

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

WA.No. 794 of 2015 () IN WP(C).3511/2015

AGAINST THE JUDGMENT IN WP(C) 3511/2015 of HIGH COURT OF KERALA
DATED 16.02.2015

APPELLANTS/RESPONDENTS IN WPC:

1. THE EXCISE COMMISSIONER
COMMISSIONERATE OF EXCISE
THIRUVANANTHAPURAM-695033.
2. THE DEPUTY COMMISSIONER OF EXCISE
ALAPPUZHA.
3. THE EXCISE INSPECTOR
EXCISE RANGE OFFICE, KARTHIKAPPALLY
ALAPPUZHA DISTRICT.

BY SENIOR GOVERNMENT PLEADER SRI. C.S. MANILAL

RESPONDENT/PETITIONER IN WPC:

DEVIDASAN
S/O. RAMAKRISHNA PILLAI, PALLAMPIL KIZHAKETHIL HOUSE
EREZHA VADAKKUMURI, CHETTIKULANGARA
KANNAMANGALAM VILLAGE, MAVELIKKARA TALUK, PIN-690106.

BY ADVS. SRI. NIREESH MATHEW
SRI. M.G. KARTHIKEYAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 14-09-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

smv

CR

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

W.A. No.794 of 2015

Dated this the 14th day of September, 2015

JUDGMENT

Surendra Mohan,J.

The question that arises for consideration in this Writ Appeal is whether the obtaining of a Report of Chemical Analysis is a pre-condition for registering a crime under the Abkari Act and for suspension of an Abkari licence ?

2. The State is in appeal before us challenging the judgment dated 16.02.2015 of the learned Single Judge in W.P.(C) No.3511 of 2015. The respondent herein had filed the said writ petition challenging Ext.P3 order of the Excise Commissioner (1st appellant) suspending his licence and seeking the issue of directions permitting him to conduct the Toddy Shops in group No.VI of Karthikappally Excise Range despite Ext.P2 Crime and Occurrence Report and the registration of a crime, apart from other ancillary reliefs. The writ petition has been allowed by the learned Single Judge holding that

suspension of the respondent's licence was unsustainable for the reason that the same was issued without obtaining a Chemical Analysis Report.

3. The respondent was the licensee of the toddy shops in Group No.VI of Karthikappally Excise Range for the year 2015. Accordingly, the respondent was issued with necessary licences to conduct the toddy shops in Group No.VI. On 19.12.2014 at about 02.30 p.m., an Excise Party conducted a search of toddy shop No.30/14-15 of which the respondent was the licensee. At the time of the search, some persons were found to be standing on the south-western portion of the property in which the toddy shop was situate. The Excise Party proceeded to the said spot and seized 95.4 liters of spirit, 39.8 liters of sugar solution, 459.2 liters of spirit laced sugar solution, 996 liters of toddy etc. Three persons were arrested from the spot. A crime was registered as C.R.No.154/2014 of Karthikappally Excise Range. A copy of the Crime and Occurrence Report was produced along with the Writ Petition, marked as Ext.P2.

4. According to the respondent, he was not made an accused in Ext.P2 Crime and Occurrence Report. Later, by way

of an additional report, he was included as the 4th respondent in the case. It is the case of the respondent that, he was so arrayed as an accused in the said criminal case only for the reason that, he was the licensee of toddy shop No.30 of Group No.VI of Karthikappally Excise Range. It is the further case of the respondent that, no contraband was seized from the licensed premises, which is confined to the limits of the toddy shop alone. The seizure, according to him, was made from outside the licensed premises, though the actual spot from which the seizure was made is within the same compound in which the toddy shop was situate. The respondent also contended that there was no evidence or other materials to connect him to the offences. In other words, according to the respondent, his implication as an accused in the crime was without any bona fides whatsoever. It also does not have any legal backing. The persons arrested are strangers to the respondent. They are not employees of the toddy shop or any one connected with him.

