

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 16TH DAY OF FEBRUARY 2015/27TH MAGHA, 1936

WP(C).No. 3511 of 2015 (L)  
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PETITIONER:  
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DEVIDASAN, AGED 47 YEARS,  
S/O.RAMAKRISHNA PILLAI, PALLAMPIL KIZHAKKETHIL HOUSE,  
EREZHA VADAKKUMURI, CHETTIKULANGARA,  
KANNAMANGALAM VILLAGE, MAVELIKKARA TALUK.

BY ADVS.SRI.NIREESH MATHEW  
SRI.C.C.THOMAS (SR.)

RESPONDENTS:  
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1. THE EXCISE COMMISSIONER,  
COMMISSIONERATE OF EXCISE,  
THIRUVANANTHAPURAM - 695 033
2. THE DEPUTY COMMISSIONER OF EXCISE,  
ALAPPUZHA - 688 001
3. THE EXCISE INSPECTOR,  
EXCISE RANGE OFFICE, KARTHIKAPPALLY,  
ALAPPUZHA DISTRICT - 673 543

R1-R3 BY ADV. SRI. C.S. MANILAL, SR. GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON  
16-02-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**APPENDIX**

PETITIONER'S EXHIBITS :  
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P1-PHOTOCOPY OF THE GUIDELINES FOR THE EXTENSION OF PRIVILEGE OF TODDY SHOPS FOR THE YEAR 2015-2016 ISSUED BY THE EXCISE COMMISSIONER.

P2- PHOTOCOPY OF THE CRIME AND OCCURRENCE REPORT IN CR.NO.154/2014 REGISTERED BY THE 4TH RESPONDENT.

EXTP2(a)- ENGLISH TRANSLATION OF EXT.P2.

P3- PHOTOCOPY OF THE ORDER NO.XA7-34104/14 DATED 26.12.2014 PASSED BY THE 1ST RESPONDENT.

P4- PHOTOCOPY OF THE REPLY DATED 5.1.2015 SENT TO THE 1ST RESPONDENT.

P5- PHOTOCOPY OF THE ORDER DATED 28.1.2015 IN WP(C) NO. 952/2015 PASSED BY THIS HON'BLE COURT.

RESPONDENTS' EXHIBITS:  
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EXT.R3(a): TRUE COPY OF THE CONFESSION STATEMENT ALONG WITH ITS ENGLISH TRANSLATION.

EXT.R3(b): TRUE COPY OF THE PERMIT ISSUED IN RESPECT OF THE VEHICLE BEARING NO.KL31D 6117.

EXT.R3(c): TRUE COPY OF THE SKETCH, POSSESSION CERTIFICATE AND SCHEDULE AND BOUNDARIES OF THE SHOP ISSUED BY THE VILLAGE OFFICER ALONG WITH ITS ENGLISH TRANSLATION.

/True Copy/

P.A to Judge.

Rv

**DAMA SESHADRI NAIDU, J.**

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**W.P. (C) No. 3511 of 2015 (L)**  
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**Dated this the 16<sup>th</sup> day of February, 2015.**

## **JUDGMENT**

### **INTRODUCTION:**

The issue in this writ petition concerns itself with whether registering of a crime is a *since qua non* either to suspend or cancel an abkari licence. The question of law that throws itself open in this process is whether Rule 8(3) of the Kerala Abkari Shops Disposal Rules, 2002 ('the Rules' for brevity) is repugnant to Section 41A of the principal enactment i.e., the Abkari Act, ('the Act' for brevity) as has been contended by the learned Special Government Pleader for the respondents.

### **FACTS IN BRIEF:**

2. The facts to the extent relevant for the discussion are that the petitioner is a licensee of toddy shops in Group No. VI of Karthikappally Excise Range for the year 2014-2017. On 19.12.2014, the excise party (special squad) conducted an inspection in toddy shop No.30 belonging to the petitioner. Though nothing incriminating was found in the shop itself, in the

jeep parked within the precincts of the shop were found considerable quantity of spirit and also sugar solution, apart from spirit mixed with sugar solution. It is not in dispute that the jeep had the necessary permit for transporting the toddy to the shop in question, though the very jeep was not owned by the petitioner. Under those circumstances, CR No.154 of 2014 of Karthikappally Excise Range, Harippad Circle, was registered against the petitioner and others for offences punishable under Sections 55(a), 55D, 58 and 67B of the Abkari Act ('the Act' for brevity).

