

(2003) 08 KL CK 0048

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 23 of 2003 (S)

V. Bindu

APPELLANT

Vs

Assistant Police Commissioner and Others

RESPONDENT

Date of Decision : 01-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 41
Penal Code, 1860 (IPC) — Section 120B, 342, 353

Citation : (2003) 2 KLJ 1010 : (2003) 3 KLT 583

Hon'ble Judges : S. Sankarasubban, J; K.K. Denesan, J

Bench : Division Bench

Advocate : T.G. Rajendran and A.K. Alex, for the Appellant; P.V. Madhavan Nambiar and T.K. Kunjabdulla (GP), for the Respondent

Final Decision : Dismissed

Judgement

K.K. Denesan, J.—Petitioner in W.P.(Crl.) No. 23/03 is the wife of one Sunil Kumar @ China Sunil, who is accused No. 3 in Crime No. 116 of 2003 of Nemam Police Station, Petitioner in W.P.(Crl.) No. 29/03 is the wife of one Babu who is accused No. 4 in the above crime case. The main offence alleged against the accused is u/s 55(a) of the Kerala Abkari Act (hereinafter referred to as the "Act"). According to the petitioners accused Nos. 3 and 4 were arrested from their houses on 29.05.2003 by the police and were taken to the Office of the 1st respondent who is authorised to detect and investigate offences punishable under the Act.

2. The prosecution case, based on materials now available on record and the investigation so far conducted appears to be the following: F.I.R. in Crime No. 116 of 2003 of Nemam Police Station was registered on 09.04.2003 in respect of an offence alleged to have been detected on 8.4.2003 at about 8.15 p.m. The place of occurrence is a room on the back side of building No. T.C. 51/136 and adjacent premises within the limits of Nemam Police Station. In a search

conducted by the police party as directed by the Commissioner of Police, Thiruvananthapuram City at about 8.45 p.m., 17010 litres of rectified spirit contained in plastic cans were seized from the said room and two motor cars found parked in that compound. Police could not arrest anybody during the raid and search. What is stated in Ext. P1 FIR is that the police party found two persons running away from the nearby place. The principal accused in the said crime is alleged to be one Sudhi. Against the column for filling up the details of the accused in Ext. P1 what is written is "Sudhi and others" (I). It is seen from the writ petition that the aforesaid Sudhi appeared before the Judicial First Class Magistrate-I, Neyyattinkara on 22.4.2003 and he was remanded to judicial custody. After registering Crime No. 116 of 2003. the 1st respondent who is in charge of the investigation of the case submitted a report before the Judicial First Class Magistrate-1, Neyyattinkara, showing the names and address of two persons including the aforesaid Sudhi against whom investigation had already commenced. Ext. P3 report says that further investigation revealed that the detainees, namely Sunil Kumar @ China Sunil and Babu@ Babuji were also involved in the commission of the crime and therefore investigation is continued against them also arraying them as accused Nos. 3 and 4. Ext. P3 was submitted before the Magistrate Court on 30.05.2003. On the same day the 1st respondent submitted Ext. P4 remand report before the court of the Judicial Magistrate of First Class-1, Neyyattinkara praying for remanding accused Nos. 3 and 4 to judicial custody for a period of 15 days in order to enable the police to conduct investigation into the crime.

3. Ext. P4 remand report says, among other things, that while the 1st respondent along with other members of the police party, after reaching the place called Chenkalchoola in their own Maruthi cars for conducting investigation into Crime No. 116 of 2003, were taking photographs on 29.05.2003 at about 12.40 p.m. accused Nos. 3 and 4 obstructed them by putting the cars belonging to the said accused in such a way as to create a block and thereafter questioned the police party as to why they were taking photographs using video cameras. The 1st respondent who was in mufti, as he was engaged in secretly collecting evidence in connection with the investigation of abkari offences, told accused Nos. 3 and 4 and their men that he is a police officer and lie was taking photographs in connection with the discharge of his duties and that the obstruction should be immediately removed. But the said accused did not pay any heed to that. Instead they insisted that the 1st respondent and others with him, will not be allowed to go unless the video cassette was handed over to the accused. The accused attempted to forcibly snatch away the key of the car in which the 1st respondent had reached the place of occurrence. Under the circumstances the 1st respondent and the police party accompanying him took accused Nos. 3 and 4 into custody. After issuing necessary instructions to the Circle Inspector of Police, who was accompanying the 1st respondent, he returned to the police station along with the accused. Thereafter a search was conducted in the house of accused Nos. 3 and 4 on 29.5.2003 and 30.5.2003. As

