

(2010) 03 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25609 of 2005 (W)

Pradeep T.B. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-03-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Abkari Act, 1077 — Section 55, 56, 58

Citation : (2010) 2 KLJ 413

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : C.C. Thomas, M.G. Karthikeyan and Nireesh Mathew, for the Appellant; I.B. Pramod, G.P., K.P. Satheesan and K.K. Gopinathan Nair, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—First petitioner is the licensee of toddy shop No. 25/2005-06 of Njarakkal Excise Range, T.S. No. 39/2005-06 of Anthikkad Excise Range, T.S. No. 26 in Cherpu Excise Range. Second petitioner is the licensee oftoddy shop Nos. 7, 8, 10, 17, 19, 31, 32, 39, 40, 42, 43, 45, 46, 49, 50 to 53 and 6/2005-06 of Kodungallur Excise Range. Third petitioner is the registered owner of tempo van KL-9/M-7364. Petitioners are accused 2 to 4 in C.R. 11/2005 of Chittur Excise Range registered under Ext.P4 crime and occurrence report. The case against the accused is that on 18.5.2005 at about 8 a.m, when the Circle Inspector of Excise Range intercepted Tempo Van KL-9/M-7364 it was found 3000 litres of toddy was being transported therein though under Ext. PI to P3 permits, petitioners were allowed to transport only 1005 litres of toddy. The driver of the pick up van was arrested and the toddy was seized and ease was registered u/s 58 of Abkari Act. This petition is filed under Article 226 of the Constitution of India to quash Ext. P4 to the extent it proceeds except u/s 56 of Abkari Act and to declare that petitioners 1 and 2 are liable to be prosecuted only for the offence u/s 56(b) of Abkari Act and to declare that they are entitled to conduct the toddy

shops on the basis of the respective licence. Case of the petitioners is that even if petitioners were transporting toddy in excess of the allowed quantity, it attracts only an offence u/s 56(b) of the Abkari Act, as it is only a violation of the conditions of the licence and not an offence u/s 58 of the Abkari Act.

2. A counter affidavit was filed by Assistant/Excise Commissioner, Palakkad on behalf of respondents 3 to 5 which discloses that the pick up van was intercepted and on such search, it was found that 1995 litres of toddy in excess of the permissible limit under the permits was being transported and therefore an offence u/s 58 of the Abkari Act is committed. It is contended that when under Ext. PI to P3, petitioners are permitted to transport only 1005 litres of toddy and 1995 litres of excess toddy was being transported, it attracts-not only an offence u/s 56(b) but an offence u/s 58 of the Act also and therefore the petition is to be dismissed.

3. Learned senior counsel appearing for the petitioners and learned Public Prosecutor were heard.

4. Learned senior counsel relying on the decision of this Court in Crl.M.C. 322/2010 dated 23.2.2010 where identical aspects were considered, though not on the applicability of Section 58 but Section 55(a) of Abkari Act, and relying on the decisions of this Court in Surendran Vs. Excise Inspector, and Balan v. State of Kerala 2002(3) KLT 161 submitted that petitioners could only be prosecuted for the offence u/s 56(b) and not u/s 58 of the Abkari Act.

5. Learned Public Prosecutor argued that petitioners were permitted to transport "only 1005 litres of toddy and they were found transporting 3000 litres of toddy and the said transport of excess quantity of toddy was without lawful authority and-therefore Section 58 is attracted. It is also argued that Section 56(b) would apply only if there is no other provisions in the Act applies and when Section 58 applies, petitioners are not entitled to get the said offence quashed on the ground that Section 56(b) alone is attracted,

6. It is the prosecution case that petitioners were found transporting in a pick up van 3000 litres of toddy, when under Exts. P1 to P3 licenses were permitted to transport only 1005 litres of toddy. The case is that the transportation" of 1995 litres of toddy was without a licence and hence unauthorised-The question is whether the said transport would attract an offence u/s 58 or Section 56(b) of the Abkari Act.