5. In spite of the above, the 1st appellant by the issue of Ext.P3 proceedings, suspended the licences of the toddy shops in Group No.VI of Karthikappally Excise Range. The respondent

was also directed to show cause why his licence should not be cancelled. The respondent submitted Ext.P4 reply to the show cause notice. The Writ Petition was filed by the respondent at the said stage, contending that the entire proceedings were vitiated by the non-compliance of Rule 8(3) of the Kerala Abkari Shops Disposal Rules, 2002 (hereinafter referred to as “the Rules” for short). The respondent contended that a crime could be registered only after obtaining a report of Chemical Analysis in respect of the contraband that was allegedly seized. In the present case, at the time of issuing Ext.P3, since a Chemical Analysis Report had not been obtained, it was contended that the entire proceedings were vitiated by the non-compliance of a mandatory provision of law and was consequently liable to be set aside.

6. The contentions of the respondent were opposed by the appellants. The 3rd appellant filed a counter affidavit in answer to the averments made in the Writ Petition. Three documents were also produced in support of the contentions advanced. According to the appellants, the seizure made was of spirit which was a prohibited article, together with ingredients necessary for

the preparation of artificial toddy. It is also the case of the appellants that, the 3rd accused in the crime is a registered worker of the respondent who had given an extra judicial confession upon questioning that, he along with the other persons had indulged in mixing of the spirit with toddy as per the directions of the licensee. For the above reasons, it was contended that the involvement of the respondent was clearly established. It was also urged before the learned Single Judge that the Abkari Act conferred ample powers on the appellants to register a crime and investigate an Abkari offence. Rule 8(3) could not and should not control the scope and ambit of the other provisions of the Abkari Act, being a subordinate legislation. Though various decisions were also relied upon to support their contentions, according to the appellants, the learned Single Judge has by the judgment appealed against held that the report of Chemical Analysis of the contraband seized, was a pre-requisite for registering a crime. On the basis of the above conclusion, Ext.P3 has been quashed, to the extent it had suspended the licences of the toddy shops.

7. According to Sri.C.S.Manilal, the learned Senior

Government Pleader who appears for the appellants, pursuant to the inspection that was conducted by the Excise Party and the seizure that was effected, a crime was registered for offences under Sections 55(a), 55D, 58 and 67B of the Abkari Act, 1077 as C.R. No.54/2014 of Karthikappally Excise Range. According to the learned Senior Government Pleader, Section 34 of the Abkari Act confers power on the authority to register a crime and to arrest without warrant, any person found committing the offences punishable under the Abkari Act. Section 41A makes offences under the Abkari Act, cognizable and non-bailable. Therefore, the procedure prescribed by Section 154 of the Code of Criminal Procedure, 1973 is applicable entitling an officer of the Excise Department to register a crime and make an arrest upon obtaining information of commission of the crime. The said provisions being part of the parent enactment, the power conferred by the said provisions could not be restricted or controlled by a Rule made in exercise of the executive power of the State. The Rules have been made in exercise of the power conferred by Section 29 of the Act. The Rule making power is intended to be exercised for giving effect to the provisions of the

enactment. The said power cannot be used to restrict or set at naught, provisions of the substantive enactment. According to the dictum in the judgment appealed against, even registration of a crime is rendered impermissible without first obtaining a Chemical Analysis Report. The said situation, according to the learned Senior Government Pleader is an unsatisfactory state of the law. Therefore, it is contended that the interpretation placed on Rule 8(3) is unsustainable and liable to be set aside.

8. Per contra, Sri. M.G. Karthikeyan who appears for the respondent contends that, initially a licensee was also included within the scope of Section 55 of the Abkari Act. However, the licensee was removed from the purview of Section 55 with effect from 3.6.1997.