3. Pursuant to the registration of the crime in the manner indicated above, the first respondent issued Ext.P3 order suspending with immediate effect the licence of the petitioner, apart from directing the petitioner to show cause within a period of 7 days from the date of receipt of a copy of the order why the privilege and licence of Group No.VI/14-15 of Karthikappally Range should not be cancelled under Section 26(b) of the Abkari Act ('the Act' for brevity), read with Rules 5(19), 7(5), 7(31) and 9(2) of the Rules. Having submitted Ext.P4 explanation, the petitioner filed the writ petition essentially contending that the suspension of licence is

premature as it is said to be in violation of Rule 8(3) of the Rules.

**Rival Contentions:**

**a. Petitioner's:**

4. In the above factual background, the learned counsel for the petitioner has strenuously contended that Rule 8(3) of the Rules mandates that no crime can be registered unless a report of the chemical analysis is received by the authorities. According to the learned counsel, any registration of crime, and for that matter, all consequential steps in the wake of registration of a crime in the absence of the report of chemical analysis made available to the authorities, cannot be sustained. In support of his submissions, the learned counsel has drawn my attention to Ext.P5, an interim order given by this Court in another case, more or less, under similar circumstances.

**b. Respondents':**

5. *Per contra*, the learned Special Government Pleader, in tune with the averments made in the counter affidavit filed by the 3<sup>rd</sup> respondent for and on behalf of the 2<sup>nd</sup> respondent, has strenuously opposed the claims and contentions of the petitioner.

Initially advertent to the facts of the matter, the learned Special Government Pleader would contend that the presence of the jeep and the auto rickshaw parked within the precincts of shop No.30 licensed to the petitioner leaves no manner of doubt in the mind of any person that those vehicles are inextricably connected with the business of the petitioner. In elaboration of his submissions, the learned Special Government Pleader has submitted that both the jeep, which has got the necessary permit to transport toddy to the shop in question, and the auto rickshaw, which was found parked along with the jeep, have contained the prohibited substances, i.e., spirit and sugar syrup — both separately and also mixed in huge quantities.

6. The learned Special Government Pleader has contended that the person who was found with the substance is in fact a worker employed by the petitioner, and that the said worker extra judicially confessed to the crime. The officer, who conducted a special search, is an Inspector in the Department with 16 years of experience; with his expertise, on the strength of his olfactory observations, he has come to an undeniable conclusion that the

substances found in the jeep and in the auto rickshaw were nothing but spirit and sugar syrup, which were meant to be mixed with toddy for a nefarious purpose of having some commercial gain at the cost of the health of the consumers, especially in gross violation of the statutory restrictions imposed in that regard.

7. The learned Special Government Pleader has made elaborate submissions on legal aspects involved in the issue. Initially, he has drawn my attention to Sections 55(a) and 58 of the Act, the impact of which shall be adverted to at an appropriate stage. He has also contended that insofar as Ext.P5 order of this Court is concerned, apart from its being an interim order having no binding force, the impact of Section 41A of the Act *vis-a-vis* Rule 8 (3) of the Rules has not been considered therein.

8. Expatiating on his submissions, on the issue of repugnancy between Section 41A of the primary legislation and Rule 8(3) of subordinate legislation, the learned Special Government Pleader has submitted that whenever there is any conflict between them, the subordinate legislation shall always give way to the primary legislation. According to him, once the authorities have come to a

*prima facie* conclusion that the petitioner has committed a cognizable offence, it is ineluctable that crime is to be registered in terms of Section 154 of Cr.P.C. Under those circumstances, the pre-condition imposed in Rule 8(3) of the Rules that it ought to be preceded by a report of chemical analysis, contends the learned Counsel, cannot be sustained.

9. The learned Special Government Pleader, explaining the procedural parameters involved in unearthing the malpractices taken recourse to by unscrupulous licencees, would contend that there are two types of inspections: one routine and the other with an element of surprise. According to him, Rule 8(3) of the Rules contemplates routine inspection. In the present instance, a special squad appointed for the purpose of conducting surprise inspection concerning grave offences of adulteration etc., has conclusively come to a conclusion, *prima facie* though, that the petitioner has been guilty of violating various statutory provisions by mixing spirit and other substances with toddy, thus producing a mixture having deleterious impact on the health of the consumers. To support the contention that obtaining chemical analysis report in terms of Rule

8(3) of the Rules is not a pre-condition to registering a crime, the learned Special Government Pleader has placed reliance on a plethora of precedents, all of which will be referred to at an appropriate stage.

