating drug, material, still, utensil, implement or apparatus or any receptacle, package or covering in which such liquor, intoxicating drug, material, still, utensil, implement or apparatus is found or any animal, cart, vessel, or other conveyance used in carrying the same is seized and detained under the provisions of this Act; the officer seizing and detaining such property shall, without any unreasonable delay, produce the same before an officer authorised by the Government in this behalf by notification in the Gazette, not being below the rank of an Assistant Excise Commissioner (hereinafter referred to as the authorised officer).

(2) Where an authorised officer seizes and detains any property specified in Sub-section (1) or where any such property is produced before an authorised officer under that Sub-section and he is satisfied that an offence under this Act has been committed in respect of or by means of that property and that such property is liable to confiscation under this Act, such authorised officer may, whether or not a prosecution is instituted for the commission of such offence, order confiscation of such property and where such property consists of any receptacle or package, the authorised officer may also order confiscation of all contents thereof.

(3) When making an order of confiscation under Sub-section (2), the authorised officer may also order that such of the properties to which the order of confiscation relates, which in his opinion cannot be preserved or are not fit for

human consumption, be destroyed.

Section 67C. Issue of show cause notice before confiscation u/s 67B: (1) No order confiscating any property shall be made u/s 67B unless the person from whom the same is seized-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation and

(c) is given a reasonable opportunity of being heard in the matter.

(2) Without prejudice to the provisions of Sub-section (1), no order confiscating any animal, cart, vessel or other conveyance shall be made u/s 67B if the owner of the animal, cart, vessel or other conveyance proves to the satisfaction of the authorised officer that it was used in carrying the liquor or intoxicating drug or the material, still, utensil, implement or apparatus or the receptacle, package or covering without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

10. There is no dispute that the vehicle was involved in an abkari offence. There is also no dispute that the vehicle was insured with the New India Assurance Company Ltd. by the owner of the vehicle. It is also not in dispute that the vehicle was stolen from the possession of the owner of the vehicle. It is also an admitted case that the factum of theft of the vehicle was reported to the police and the police could not trace out the vehicle and apprehend the offender. While the vehicle was out of the control of the registered owner, it was used for commission of the offence under the Abkari Act by two persons. There is no case for the authorities below that the two accused persons involved in the abkari case have any connection with the registered owner of the vehicle. The registered owner was not made an accused in the abkari offence, since evidently there was no case that the registered owner of the vehicle was involved in the abkari offence. Without knowing that the vehicle was seized by the Excise Officials in an abkari offence, the insurance claims were settled by the New India Assurance Company Ltd. with the registered owner of the vehicle and a sum of Rs. 2,10,000/- was paid to him. The registered owner of the vehicle had executed Ext. P5 irrevocable power of attorney and Exhibit P5(a) subrogation letter in favour of the Insurance Company. The Insurance Company has acquired the rights of the registered owner in respect of the vehicle. Therefore, the Insurance Company can challenge the order passed by the authorised officer confiscating the vehicle u/s 67B of the Act. The contention raised by the Respondents that the Insurance Company has no locus standi to challenge the order of confiscation, is therefore rejected.

11. The registered owner of the vehicle appeared before the authorised officer and proved that his vehicle was stolen about five months before the date of its seizure in an abkari offence. He had also produced all the relevant records in respect of the registration of the crime and the reports filed by the investigation officer before the Magistrate''s Court. The question is whether proof of these facts would constitute proof of the ingredients of sub-s.(2) of Section 67C of the Abkari Act. u/s 67C(2) of the Abkari Act, the owner has to prove to the satisfaction of the authorised officer that the vehicle was used in carrying the contraband without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the vehicle and that each of them had taken all reasonable and necessary precautions against such use of the vehicle. In the facts situation of the present case, there was no agent or person in charge of the vehicle. Therefore, the owner of the vehicle has to prove the ingredients of sub-s.(2) of Section 67C. What he has to prove is that the vehicle was used in carrying the contraband without his knowledge or connivance. In the practical sense, it is a negative fact. Still, it can be proved by the proof of positive facts. The positive facts proved by the owner are the following:

(i) The vehicle was stolen on 9.1.2008 from his lawful possession, (ii) The vehicle could not be traced out even after several months, (iii) The vehicle was seized by the Excise Officials only on 13.6.2008. (iv) The number of the vehicle was changed and another number was being exhibited. The number exhibited on the vehicle belongs to a motor bike, (v) Before the seizure of the vehicle, the police had reported before the Magistrate''s court that the offence was not detected.