9. For the above reason, it is contended that offences committed by a licensee are treated separately and differently by the provisions of the Abkari Act and the Rules thereunder. This is for the reason that, a licensee is a person who is permitted to possess and deal in the type of liquor with respect to which the licence is granted. Therefore, prima facie he is entitled to be found in possession of liquor. For the above reason, care has

been taken to provide that, before initiating action against the said person, the article seized should be proved by chemical analysis to be contraband article. Detection relying purely on the sensory perceptions of the Excise Officials cannot be accepted as sufficient to visit a licensed person with the penal consequences prescribed by the Act. In other words, it is to safeguard the rights of the licensee that Rule 8(3) has been enacted. On the above ground it is contended that the learned Single Judge is perfectly justified in holding that Report of Analysis by a Chemical Laboratory was a sine qua non for the registration of a crime against the licensee. Therefore, according to the learned counsel for the respondent, the contentions of the appellants are only to be rejected.

10. Heard. The facts in this case are not in dispute. It is not in dispute that, the Excise Party had conducted an inspection of toddy shop No.30 of Group No.VI of Karthikappally Excise Range of which the respondent is the licensee. It is also not in dispute that, various contraband articles were seized by the Excise Party from a portion of the property in which the toddy shop is situate. The contention of the respondent is that he has

no connection with the said property, which is outside his licensed premises. He is responsible for only what happens within the licensed premises. He also disclaims any connection with the persons who are arrested and taken into custody. His case is that in spite of the above, Ext.P3 proceedings have been initiated suspending his licence and directing him to show cause why his licence should not be cancelled.

11. According to the learned counsel for the respondent, subsequently the contraband that was seized had been subjected to a Chemical Analysis and the report shows that the articles seized were contraband. Pursuant to the report of Chemical Analysis, the respondent's licence has been cancelled and a fresh auction has been conducted in respect of the toddy shops. The criminal proceedings are progressing. In view of the above change in circumstances, according to the learned counsel for the respondent, nothing survives in this appeal. Therefore, according to the learned counsel, the appeal is only to be dismissed.

12. The learned Senior Government Pleader, on the other hand, points out that this is a case in which the learned Single

Judge has interfered with Ext.P3 proceedings in the writ petition filed by the respondent and set aside Ext.P3 to the extent it sought to suspend the licence of the respondent. The said relief has been granted on the basis of an interpretation of Rule 8(3) of the Rules which is wrong and unsustainable. In view of the above, the State has been prejudiced substantially by the judgment appealed against. Therefore, the judgment requires to be interfered with and set aside, it is contended. For the above reason, correctness of the judgment appealed against has to be examined and the issue has to be conclusively decided. More so, because the fate of various other cases are also dependent on such decision. In view of the above, we shall consider the contentions advanced before us on merits.

13. As already noticed above, according to the learned Single Judge, the report of a Chemical Analysis as stipulated by Rule 8(3) of the Rules is a mandatory pre-condition for registering a crime. In order to decide the correctness of the above finding, it is first necessary to understand the scope of Rule 8 of the Rules. We notice that, the Rule appears in Chapter 7 of the Rules which deals with the "Procedure in taking samples

from Toddy Shops or Foreign Liquor – 1 Shops”. We extract Rule 8 in full for the sake of convenience of reference:

“8.(1) All Abkari officers not below the rank of Excise Inspectors in the case of Foreign Liquor – 1 shops and preventive Officers in the case of Toddy Shops shall have authority to take samples of any toddy or foreign liquor kept for sale in any Toddy Shop or Foreign Liquor – 1 Shop for chemical analysis.

(2) While taking sample of any liquor by the Abkari Officer for chemical analysis, the following procedure shall be followed, namely:-

(a) The quantity of sample taken for analysis shall not be less than 180 ml. In the case of toddy, the quantity shall not be less than 500 ml. Benzoic Acid should be added as preservative in toddy at the rate of one gram for 100 ml. of toddy.

(b) The contents in the vessel in which the liquor is stored shall be thoroughly mixed so as to get a representative sample;

(c) Divide the sample in to two parts and put each part in to separate bottles or containers which are properly cleaned and dried.