10. With regard to the proximity of the vehicles having been found in the vicinity of the shop and the crime the petitioner has been accused of, the the learned Special Government Pleader has, placing reliance on **Binoj v. Excise Commissioner** (2004 (1) KLT 777), contended, as a matter of alternative submission, that even in the absence of a crime registered, licence can be suspended once there is very strong *prima facie* case against the licensee. In elaboration of his submissions, he has drawn my attention to Ext.P3 order passed by the first respondent, with a specific reference to paragraph four thereof.

11. The learned Special Government Pleader has eventually contended that Ext.P4 is only a show cause notice, in response to which the petitioner has already replied. According to him, suspension is only a temporary measure and it is always open for the petitioner to submit cogent explanation concerning the grounds

raised in the show cause notice and seek the indulgence of the authorities, who can revoke the suspension. In other words, it is the singular contention of the learned Special Government Pleader that at this stage the writ petition cannot be entertained.

12. Summing up his submissions, the learned Special Government Pleader has drawn my attention to Rules 5(19), 7(5), 7(31) and 9(2) of the Rules to contend that the petitioner has breached the conditions of licence on multiple grounds and suspension inflicted through Ext.P4 can be termed as neither illegal nor arbitrary. Thus, he sought the dismissal of the writ petition.

13. Heard the learned counsel for the petitioner and the learned Special Government Pleader for the respondents, apart from perusing the record.

**Issues:**

14. As has been indicated at the outset, though the arguments have been advanced by either of the learned counsel on various grounds, some of them being alternative in nature, the issue to be determined is whether Ext.P3 can be sustained in the face of Rule 8(3) of the Rules; in other words, whether obtaining a

report of chemical analysis is a pre-condition for registering a crime under Sections 55(a) and 55(d) of the Abkari Act.

15. The incidental issue that is required to be adjudicated upon is whether the licence can be suspended, even without any valid registration of crime, once it is to be assumed that the registration of crime is in violation of Rule 8(3) of the Rules.

16. Further the question of law required to be resolved is whether Rule 8(3) of the Rules is repugnant to Section 41A of the principal enactment.

**Statutory Scheme:**

17. Before proceeding further, it is appropriate to observe that there is not much factual dispute. As such, I do not propose to lay any special emphasis on any factual aspect. Pure and simple, a question of law is required to be determined within the statutory parameters, as have been indicated above. Since the petitioner has Rule 8(3) of the Rules as his flagship, it is appropriate to refer to the said Rule, which reads as follows:

“Rule 8.3: On receipt of the Chemical Analysis Report, if any violation of the provisions of the Abkari Act, rules or conditions of Licence 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.”

18. Indeed, the above extracted provision admits of no ambiguity to conclude that the registration of a crime shall be preceded by receipt of a chemical analysis report on any presumed violation of the provisions of the Act.

19. Proceeding further, it is to be observed that the impugned order of suspension of licence is said to be by way of exercise of powers under Section 26(b) of the Act, read with Rules 5(19), 7(5), 7(31) and 9(2) of the Rules. As such, I propose to examine the scope of Section 26(b) and the relevant Rules that have been relied on for the purpose of sustaining the impugned order by the respondents against the petitioner.

20. Section 26(b) of the Act mandates that in the event of any breach by the holder of licence or permit or by his servant, or by any one acting with his express or implied permission on his behalf, of any of the terms and conditions of the licence or permit etc., the first respondent may cancel or suspend any licence or permit granted under this Act. What is relevant is the breach of

conditions. At this juncture, the alleged breach need not be established beyond reasonable doubt. But, at any rate, there ought to be a *prima facie* conclusion for suspending or cancelling the licence.

21. Proceeding further, if we observe in the same breath, under Rule 5(19) of the Rules, the Commissioner has been empowered to cancel any licence issued under these Rules at any time on valid grounds. Again, in my considered view, 'valid grounds' assumes importance.

22. Further, Rule 7(5) of the Rules speaks of possessing or selling at a licensed premises any liquor other than which the licensee is permitted to serve. In other words, what is required to be determined is whether the licensee has possessed any category of liquor other than the one licensed to be dealt in.

23. Rule 7(31) of the Rules is generic in nature, being sweeping in its scope, mandating that infraction of any of the Rules or the conditions of the licence either by the licensee or by any person claiming under him or in his employment shall entail the forfeiture of deposit/annual rental and cancellation of licence.