12. It is to be noted that though the vehicle was seized on 13.6.2008, the police or the Excise Authorities were not aware till 19.7.2008 that the seized vehicle was the vehicle which belonged to Francis, because the registration number found on the vehicle was different. The registered owner of the car promptly reported the theft of the vehicle to the police. There was no case that the registered owner of the vehicle was in any manner involved in the transportation of spirit. In these circumstances, what else could be expected to be proved by the registered owner of the vehicle to avoid confiscation of the vehicle? It is true that the burden of proof is on the owner of the vehicle, but nobody can expect an impossible thing to be proved. Each case has to be decided by the confiscating authority on the facts and circumstances of the case. Only certain general principles could be laid down. Section 67C(2) mandates only proof of those facts which would enable the authorised officer to find that the vehicle was used for illegal purposes without the knowledge or consent or connivance or instructions or directions of the registered owner. In other words, if it is proved that the owner had no control or dominion over the vehicle and he was in the dark as to who actually possessed the vehicle at the relevant time, proof of those facts would be sufficient to attract the ingredients of sub-s.(2) of Section 67C of the Act. What is to be looked into is whether the vehicle was used for illegal purposes with the knowledge or connivance of the owner or his agent or the person in charge of the vehicle. Section 67(2) is not a provision intended to penalise an

innocent owner of the vehicle. The provision for confiscation is intended as a deterrent against the commission of abkari offence. A provision like Section 67C(2) is intended to deal with a possible false defence that the owner or his agent or the person in charge of the vehicle was not aware of the commission of the crime. The owner is compelled to prove the facts and the ingredients mentioned in sub-s.(2) of Section 67C to dispel any circumstance pointing out to his complicity in the offence directly or indirectly. If the owner or his agent or the person in charge of the vehicle is innocent and the vehicle was used by a stranger, who dispossessed the owner by committing a crime, the owner cannot be deprived of his right over the vehicle by compelling him to prove impossible things. That the owner of the vehicle was dispossessed of the vehicle by the commission of a crime and that the offenders were not apprehended and the vehicle was not traced out, are sufficient, prima facie, to show that the owner was not involved in the commission of the offence. Coupled with that, the absence of any allegation that the owner of the vehicle was involved in the abkari offence, is to be taken note of. The cumulative effect of proof of these facts is the proof of the ingredients of Section 67C(2).

13. In Vijayan v. Asst. Excise Commissioner, Cannanore 1980 KLT 45, it was held as follows:

The following propositions emerge from the above discussion: (i) to confiscate a conveyance u/s 67C of the Act, it is necessary that its owner, his agent or the person to whom it is entrusted by him should have a guilty mind (mens rea), though not to the extent of an intention on his part to commit the Abkari Offence of carrying contraband goods therein or to abet the same, at least to the extent of knowingly and willingly permitting its user for the carriage of such goods; (ii) the onus is on the owner to establish absence of any guilty mind and not on the department to prove its presence;(iii) the owner, his agent and the person in charge of the conveyance should also have taken all reasonable and necessary precautions against such use; (iv) here again, the burden of proof is upon the owner to prove that each of them had exercised reasonable and necessary precautions against such use; (v) there are no rules specifying the nature of the precautions to be taken by them, the only guideline in that behalf being that all reasonable and necessary precautions should be taken;(vi) Section 67B(2) is only permissive and not obligatory (this Sub-section uses only the word ''may'' and not ''shall'', even which word was construed by the Supreme Court in the above-mentioned case, as only permissive and not obligatory); (vii) it is a penal provision and should be construed in such a way that an innocent person is not visited with a penalty; and (viii) a very strict and rigid construction of the provision in Section 67B(2) may lead to absurdity and unconstitutionality. It is bearing in mind all these aspects that the question of ordering confiscation of a stage carriage from which contraband liquor was detected in a suit-case and in a packet, both admittedly belonging to a passenger travelling in it, is to be considered.

14. The learned Government Pleader submitted that the Insurance Company is not entitled to put forward the contentions which are available to the owner u/s 67(2) of the Act and that the Insurance Company is not an aggrieved party under Sections 67E to 67F. It is true that the proof of facts to constitute discharge of the burden of proof u/s 67C(2) is to be made by the owner. But the benefit of the same could enure to the transferee of the owner or the person who steps into the shoes of the owner or the person who derives some rights from the owner. The question is not whether the vehicle was transferred to some other person and that he became the person entitled to the benefit of the order for release of the vehicle. The question is whether the vehicle is liable to confiscation. If the vehicle is not liable to confiscation, the benefit of release of the vehicle could go to the owner or any rightful claimant. In the case on hand, the owner of the vehicle had relinquished all his rights in favour of the Insurance Company after receiving a sum of Rs. 2,10,000/- from the Company. Therefore, the person who is entitled to receive the vehicle is the Insurance Company. This question can be answered in another way. Suppose, there was no involvement of the vehicle in an abkari offence. The vehicle in question was stolen. After the police seizes the vehicle, naturally it would be produced before the criminal court concerned. The Insurance Company could approach the criminal court for the release of the vehicle u/s 451 or Section 457 of the Code of Criminal Procedure, as the case may be, since the Insurance Company had acquired rights over the vehicle in the meanwhile. If so, the same result would follow, if it is found that there is no ground for confiscation of the vehicle.

15. I am of the view that the orders passed by the authorised officer and the appellate authority confiscating the vehicle are illegal and contrary to the provisions of Sections. 67B and 67C of the Act. Exts. P6 and P7 orders are, therefore, set aside. The Respondents shall release the vehicle to the Petitioner, namely, the New India Assurance Company Ltd.

The Writ Petition is disposed of as above.