(d) The bottles or containers shall be securely fastened with suitable caps or corks so as to make it leak proof to prevent any spillage. The neck portion of bottles or containers and the caps or corks shall be covered with a pieces of cloth and tied together with a string securing the covered cloth and a seal shall be affixed on the

knot of the string using sealing wax in such a manner that the caps or corks cannot be removed unless the string is cut or the seal is broken. Only the official or personnel seal of the officer taking sample shall be used for sealing. The seal shall be legible and decipherable. Another string shall be tied around the bottles breadth wise in such a manner that the knot shall be over the label affixed on the bottles or containers and a seal shall be affixed on the knot using sealing wax so as to make it impossible to remove the label without cutting the string or breaking the seal;

(e) Labels marked 'A' and 'B' shall be affixed on each bottle or container, bearing the signature, name, designation of the officer taking the samples with the details of the shop and the item of the sample taken with quantity along with the signature or thump impression of the person from whom the sample is taken:

Provided that in case the person from whom the sample is taken, refuses to affix the signature/thump impression, the signature or thump impression of two independent witnesses shall be obtained on the label;

(f) The sealed bottle or container marked 'a' shall be forwarded to the Chief Chemical Examiner or Joint Chemical Examiner to the Government of Kerala or to any officer authorized by the Government in this behalf along with a memorandum in Form No.V appended to these rules, without unreasonable delay. The

memorandum shall be forwarded in a sealed cover.

(g) A small quantity of the preservative used shall also be forwarded separately along with the sample to the Chemical Examiner/Authorized Officer;

(h) The bottle or container marked as 'B' shall be handed over to the concerned Assistant Excise Commissioner of the division who shall be the Authorised Officer with a copy of the memorandum, immediately, under proper acknowledgment. He shall affix his seal over the string on the neck portion of the bottles or containers and shall assign a register number on the label affixed;

(i) The Assistant Excise Commissioner of the Division shall maintain an exclusive register for registering the details of samples received by him. The samples shall be registered serially and that serial number shall be assigned as the register number. The details of further action taken by him shall be noted in the register.

(3) On receipt of the Chemical Analysis Report, if any violation of the provisions of the Abkari Act, rules or conditions of License or any adulteration is noticed, a case shall be registered within 24 hours. The sample marked as 'B' shall be produced before the concerned court. If no case is registered, the sample marked 'B' shall be destroyed."

14. A reading of the above Rule leaves no doubt in our mind

that the Rule is intended to prescribe the procedure for taking samples from Toddy Shops or Foreign Liquor – 1 Shops. A provision is required to be understood and its scope delineated, bearing in mind the context in which it has been placed. Rule 8 specifies the Officers who are competent to take samples, prescribes the manner in which such samples are to be taken, stipulates the quantity of the samples to be taken, the manner in which the samples are to be preserved, divided, sealed, secured, fastened and sent for chemical analysis. Sub- rule (3) of Rule 8 constitutes the last step in the procedure for taking such samples. It only provides that on receipt of the Chemical Analysis Report, if any violation of the provisions of the Abkari Act, Rules or conditions of licence or adulteration is noticed, a case shall be registered within 24 hours. In such an event, the sample that has been marked as 'B' has to be produced before the concerned court. If no case is registered, the said sample must be destroyed. The Rule does not seek to enact an interdiction against registration of a crime before such a Chemical Analysis Report is obtained. It is true that, according to the Rule, wherever the Chemical Analysis Report shows

violation of the provisions of the Abkari Act, rules or conditions of license or any adulteration, a case shall be registered within 24 hours. The said mandate can apply only in a case where for some reason or other no crime was registered earlier. Therefore, a plain reading of the Rule does not justify a conclusion that, the obtaining of a Chemical Analysis Report is a sine qua non or a pre-condition for the registration of a crime under the Abkari Act. It is further required to be noticed that, an Excise Official is empowered to arrest a person and register a crime under various provisions of the Abkari Act. Section 34 of the Abkari Act which is one such provision, reads as under:-