7. Section 58 of the Abkari Act provides the punishment for possession of illicit liquor as the headnote shows. Under the section whoever-, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing that-duty, tax or rental payable under the Act have not been paid thereof, without lawful authority, shall be punishable with imprisonment provided therein. Therefore to attract an offence u/s 58, petitioners should be in possession of the toddy knowing that it was unlawfully imported, transported or manufactured or

knowing that duty payable was not paid. Section 58 is not attracted when the toddy was being/transported under licences, though the quantity so transported is an excess of the limit under the licence. Section 56 provides the punishment for misconduct by a licensee. Under Clause (b) whoever, being the holder of a licence or permit granted under the Act or being in the employee of such holder and acting on his behalf, wilfully does or omits to do anything in breach of any of the conditions of his licence or permit not otherwise provided for in this Act, is punishable for the sentence provided therein. Therefore when petitioners 1 and 2 are holding license authorising them to transport toddy, if they are found transporting toddy in excess of the permissible limit under the licence, it would attract only an offence u/s 56(b), as they were transporting excess quantity of toddy, in breach of the conditions of the licence or permit. It cannot be said that when they are transporting toddy under the licence, and along with the permissible limit, excess quantity of toddy was also being transported, they are possessing that toddy with the knowledge that the said toddy was unlawfully imported or transported or manufactured or knowing that duty payable was not paid.

8. The aspect of possession as provided u/s 58 was considered by the Division Bench of this Court in the light of the specific provision for punishment, of illegal import or export or transport of liquor; u/s 55 of the Abkari Act in Surendran's case (supra). The Division Bench considered this question, in the light of conflicting decision of the single Judges in Rajeevan v. Excise Inspector 1995 (1) KLT 38 and Purushan v. State of Kerala 2002 (2) KLT 661 on the one hand and Meenakshi v. Excise Circle Inspector 1995 (1) KLT 738 on the other. Their Lordships held:

9. If the view as taken in Meenakshi's case is accepted the result would be that when a person is in possession of liquor with the knowledge that it has been unlawfully imported,, transported, manufactured or that duty etc, has not been paid, the sentence would be less while in a case where there is mere possession without any knowledge of any other illegality the sentence would be higher. We cannot attribute such an intention to the Legislature. Innocent possession cannot be a more serious offence than possession with the knowledge of illegal import etc. Thus, it appears that the case shall fall within:he ambit of Section 55(a) only when a person is found to be in possession of liquor in the course of import; export, transport or transit of the goods. In case the possession is merely with the knowledge of the goods having been illegally imported or manufactured, the case would fall within the mischief of Section 58.

10. The matter can be looked at from another angle also. Keeping in view the slight similarity in language it is permissible to refer to the heading of the provision. Section 55 is labelled as for illegal imports etc". Thus, the Legislature is providing for penalty in a case where a person illegally imports alcohol. Section 58 makes the "possession of illicit liquor" culpable. Resultantly, it is clear that when a person is in possession of liquor while illegally importing it, the case

would be covered u/s 55(a). In a case where the possession is of illicit liquor the case would fall within Section 58. In other words, we hold that the view as expressed in *Rajeevan v. Excise Inspector* and *Purushan v. State of Kerala* is correct.

9. When the only case of the prosecution is that 1995 litres of toddy in excess of 1005 litres of toddy was transported in the pick up van, when it was intercepted and seized by the excise officials, and it is the admitted case that petitioners 1 and 2 are authorised to transport 1005 litres of toddy, it is only a case of transporting excess quantity of toddy than the permissible limit under the licence. If so the offence attracted is only u/s 56(b). Hence it is to be declared that petitioners can be prosecuted only for the offence u/s 56(b) and not u/s 58 of the Abkari Act. As by order dated 31.8.2005 an order of stay of investigation was granted which was extended from time to time. The third respondent is entitled to proceed with the investigation of Ext. P4 crime and occurrence report for the offence u/s 56(b) of the Abkari Act.

10. Learned senior counsel then submitted that by Ordinance 26 of 2009 Section 67A. is inserted in the Act, providing power to-the/Commissioner of Excise or Deputy Commissioner of Excise of the District concerned or any Abkari Officer specially empowered by the Government, by notification in the Gazette to accept, from any person reasonably suspected of having committed any of the offences specified in column (1), a sum of money as specified in column (3) of the Table by way of composition of the offence which may have "been committed and the table shows that misconduct by licensee corresponding to Section 56 is compoundable by payment of Rs. 25/000/- and Sub-section (2) of Section 67A provides that even when the case involving an offence is pending before a court, such offence can be compounded with the permission of that court and therefore petitioners may be permitted to compound the offence in view of Ordinance 26 of 2009 inserting Section 67A.

Petition is allowed. It is declared that petitioners can be prosecuted only for the offence u/s 56(b) of Abkari Act. Investigation can be proceeded for the offence u/s 56(b) of the Abkari Act. It is also made clear that the offence is made compoundable u/s 67A of Abkari Act. Petitioner is at liberty to approach the concerned officer to compound the offence.