Eventually, if we refer to Rule 9(2) of the Rules, it is evident that the Rule prescribes the nature of substance that can be sold in the licensed premises.

24. After having a bird's eye view of all the above statutory rules, it can be said that most of the provisions are enabling in nature conferring on the authorities power, which is required to be exercised only under specified circumstances or under specific conditions.

**Repugnancy:**

25. Before proceeding further, it is appropriate to consider the contention of the learned Special Government Pleader regarding the supposed repugnancy between Section 41A of the Act and Rule 8(3) of the Rules. Indeed, it is pertinent to observe that though subordinate legislation suffers from certain inherent limitations, once they have been engrafted into the statute book, they cannot be treated as an inferior form of legislation. In other words, subject to repugnancy and judicial invalidation on more grounds than what are available *vis-a-vis* the principal enactments, for all other purposes subordinate legislation gets elevated to the

level of the principal legislation, for an act operates in conjunction with the ruled framed thereunder.

26. The established cannon of statutory construction behoves that all legislative dictates are required to be read and understood in a harmonious manner so that no portion becomes either otiose or unworkable. Variably expressed, repugnancy or unconstitutionality cannot be presumed unless conclusively established. With this prefatory frame work, we may examine the precedential dicta concerning the judicial invalidation of the legislation, be it primary or subordinate.

27. In the alternative, I may observe that if one is to conclude that there is any repugnancy, no statutory provision, even of subordinate legislation, can be merely washed away on an assumption that there is an element of repugnancy. A valid statute is required to be interdicted by way of judicial invalidation through a validly constituted proceedings, such as by way of judicial review. In the absence of any such challenge, I am afraid, no collateral challenge can be laid against the validity of any regnant legislation of whatever nature.

28. In **State of T.N. v. P. Krishnamurthy** ((2006) 4 SCC 517), the Hon'ble Supreme Court has set out the circumstances under which the repugnancy of subordinate legislation can be determined, by holding thus:

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).”

29. Indeed, a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground

that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary (vide **Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India** ((1985) 1 SCC 641).

30. In fact, the learned author C.K. Thakker in his celebrated commentary, *Administrative Law* (Pg.160, EBC, 2<sup>nd</sup> Edn.), has culled out from the ratio of *Indian Express Newspapers* (supra) the grounds of attack on the delegated legislation as under:

1. Where parent Act is unconstitutional;
2. Where parent Act delegates essential legislative functions;
3. Where delegated legislation is inconsistent with the parent Act;
4. Where delegated legislation is inconsistent with general law;
5. Where delegated legislation is unconstitutional;

6. Where delegated legislation is arbitrary;
7. Where delegated legislation is unreasonable;
8. Where delegated legislation is mala fide;
9. Where delegate further delegates (sub-delegation);
10. Where delegated legislation excludes judicial review;  
and
11. Where delegated legislation operates retrospectively  
[without express or implied sanction].

31. Examining the scope of Article 254 of the Constitution, a Constitution Bench of the Hon'ble Supreme Court in **M. Karunanidhi v. Union of India** ((1979) 3 SCC 431), has viewed the issue of repugnancy in the federal context. The learned Bench has held thus:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.
2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.
3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an

analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.”

32. Further, the learned author Dr.C.D.Jha in his commentary, *Judicial Review of Legislative Acts* (page 361, 2<sup>nd</sup> Edn.), has set out the instances when the delegated legislation is impermissible:

- (a) If the delegation is in excess of the legislative power;
- (b) If the delegation is repugnant to any provision of the Constitution;
- (c) If the delegating statute is in violation of the Fundamental Rights guaranteed in the Constitution. “No piece of delegated legislation can be allowed if it is inconsistent with Fundamental Rights.”
- (d) If the delegated statute is in conflict with the delegating statute.
- (e) If the delegation is made in disregard to the procedure laid down by the Legislative Act. (Parent Act).

**Can the State or its instrumentality take the plea of Repugnancy or Ultra vires?**

33. The respondent, the State or any of its limbs, shall be the last person — nay, not entitled at all — to call its own legislation *ultra vires* or repugnant. It is estopped. It is the executive that has framed the Rules exercising its power delegated by the Legislature. It does not, *ipso facto*, lie in the mouth of the executive to cry foul of its own making — it is an unaffordable luxury. The State or its instrumentality cannot run with the hare and hunt with the hounds, so to say. Variably expressed, Rule 8(3) of the Rules is required to be read in conjunction with Section 41A, unless such an effort is to lead to any incongruity or impossibility; the repugnancy cannot be pressed into service for mere asking, even by non-state players.