“34. Offenders may be arrested and contraband liquor, vehicles, etc. seized without warrant:- Any [Abkari Officer] Department may arrest without warrant in any public thorough fare or open place other than a dwelling house, any person found committing an offence punishable under this Act, and in any such thorough fare or public place may --

(a) Seize and detain-

- (i) any liquor or intoxicating drug;
- (ii) any materials, still, utensil, implement or apparatus;
- (iii) any receptacle or package or covering; and
- (iv) any animal, cart, vessel or other conveyance, which he has reason to believe to be liable to

confiscation under this Act;

(b) search any person, animal, cart, vessel or other conveyance, package, receptacle or covering upon whom or in or upon which he may have reasonable cause to suspect any such liquor or intoxicating drug to be, or to be concealed.

(2) The provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), shall apply in so far as they are not inconsistent with the provisions of this Act, to all arrests searches and seizures made under this Act.”

15. The above provision empowers an Abkari Officer to arrest without warrant any person found committing an offence punishable under the Act. Sub-section (2) of the above provision makes the Code of Criminal Procedure, 1973 applicable in so far as they are not inconsistent with the provisions of the Act, to all arrests, searches and seizures made under the Abkari Act. Section 41A of the Abkari Act is another provision that deals with the offences under the Abkari Act, which reads as follows:-

“41A. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of three years or more under

this Act shall be released on bail or on his own bond unless-

(i) the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub section (1) are in addition to the limitation under the Code of Criminal Procedure, 1973 (Central Act, 2 of 1994) or any other law for the time being in force on granting of bail."

16. The above provisions make it clear that the offences under the Abkari Act are cognizable and non-bailable. Section 154 of the Code of Criminal Procedure, 1973 therefore, applies to such cases. The section reads as follows:

"154. Information in cognizable cases.- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it,

and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information disclosed the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.”

A Constitution Bench of the Supreme Court has considered the scope of the above provision in **Lalita Kumari v. Government of Andhra Pradesh** [2013(4) KLT 632(SC)]. Speaking for the court, P. Sadasivam CJ. has emphasized the mandatory character of the provision in the following words:

“39. Consequently, the condition that is sine qua non for recording an F.I.R. under S.154 of the Code is that there must be information and that information must disclose a cognizable

offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of S.154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of S.154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of S.154(1) of the Code have to be given their literal meaning.

'Shall'

40. The use of the word "shall" in S.154(1) of the Code clearly shows the legislative intent that it is mandatory to register an F.I.R. if the information given to the police discloses the commission of a cognizable offence.

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44. Therefore, the context in which the word "shall" appears in S.154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register F.I.R.'s, all these factors clearly show that the word "shall" used in S.154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of S.154 (1) of the Code, read in the light of the

statutory scheme, do not admit of conferring any discretion on the officer-in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an F.I.R. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.”

What follows from the above is that a Police Officer has no manner of discretion in the matter of registering a crime under the above provision. It is the very same power that is to be exercised by an Excise Official under the Abkari Act also.

17. It is clear from the above provisions that an Abkari Officer has sufficient powers to register a crime and to investigate the same in the same manner in which other crimes are registered and investigated under the Criminal Procedure Code, except where any provision of the Code is inconsistent with the Abkari Act. The provisions show that an Abkari Officer is armed with the same powers as a Police Officer under the Criminal Procedure Code. The above position has been made explicit in Section 30A of the Act which provision is also reproduced hereunder for convenience of reference:

“30A. Abkari Officers to have similar powers of

police officers for the purpose of investigation of offences.- For the purpose of investigation of offences under this Act, the abkari officers shall have the same powers of investigation which the police officers have under the Code of Criminal Procedure, 1973 (Central Act 2 of 1974)."