requested by the accused persons information regarding arrest was passed on to Shri. Ajith Kumar, the advocate of the accused. Ext. P4 remand report shows that accused No. 3 is a person against whom prosecution and investigation is pending in respect of other incidents involving offence punishable under the Act. According to the 1st respondent, investigation is going on with regard to the involvement of the accused in connection with illicit transport and distribution of liquor as also alleged conspiracy hatched out for that purpose. The 1st accused who was remanded to judicial custody was handed over to the 1st respondent for interrogation in police custody. Ext. P4 says that certain valuable information could be collected from the 1st accused during such interrogation.

4. As disclosed in the writ petition itself petitioner in W.P. 23 of 2003 approached this Court by filing W.P.(Crl.) No. 20 of 2003 seeking a writ of habeas corpus which was dismissed by a Division Bench of this Court observing that the accused has got other effective remedies. It is thereafter that W.P.(Crl.) No. 23 of 2003 was filed for the following reliefs:

(a) issue a writ of Habeas Corpus or any other appropriate writ, order or direction, commanding the 3rd respondent to produce the body of the detainee, husband of the petitioner by name Sunil Kumar alias China Sunil before this Hon"ble Court, and set him at liberty.

(b) declare that the detention of the detainee is illegal and violative of the fundamental rights.

(c) declare that the 1st respondent or any officer or the Police Department or Excise Department has no powers to investigate Crime 116/03 of Nemom Police Station including the detainee as the 3rd accused, since possession of Rectified Spirit is not an offence.

(d) award and direct the government regarding suitable and monetary compensation as detainee was arrested and imprisoned with a mischievous and illegal act on the part of the respondents.

(e) issue a writ of certiorari or any other appropriate writ, order or direction, quashing Ext. P1 FIR and Ext. P3 report of 1st respondent to treat the detainee as Accused No. 3 in Cr. No. 116/03 of Nemom Police Station.

(f) grant such other reliefs as prayed for from time to time including cost of this proceedings.

5. The 1st respondent has filed a counter affidavit justifying the action taken by him and denying, among other, the allegation that the custody of the accused is illegal. The 3rd accused Sunil Kumar @ China Sunil was remanded to judicial custody by the Judicial Magistrate on 30.05.2003, as prayed for in Ext. P4 remand report. The 1st respondent who was directed by the Commissioner of Police, Thiruvananthapuram City on 11.4.2003, is conducting the investigation in Crime No. 116 of 2003 of Nemom Police Station under Sections 55(a) and 58 of the Act read with Section 120B of the IPC. The 1st respondent has stated in his

counter affidavit certain facts which came to his knowledge during the course of investigation including the interrogation of the 1st accused in police custody. We are not reproducing here all those statements as they are not very material in deciding the issues raised in these writ petitions.

6. According to accused Nos. 3 and 4, they objected the acts of the 1st respondent and other persons in taking photographs because they were not in their official uniform and their identity was not known. The version of the accused is that when people who assembled there raised protest, those who has come in Maruthi cars for taking video photographs escaped from that place. Though an attempt was made to chase them, it did not succeed as the Maruthi cars were driven in great speed. According to the petitioners, accused Nos. 3 and 4 were not arrested from the place of occurrence, but were arrested from their own houses. Any way, we do not think it necessary to examine the correctness of those disputed questions of facts in these writ petitions. They are disputes to be raised at a later stage of the criminal proceedings, if need be.