**Rule 8 (3) & Cognizance of Offence:**

34. The Kerala Abkari Shops Disposal Rules, 2002, have been framed by the Executive as per the delegated legislative powers under Sections 18A and 29 of the Act. Section 18A speaks of grant of exclusive or other privilege of manufacture, etc., on payment of rentals. Section 29 is the power to make rules either prospectively or retrospectively for the purposes of the Act.

35. In the present instance, Rule 8(3) of the Rules mandates that the report of chemical analysis is a precondition for registering a crime; Section 41A(1)(a) of the Act, on the other hand, mandates that notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under this Act shall be cognizable.

36. In fact, as per Section 154 of Cr. PC., 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.

37. The upshot of the above statutory scheme is that in terms of Section 41A(1)(a) of the Act, every offence punishable under the Act shall be cognizable. Section 154 of Cr.PC., makes it mandatory that information regarding any cognizable offence is required to be

registered as a crime. Now the moot question is whether Rule 8(3) of the Rules fits into the scheme of things or sounds a jarring note in the statutory symphony.

38. There is no cavil that every offence under the provisions of the Act is a cognizable offence; every piece of information regarding any cognizable offence is required to be registered, but the fact remains that an incident *per se* will not bear a mark on its forehead that it is an offence. For an incident to be categorised as an offence, it may have to pass muster under a statutory scheme. In the present instance, the incident is required to pass the litmus test prescribed under Rule 8(3) of the Rule that the incident or event is, indeed, an offence. For that purpose, given the gravity of consequences, the legislative wisdom, delegated though, has deemed it fit to subject the substance to chemical analysis before concluding, even *prima facie*, that there is a breach of statutory scheme. Thus, the establishment of a breach is *sine qua non* for branding an incident or event an offence.

39. If we examine the extent to which the subordinate legislation can travel or the field it can occupy, it is evident that confer-

ment of rule-making power does not enable rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto (vide **State of Karnataka v. H. Ganesh Kamath** (AIR 1983 SC 550)).

40. On factual front, a substance found in the possession of the person or in the vicinity of the shop need not be a prohibited substance. Once the licensee is permitted to vend one type of intoxicant, the substance otherwise found is required to be established as being a different one, which purpose, precisely, calls for chemical analysis.

41. In my considered view, on both counts, that of repugnancy and lack of proper challenge to the assumed repugnancy — though they may seem to be at cross purpose — the challenge sought to be laid by the respondents has to be and is repelled.

**Whether Licence can be Suspended or Cancelled *de hors* recourse to Rule 8 (3) of the Rules?**

42. A profusion of precedents has been cited by the learned Special Government Pleader to sustain his submission that even in the absence of a crime registered, the first respondent can exercise

his powers of suspension of licence. He has also strenuously contended that even in the absence of the report of chemical analysis, based on the experience of the Inspecting Officer or, for that matter, on olfactory evidence, the proceedings under Ext.P3 can be sustained.

43. In **Lalita Kumari v. Government of Andhra Pradesh** (2013 (4) KLT 632 (SC)), the issue was with regard to the registering a crime involving a cognizable offence. In fact, their Lordships have concluded in paragraph 39 of the judgment that once a police officer receives credible information with regard to committing a cognizable offence, it is *sine qua non* for an officer to record an FIR under Section 154 of the Cr.P.C. It is axiomatic to observe that any ratio is required to be appreciated in the factual frame of the said case.

44. On a perusal of the judgment relied on by the respondents, I do not see any provision analogous to Rule 8(3) of the Rules. Though it is essential that a crime is required to be registered against the commission of a cognizable offence, the very cognizability or the very nature of offence may be required to be

determined through a special process, as has been prescribed under Rule 8(3) of the Rules. I am, therefore, of the considered opinion that the ratio laid down in **Lalita Kumari** (supra) has no application in the present factual context.

45. In **Ramkaran Singh v. Emperor** (AIR 1935 Nagpur 13), the issue is concerning the conviction of an accused based on olfactory evidence. In fact, the Privy Council in the said judgment has observed that though the Excise Sub-Inspector is an expert in his own department and is able to distinguish liquors, but the Court should have, under Section 51 of the Evidence Act, ascertained the grounds on which his opinion was based, so as to test it. It eventually acquitted the appellant therein. It can be seen that in **Gobardhan v. The State** (AIR 1959 Allahabad 53) and **Paltu v. State of M.P.** (AIR 1961 Madhya Pradesh 5), cited at the bar by the learned Special Government Pleader, the ratio laid down in **Ramkaran Singh** (supra) has been followed.