18. In the above statutory scheme, an Abkari Officer is armed with ample powers to register a crime upon detection of an Abkari offence. Therefore, to hold that Rule 8(3) is mandatory to the extent of disentitling an Abkari Officer from even registering a crime without first obtaining a report of chemical analysis would have the effect of rendering nugatory, even the specific powers conferred by the parent statute. Such an interpretation would be inconsistent with the intent and purpose of the rule. A learned Single Judge of this Court has in **Kamalaksha v. S.I. of Police** [2007(1) KLT 299], rightly held as follows:

"It is always in the interests of the prosecution as well as the accused that the contraband article is sent to the chemical analyst for ascertaining whether it contains alcohol or not (see *Muthan Ankamuthu v. State of Kerala* (1970 KLT 427)). But driven to illogical extremes of the above view, it could even be said that until chemical

confirmation of the suspected liquid, even the accused cannot be arrested and even a search and seizure of the suspected liquid cannot be effected. But this is certainly not the policy of law. A prima facie satisfaction of the detecting and investigating officer arrived at bona fide that the liquid seized from the accused is contraband liquor will be sufficient to reach a conclusion that the accused should be placed on trial.”

19. In the above context, it is worth noticing that an Abkari Officer is a person who is experienced in identifying alcoholic liquors and other contraband articles prohibited by the Abkari Act. This Court has in various decisions held that, the experience of an Abkari Officer though dependent mainly upon his sensory perceptions is sufficient to prima facie detect an Abkari offence and in some cases, even to support a conviction. In other words, the experience of an Abkari Officer in the field should not be underestimated as a valuable input in detecting and identifying the various ingredients that go into the production of contraband items prohibited by the Abkari Act.

20. A learned Single Judge of this Court, Anna Chandy J, has in **State of Kerala v. Bhavani** (1963 KLT 549) relied upon the oral evidence of an Excise Guard in identifying the contraband

liquid, that was seized by tasting and identifying the same as arrack, to set aside the acquittal of an accused person. The decision in **Ramkaransingh v. Emperor** [AIR 1935 Nagpur 13] is another decision in which it has been held that an Excise Official is an expert in his field. The same view has been reiterated in **Gobardhan v. The State** [AIR 1959 Allahabad 53]. While considering a similar question, a Single Bench of the Madras High Court has held that an Excise Inspector was an expert, in **In re Oil** [1976 CrL.J.1339]. In the said decision, Ratnavel Pandian J. (as he then was) has considered the issue as under:

“3. It is true that in cases of this nature, the prosecution has got a primary duty to establish by letting in sufficient and acceptable evidence, viz, of an expert within the meaning of Section 45 of the Evidence Act, that the article seized is a contraband prohibited by the enactment. The next question is, who is an expert. An expert is one who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such knowledge may have been acquired by practice, observation, research or careful study. But, it is the duty of the judge to decide whether the skill of any person in the matter on which evidence of the Expert's opinion is offered, is sufficient to entitle him to be

considered an expert. In other words, it is the duty of the Judge to decide the question of competency of the witness. An expert, in order to be competent as a witness, need not have acquired his knowledge, professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject or acquired special experience therein”.

In **Dominic v. State of Kerala** [1989 (1) KLT 601], a learned Single Judge of this Court has held that identification by the smell, of ganja was not inconclusive in all cases. In a later decision, a Division Bench of this Court has, in **Mary v. State of Kerala** [2005 (4) KLT 39] sustained the conviction of a person, placing reliance on the evidence of the Officers of the raiding party to the effect that the substance seized was ganja, going by the smell of the article. At the same time, it has also to be remembered that the report of chemical analysis cannot be accepted as conclusive in all cases. It could only be treated as one of the items of evidence available, that the court would have to consider along with the other items of evidence in the case.