7. According to the petitioners, the accused were arrested by the police in connection with Crime No. 113 of 2003 and there was no arrest in connection with Crime No. 116 of 2003. The above statement on behalf of the accused is denied by the 1st respondent who in his counter affidavit would swear that he took accused Nos. 3 and 4 in connection with Crime No. 116 of 2003, though they were liable to be proceeded for committing offence u/s 342 and 353 of the Indian Penal Code also for having obstructed the 1st respondent from discharging his official duties and using criminal force. According to the 1st respondent, offence u/s 55(a) of the Act being the major offence which was already under his investigation, he arrested accused Nos. 3 and 4 in connection with that crime. Annexure R1(c) produced along with the counter affidavit is the copy of the arrest memo evidencing the arrest of accused No. 3 on 29.05.2003 at about 12.45 p.m. in connection with Crime No. 116 of 2003 of Nemom Police Station for offence u/s 55(a) of the Act. Ext. R1(c) shows that the arrest memo was signed by accused No. 3 as well as by the 1st respondent. It also shows that information about the arrest was passed on to Advocate Mr. Ajith Kumar as requested by the arrestee. Two witnesses whose names and address are shown therein have signed Ext. R1(c). Annexure R1(b) is the copy of the order passed by the Judicial Magistrate of the First Class-I, Neyyattinkara on 2.6.2003 in C.M.P. No. 4675 of 2003 (Crime No. 116 of 2003 of Nemom Police Station) allowing the application filed by the 1st respondent who is the petitioner in that C.M.P. for entrusting the custody of accused Nos. 3 and 4 for the purpose of investigation of the case. The said order shows that the aforesaid accused were arrested and produced before the Judicial Magistrate of the First Class-I on 30.05.2003 and the court remanded the accused to judicial custody. The 1st respondent has also produced Annexure R1(a) which is the copy of the report prepared by him on 29.05.2003. This report which is alleged to have been prepared on 29.05.2003 in connection with Crime No. 116 of 2003 contains, among other things, the following statements:

Again after narrating the other details of the incident that followed, Ext. R1(a) states:

8. One of the contentions strongly put forward by the learned counsel for the writ petitioner is that there was no arrest of Sunil Kumar in connection with Crime No. 116 of 2003 and therefore keeping him in custody either by the police or under the orders, of the learned Magistrate is unwarranted rendering the detention of Sunil Kumar illegal ab initio. Similar contention was taken by the petitioner in W.P. (Crl.) 29/03 also regarding the arrest of Babu @ Babuji. In our view, the materials available in this case and referred to in the preceding paragraphs will not justify the conclusion that accused No. 3 and 4 were not arrested by the police nor remanded by the Magistrate in connection with Crime No. 116 of 2003 of Nemom Police Station u/s 55(a) of the Act. We therefore hold that the arrest and detention of the detainee cannot be declared illegal on the above score. We are also of the view, in the light of the records produced along with the counter affidavit that no illegality was committed in the matter of arrest and detention of accused Nos. 3 and 4 in Crime No. 116/03.

9. The main ground taken in the writ petitions is that possession of rectified spirit is not an unlawful act and therefore Section 55(a) of the Act is not attracted to the facts of the case. It is submitted by the learned counsel for the petitioners that in the above view of the matter the detention of the two accused is illegal. Petitioners have prayed for quashing Ext. P1 FIR and Ext. P3 report. (These documents are referred to as marked in W.P.(Crl.) 23/03). According to the petitioners, the act of possessing rectified spirit, by itself will not attract Section 55(a) of the Act. Learned counsel for the petitioner in W.P.(Crl.) 23/03, relying on Section 13 of the Act read along with Ext. P6 notification issued by the Government contended that since no limit is prescribed in the said notification as regards the quantity of rectified spirit which a person is entitled to possess, possession of rectified spirit is not an offence. In this context Section 10 was also referred to. Evidently, Ext. P6 notification is one issued in exercise of the powers conferred by Sections 10 and 13 of the Act. As per the said notification possession of toddy, Indian made foreign liquor, beer, wine, foreign made foreign liquor and coco brandy upto a certain quantity mentioned therein are permitted and therefore such possession will not be an offence under the Act. Petitioners' contention is that rectified spirit is a liquor which is consciously omitted to be included in Ext. P6 and therefore possession of rectified spirit, whatever be the quantity, is not a prohibited act and therefore is not an offence punishable u/s 55(a) of the Act. It was further submitted that since the provisions of the Act do not impose prohibition either absolutely or conditionally the possession of rectified spirit, unlike "arrack" the possession, manufacture, storage, etc. of which is prohibited in absolute terms and made punishable u/s 8 of the Act, is not unlawful. It was submitted that rectified spirit as such is not a potable liquor and does not come within the definition of arrack. Ext. P6 notification was issued in supersession of the previous notification on the subject. Our attention was invited to the notification issued by the Government vide SRO No. 89/69 to show

that rectified spirit was included in that notification and that possession of rectified spirit upto 250 ml. was not unlawful or illegal. According to the learned counsel for the petitioner in the absence of a notification specifying the quantity, possession of liquor defined in Section 3(10) is lawful, unless prohibited as done in the case of arrack. As per Section 3(10), "liquor" includes spirits of wine, arrack, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol. Possession, manufacture, storage, etc. of arrack is totally prohibited by Section 8 of the Act. But as regards other kinds of liquor no such prohibition is there. But a limit is prescribed for possessing such kinds of liquor upto a certain quantity. Section 55(a) of the Act would be attracted only if liquor (other than arrack) in excess of that quantity is possessed. These are, in brief, the arguments advanced on behalf of the petitioners.

10. Countering the above submission, the learned Director General of Prosecution invited our attention to Kerala Rectified Spirit Rules 1972 (hereinafter referred to as the "Rules") framed and published by the Government in exercise of the power conferred u/s 29 of the Act. The said rules came into force with effect from 9.5.1972 on which date the same were published. As per Rule 2(i) of the said rules "rectified spirit" means plain undenatured alcohol of a strength not less than 50° over proof and includes absolute alcohol. Rule 3 of the said rules says that no person or institution other than a licensed or Government owned distillery shall possess rectified spirit in excess of the quantity prescribed by the Government by notification u/s 13 of the Act, except under and in accordance with the terms and conditions of a licence issued under these rules (Previous omitted). Rule 15 of the aforesaid rules insists that any person or institution desirous of possessing and selling duty paid rectified spirit shall take out a licence. Sub-rule(1) of Rule 15 is extracted below:

(1) Any person or institution desirous of possessing and using for a bonafide medicinal, scientific, industrial or such other purpose, or desirous of possessing and selling duty paid rectified spirit shall take out a licence in Form R.S. 1 on payment of an annual fee of Rs. 100 if the annual quantity does not exceed 10 litres, and Rs. 2000 in all other cases.

11. The accused has no case that they have taken licence for possessing rectified spirit as per Rule 15 of the Rules. It is clear that possession of rectified spirit without licence issued by the competent authority is an act in contravention of the Rules.

12. Now let us have a look at Section 55(a) of the Act. The said provision is extracted below:

55. For illegal import, etc:- Whoever in contravention of this Act or of any rule or order made under this Act.

(a) imports, exports, transports, transits or possesses liquor or any intoxicating drug; or

Thus, any person who imports, exports, transports, transits or possesses liquor or any intoxicating drug in contravention of the Act or of any rule or order made under the Act is guilty of the offence. Hence, even if possession of rectified spirit is not prohibited under the provisions of the Act, it would be sufficient for the purpose of Section 55(a), if such prohibition is found in the rules. We have already referred to Rule 15 of the Rules.

13. Hence the non-inclusion rectified spirit in Ext. P6 will not advance the case of the petitioners. We hold that possession of rectified spirit without licence attracts Section 55(a) of the Act. In this view of the matter, we decline the prayers made by the petitioners for quashing Exts. P1 and P3 in W.P.(CrI.) 23/2003 and Exts. P1 and P2 in W.P.(CrI.) 29/03.

14. It was contended by the counsel for the petitioners that the 1st respondent does not have the power to arrest the accused for violation of the provisions of the Act and even assuming that he is empowered to arrest the accused u/s 41 of the Code of Criminal Procedure, the production of the accused before the Judicial Magistrate with a request to remand them to judicial custody was unauthorised. According to the learned counsel, investigation into offences punishable under the Act can be done only by an "Abkari Officer" as defined in Section 3(ii) of the Act and not by a police Peekay Re-Rolling Mills (P) Ltd. v. secretary to Govt. of Kerala & Ors. (Jawahar Lal Gupta, C.J.) officer who is not an "Abkari Officer". It was also contended that investigation into the offences under the Act can be done only in accordance with the provisions of that Act and not in compliance with the general provisions relating to investigation contained in the Code of Criminal Procedure. In this connection learned counsel brought to our notice the provisions contained in Chapter VIII of the Act. The above arguments are addressed on the premise that certain actions of the 1st respondent in connection with Crime No. 116 of 2003 are not strictly in accordance with the provisions of the Act. Learned Director General of Prosecution submitted that as per Section 41A of the Act all offences under the Act are made cognizable. Moreover, respondent No. 1 is an Abkari Officer as per notification. Hence the contention that the police officer has no power to conduct investigation is not tenable. We think controversy centering these aspects need not be finally resolved in these writ petitions in view of the fact that investigation is only half way and these are matters to be agitated, if need be, before the court of the Judicial Magistrate of the First Class or the Court of Sessions as the case may be, and not before this Court under Article 226 of the Constitution. Petitioners are not entitled to the reliefs prayed for in the writ petitions. The result is that both the writ petitions are dismissed.