46. Further, in **In Re, Rajabather** (AIR 1959 Madras 450), a learned Single Judge of the High Court of Madras has observed thus:

“The statistics published by the Madras Government show that several thousands of prohibition cases are launched and if several thousands of portions of wash are sent to the single Chemical Examiner, with a limited staff and who is unable even to cope with murder cases, numbering a few hundreds in this State, the office of the Chemical Examiner must be multiplied more than hundred-fold. That is why no provision is made for sending the wash to the Chemical Examiner.”

(emphasis added)

47. In none of the above cases is there a situation obtaining on the similar lines as in the present instance. At any rate, as has already been indicated, no precondition of the nature incorporated under Rule 8(3) of the Rules can be seen in those decisions. Under the totality of circumstances, conviction can, it is held, be sustained based on olfactory evidence regarding the nature of substance as well.

48. In **State of Kerala v. Bhavani** (1963 KLT 549), this Court has observed, under the factual matrix of the said case, that the accused was found in actual preparation of liquid and was subjected to arrest. Later, during the course of trial, the witnesses tested the liquid and found it to be tasting of arrack, apart from finding that it strongly smelled of liquor. Based on the observations of this Court, the learned Special Government Pleader would

contend that the inspecting police officer on smelling the substance has come to a conclusion that what was being seized is spirit, which is prohibited. It can be seen that Rule 8(3) of the Rules was brought on to the statute books only in 2002. The statutory position prevailing in 1960's cannot be a cause for inflicting a punishment presently, keeping the regnant regulatory regime in the oblivion.

49. In **Sri Chand Batra v. State of U.P** (AIR 1974 SC 639), the issue was whether a police officer can be an expert in terms of section 45 of the Evidence Act. It is well to remember that expertise is a question of experience as much as qualification, for the very Evidence Act has not defined the term 'expert'. In fact, the Hon'ble Supreme Court has observed as under:

“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. Mishra 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 this 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. On the facts and circumstances of this case, neither Boosenna's case (1967) 3 SCR 871 = (AIR 1967 SC 1550 = 1967 Cri LJ 1398) nor any other case would, we think help the appellant..."

50. In **In Re Oli** (1976 Crl. L.J. 1339), the High Court of Madras also has examined the scope of Section 45 of the Evidence Act. The Court has eventually held that if an accused does not challenge the competence of the excise or police officials, as the case may be, to give his opinion, or the sufficiency of the tests adopted by him, at the trial stage itself, he should not be allowed to raise such contentions in the appellate or revisional courts, as that would amount to depriving the prosecution of the opportunity of leading more evidence by chemical examinations etc. on this aspect. Yet again, I am unable to appreciate how the said decision aides the cause of the respondents.

51. In **Mary v. State of Kerala** (2005 (4) KLT 39), a learned Division Bench of this Court has observed as under:

"18. We are afraid that we cannot agree with the above submissions. Where experienced officers of the raiding party are familiar with the contraband substance like ganja by smell or taste or by other physical properties, it

*may not be necessary to take samples from the substance and send the same for chemical analysis in the absence of a statutory provision in that regard. In such cases such experienced Officials can be considered as experts on the question...”*

(emphasis added)

52. Indeed, in the present instance, there is an insurmountable statutory hurdle in the form of Rule 8(3) that obtaining a report of chemical analysis is a pre-condition for registering a crime. In my considered opinion, **Mary** (supra) does not serve the cause of the respondents.

53. In **Kamalaksha v. S.I of Police** (2007 (1) KLT 299), this Court has observed that the olfactory and gustatory senses of even experienced officers to identify liquor through smell and taste may not be enough for a court of law to conclude that the seized liquid is liquor. It is worthwhile to extract the observations of this Court in **Kamalaksha**, which are as follows:

“5. [T]hose in charge of administration of justice cannot be insensitive to the realities of life. Considering the alarmingly escalating offences relating to narcotic drugs and other intoxicating substances and the limited number of Government Chemical Examiners' laboratories in the State, it may be difficult for such laboratories to promptly cater to the needs of the investigating agencies. But the consequential delay in getting the certificates of analysis need not deter the investigating officers from submitting the final reports before

the courts concerned. *Taking a strictly legalistic view, the olfactory and gustatory senses of even experienced officers to identify liquor through smell and taste may not be enough for a court of law to conclude that the seized liquid is liquor. In the absence of a report from the Public Analyst, it would not be safe to rely on the smell alone to find out that the liquid contained in a bottle or jerry can is liquor within the meaning of the Abkari Act or other allied legislations. (see State of Kerala v. Sreedharan (1965 KLT 1002). 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. The report under S.173(2) Cr.P.C. is nothing more than an opinion of the police officer that as far as he is concerned, he has been able to collect evidence during his investigation about the commission of the offence by the accused who is being placed on trial. If the police report or charge sheet contains necessary details so as to enable the magistrate to take cognizance of the offence and proceed further, it cannot be said that there is failure of compliance of S.173(5) Cr.P.C. just because the scientific reports have not been produced along with the charge sheet filed by the police officer. In such a case it cannot be said that the charge sheet so produced is incomplete (vide Swami Premananda @ Premkumar @ Ravi v. Inspector of Police (XXXIX MLJ (CrI) 702).*

(emphasis added)

54. Indeed, in the above decision what has fallen for consideration is Section 50 of the Act, which deals with report of the Abkari Officer providing the necessary jurisdiction to the competent Magistrate. Eventually, this Court has concluded that the report under Section 173(2) Cr.P.C is nothing more than an opinion of the police officer, that as far as he is concerned he has been able to collect evidence during his investigation about the commission of the offence by the accused, who is being placed on trial. I fail to persuade myself that the above ratio in any way dilutes the impact of Rule 8(3) of the Rules.

55. Further in **Soman v. State of Kerala** (2011 (2) KLT 104), this Court has made specific reference to Rule 8. It is profitable to extract the observation of this Court in that regard:

“17. Rule 8 relates to the procedure in taking samples from toddy shops and foreign liquor shops. I do not propose to lay down any proposition that under no circumstances. In a case of seizure of contraband from the possession of a person, the same is required to be subjected to chemical analysis nor as to the applicability of the Kerala Chemico-Legal Examination Rules, 1959 in the matter. Even going by R.8 of the Rules, the minimum quantity required to be taken for chemical analysis is 180 ml. In the present case, it is not disputed that the liquid seized was below 180 ml. Whether the said quantity was sufficient for chemical analysis, in spite of that the said process was not adhered to by detecting officer and the consequence of there being no chemical analysis of the remnant are all matters which the Trial Court has

to decide. In the first and second cases the detecting officer is said to have identified the liquid as liquor by tasting and smelling while in the third case identification was made by smell of breath of petitioners. In all the cases Alcoquant test was also conducted and the test result revealed presence of liquor in the blood of petitioners.”

56. It can be seen that the issue that has fallen for consideration is the quantity of liquor required to be seized for the purpose of chemical analysis under Rule 8 of the Rules. As such, even this decision cannot come to the rescue of the respondents. The learned Special Government Pleader has also placed reliance on the oft-quoted judgment of this Court in **Dominic v. State of Kerala** (1989 (1) KLT 601), wherein a learned Single Judge of this Court has observed thus:

“13. The question then is whether, identity of the article seized has been established conclusively. As noticed hereinbefore, a series of improprieties were committed by prosecution in the matter of preserving the sample and sending the same for analysis. In the light of the observations in Piara Singh’s case, evidence afforded by chemical analysis cannot be conclusive. But, in the instant case, the finding of guilt is not based solely on the evidence of chemical analysis. The evidence of chemical analysis is only a corroborating piece of evidence. pws. 2 and 3 have both stated that large quantities of ganja were taken into custody from two jeeps, of which petitioners were the only occupants. It must be held that petitioners had conscious possession of the commodity. As to what the commodity was, there is evidence available from pws. 2 & 3. They say that the smell of ganja was emanating from the carton. According to them, the smell was strong. The evidence of experienced officers that the article smelt of ganja cannot be rejected. Olfactory sense can be relied on, though that may not

always be conclusive. It is common knowledge not to say experience of everyday life that many articles are identified by smell, particularly those one is familiar with. Smell is one of the senses of perception, with which man is endowed. It is as important, as sight, or hearing. Many moments of life are mingled with smells. Even memories. Identification by smell, cannot be rejected as inconclusive in all cases. There may be case, where two articles have like smells, due to the presence of a common component, or inherent similarities. Ganja or 'cannabis sativa' is known to have a distinctive smell. Identification made by PWs. 2 and 3, who had decades of experience in the Department with several opportunities to see and smell ganja can be accepted, more so, when the quantity was large and smell so strong as stated by them. Law cannot be oblivious, to what is obvious to others."

57. In the first instance, the substance is ganja, which came to be determined with the help of olfactory senses that it is a particular substance. Eventually, the conclusion is that neither the chemical analysis nor olfactory evidence could be conclusive in determining the nature of substance.

58. Finally, I may refer to **Binoj v. Excise Commissioner** (2004 (1) KLT 777) sought to be taken aid of by the learned Special Government Pleader. Relying on this judgment, he has strenuously contended that registering of a crime is not a pre-condition for exercising the powers of suspending the licence. It pays to extract this Court's observation, which reads thus:

"6. [I] hold that even before the criminal court decides the case

charged and conviction by the criminal court, though the same constitutes an independent ground for cancellation of licence under S.26(c), it is not a precondition for cancellation of licence. If a case is established that the petitioner/licensee who is authorized to vend only toddy under the licence, is engaged in business of contraband item, like arrack or spirit, then the licence is liable to be cancelled in exercise of the powers conferred on the Excise Commissioner under S.26(b) of the Abkari Act read with R.7(5) of the Kerala Abkari Shops Disposal Rules, 2002. Therefore, this argument of the petitioners is found against them...”

59. A careful reading of the judgment does not lead to any such conclusion that there can be cancellation of licence without registration of a crime. In fact, it is observed in the judgment that conviction is not a pre-condition for cancelling a licence and even in the face of acquittal, under the facts and circumstances, licence can be cancelled for valid reasons.

60. On a compendious reading and appreciation of all the precedents cited at the Bar by the learned Special Government Pleader, I am unable to come to a definite conclusion that Rule 8 (3) of the Rules is repugnant to the principal enactment; nor can I persuade myself to conclude that, notwithstanding its operation, still the first respondent can exercise his powers to suspend the petitioner's licence. I am of the considered opinion that the

obtention of the report of chemical analysis ought to have preceded the registration of crime. In fact, this Court in **Anil Kumar v. State of Kerala** (2013 (3) KLT 358), more or less similar circumstances, has held thus:

“7. There can be no doubt that in the light of the decisions of this Court in *Rajan's* case, 2010 (3) KLJ 461, and *Sobhanan's* case, 2011 (2) KLD 66, continuation of proceedings based on crimes registered prior to the receipt of the chemical analysis report of the concerned sample is not permissible. One can say a valid case is registered only if it is registered on the strength of a report of chemical analysis of the sample taken from the shop concerned and forwarded for such analysis...” (emphasis added)

61. The learned Special Government Pleader has eventually contended that Ext.P3 is only a show cause notice, and that the petitioner is always at liberty to submit his explanation — which, in fact, he did — and that the first respondent would consider the issue in the light of the explanation submitted by the petitioner through Ext.P4. I am afraid, a show cause notice coupled with infliction of a punishment in the form of suspension of licence, without statutory support, cannot be viewed as a mere show cause notice not having any deleterious or adverse consequences. Once a pre-condition is attached to interdict the right of a person to carry

on business, the compliance thereof is required to be viewed strictly. Put differently, there can be no inherent power of suspension, even of licence, which has deleterious social and economic consequences.

62. In the present instance, the suspension, which is similar to cancellation, though as an interim measure, is required to be viewed in strict statutory terms. Once it is found that there is fundamental breach of any Rule or procedure, the proceedings, needless to observe, stand vitiated to that extent.

**Conclusion:**

63. In the facts and circumstances, this Court is not inclined to interfere with the process of determination of the issue by the first respondent based on Ext.P3 show cause notice and in the light of Ext.P4 explanation submitted by the petitioner concerning the violation of licence conditions. In the same breath, it is to be added that the issue of suspension, nevertheless, cannot be sustained as it is in breach of Rule 8(3) of the Rules, which already stands declared as not being repugnant to Section 41A of the Act.

**Result:**

64. As a result, Ext.P3 is interfered with to the extent of suspension of licence, which stands restored. This Court leaves it open for the authorities to take all other appropriate steps after receiving a report of chemical analysis in terms of Rule 8(3) of the Rules.

With the above observation, this writ petition stands allowed.  
No order as to costs.

**sd/- DAMA SESHADRI NAIDU, JUDGE.**

rv