21. The above decisions show that, reliance on the sensory perceptions of an Excise official could form even the basis of

conviction of a person. Therefore, a fortiori, such perceptions could form the basis for the registration of a crime, for the purpose of further investigation. It is sufficient that a Report of Chemical Analysis also forms part of the evidence to be gathered during the process of investigation. The Apex Court has also accepted the evidence of an Excise Officer as an expert in **Sri.Chand Batra v. State of U.P.** [AIR 1974 S.C. 639]. In paragraph 13 of the said judgment, the court has considered the said issue and held as follows:

“13. We find that the Excise Inspector who had deposed, at the very outset of his evidence, that he had put in 21 years service as Excise Inspector and had tested lacs of samples of liquor and illicit liquor. As already pointed out, the competence of C.D. Misra to test the composition and strength of the liquid under consideration was not questioned at all. We, therefore, think that this particular Excise Inspector could be treated as an expert within the meaning of Section 45 of the Evidence Act. The Excise Inspector had, in addition to employing the smelling test, used all the other tests he could reasonably adopt. If his competence to give his opinion or the sufficiency of the tests adopted by him had been questioned in the Trial Court, the prosecution would have been in a position to lead more evidence on these questions. We also find that the objects

recovered from the possession of the appellant almost proclaim the nature of his activity and of the liquid which could be in his possession.”

22. A careful analysis of the above decisions leads us to the inevitable conclusion that the Excise Officials who are experienced in the field would be in a position to detect and identify contraband articles relying upon their sensory perceptions like smell, taste, etc. Such an identification would be sufficient for registering a crime and commencing investigation. As already found by us, Rule 8 only prescribes a procedure for taking samples. The said Rule cannot and does not control the powers of an Abkari Officer to register a crime wherever the commission of an Abkari offence is suspected or detected. The further contention of the counsel for the respondent that a licensee under the Act is treated differently from the other offenders cannot be accepted for the reason that none of the provisions provide for such a different treatment. In cases where a Report of Chemical Analysis is necessary, certainly the procedure prescribed under Rule 8 would have to be complied with. The power to register crimes under any of the substantive provisions of the Abkari Act already referred to

above, is independent and is not controlled by Rule 8(3). The said powers conferred by the parent enactment cannot be limited or controlled by the said rule made in exercise of the rule making power conferred by the very same statute. Section 29 of the Abkari Act confers power on the Government only to make rules for implementation of the provisions of the Act.

23. The learned counsel for the respondent drew our attention to Section 69 of the Abkari Act which provides that, all rules made and notifications issued under the Act shall upon publication in the gazette, have the force of law. Thereafter, they shall be treated as part of the Act. In view of the above provision, it is contended that Rule 8 has become a part of the Abkari Act. However, we notice that the rule making power is contained in Section 29 of the Rules. The Rules are to be made for the purposes of the Act. The provisions of Rule 8, as already found above, are only intended to regulate the manner in which samples are to be taken and sent for chemical analysis. Consequently, the fact that the said Rule has become part of the enactment does not enlarge the scope of the rule in any manner. The scope of the said rule cannot be enlarged to serve any

purpose other than the one for which it has been enacted. Therefore, we do not find any substance in the said contention.

24. The learned counsel for the respondent has also placed reliance on the decision of a learned Single Judge of this Court in **Girish Kumar v. State of Kerala** [2010 (3) KLT 95] to contend that, this Court had held the provisions of Rule 8(2) and (3) to be mandatory. We notice from the facts of the said case that, the question there, was whether the taking of one sample alone had caused prejudice to the accused in the said case. It has been held by this Court that, the omission to take samples in accordance with the procedure prescribed by sub-rules (2) and (3) of Rule 8 had caused prejudice to the accused. The said contingency does not arise here for the reason that, in the present case, there is no allegation of violation of any of the provisions of Rule 8. Therefore, we find that the said dictum has no application to the facts of this case.

For the foregoing reasons, we find that the learned Single Judge has erred in holding that a report of chemical analysis of the contraband articles was a pre-requisite for the registration of a crime under the Abkari Act. Interference with Ext.P3 on the

said basis is also held to be unsustainable. This appeal is accordingly allowed. The judgment of the learned Single Judge is set aside restoring Ext.P3.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv