

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

WP(C).No. 20982 of 2008 (W)

PETITIONER:

LALKUMAR.S., GURU KRIPA,
IDICHAKKAPLAMOODU, PARASSALA PO.,
THIRUVANANTHAPURAM, PIN-695 502.

BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.K.A.BALAN
SRI.PETER JOSE CHRISTO
SRI.S.A.ANAND

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE SECRETARY
TO GOVERNMENT, TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM, PIN-695 001.
2. EXCISE COMMISSIONER, COMMISSIONERATE
OF EXCISE, PUBLIC OFFICE BUILDINGS, VIKAS BHAVAN PO.
THIRUVANANTHAPURAM, PIN-695033.
3. DIRECTOR GENERAL OF POLICE
POLICE HEADQUARTERS, SASTHAMANGALAM PO., VAZHUTHACAUD
THIRUVANANTHAPURAM, -695010
4. ASSISTANT EXCISE COMMISSIONER,
EXCISE DIVISION OFFICE, EAST FORT, FORT PO.
THIRUVANANTHAPURAM 695023.
5. CIRCLE INSPECTOR OF EXCISE
EXCISE CIRCLE OFFICE, NEYYATTINKARA PO., 695 121.
6. INSPECTOR OF POLICE,
POLICE CIRCLE OFFICE, PARASSALA, PARASSALA PO
PIN-695502.

R1-R6 BY GOVERNMENT PLEADER SMT.V.H.JASMINE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
02-11-2015, ALONG WITH WPC.NO. 24154/2008 AND CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: TRUE COPY OF THE CERTIFICATE OF RENEWAL OF LICENCE.

EXT.P2: TRUE COPY OF THE LICENCE NO.IS L-2/19/2001-2002/PVPM DATED 20.11.2002.

EXT.P3: TRUE COPY OF THE LICENCE UNDER THE KERALA PANCHAYAT RAJ ACT, 1994 FOR THE PURPOSE OF MANUFACTURING AYURVEDIC MEDICINES IN THE PREMISES OF GURU KRIPA PHARMACEUTICALS.

EXT.P4: TRUE COPY OF THE CERTIFICATE OF REGISTRATION FROM THE COMMERCIAL TAX OFFICER, NEYYATTINKARA.

EXT.P5: TRUE COPY OF THE CONTROLLER OF LEGAL METROLOGY FOR THE PURPOSE OF DEALING WITH AYURVEDIC MEDICINES.

EXT.P6: TRUE COPY OF THE LICENCE IN FORM S.P.VI UNDER THE ABKARI ACT 1 OF 1077 AND THE KERALA SPIRITUOUS PREPARATIONS (CONTROL) RULES, 1969.

EXT.P7: TRUE COPY OF THE LICENCE IN FORM S.P.VII(B) UNDER THE ABKARI ACT 1 OF 1077 AND THE KERALA SPIRITUOUS PREPARATIONS (CONTROL) RULES, 1969.

EXT.P8: TRUE COPY OF THE CIRCULAR NO.XC5-14624/99 DATED 3.3.2005 ISSUED BY THE 3RD RESPONDENT.

EXT.P9: TRUE COPY OF THE PETITION DATED 26.5.2005 SUBMITTED BY THE PETITIONER TO THE SUPERINTENDENT OF POLICE, THIRUVANANTHAPURAM RURAL.

EXT.P10: TRUE COPY OF THE PETITION DATED 26.5.2005 SUBMITTED BY THE PETITIONER TO THE DIRECTOR GENERAL OF POLICE, KERALA STATE.

EXT.P11: TRUE COPY OF THE PETITION DATED 14.5.2005 SUBMITTED TO THE DEPUTY SUPERINTENDENT OF POLICE, NEDUMANGADU.

EXT.P12: TRUE COPY OF THE CIRCULAR NO.XC5-14624/99 DATED 6.2.2007 OF THE 3RD RESPONDENT.

EXT.P13: TRUE COPY OF THE JUDGMENT IN W.P.(C)25849/05-B OF THIS HON'BLE COURT.

// TRUE COPY //

TKS

P.S. TO JUDGE

C.T.RAVIKUMAR, J.

W.P.(C)Nos. 20982, 24154, 24318, 26479, 26622,
30619 of 2008, 7491 of 2009, 34877 of 2010,
22604 of 2013, 11615 & 18619 of 2014 &
Crl.M.C.No.262 of 2011

Dated 2nd November, 2015

JUDGMENT

This group of writ petitions calls for a prelude for an appropriate disposal. Same set of facts may attract penal provisions under different enactments. So also, different offences arising out of different facts may also be discovered in the same transaction. These situations are envisaged by legislature and evidently, contemplation of such situations culminated in incorporation of appropriate provisions. In this regard, Section 26 of the General Clauses Act is worthwhile to be noticed. It reads thus:-

"Provision as to offence punishable under two or more enactments.- Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

A scanning of the said provision would reveal that it only prohibits punishment for the same set of facts under two sections but not the

trial of an accused on alternative charges and evidently, an acquittal of one charge is no bar to convict on the other, going by the said section. When an act or an omission constitutes an offence under two or more enactments by putting such a restriction that, in such circumstances, the concerned offender shall not be liable to be punished twice for the same offence the possibility of such an offender getting punished twice has been averted. If for the same act or omission the offender has been punished under one statute he cannot be punished again for the same act under another statute. There can be no bar to simultaneous prosecution under more than one enactments, one general and another special, subject, of course, to the overriding consideration of double jeopardy. Article 20(2) of the Constitution of India is also worthy to note in the contextual situation. Evidently, Article 20(2) embedded within its scope the plea of '*autrefois convict*' as known to English jurisprudence and the plea of double jeopardy known to the Constitution of the United States of America. In order to be a bar thereunder there should not only be a prosecution but also a punishment in the first instance to bar a second prosecution and punishment for the same offence. The provisions under Section 300 of the Indian Penal Code too, assume relevance in this regard. Essentially, they are based on the general principle of '*autrefois acquit*'. The principle on which the right to plead

`*autrefois acquit*' is that a man may not be put twice in jeopardy for the same offence. It also embraces the principle `*autrefois convict*'. The above provisions and the principles embedded therein may beckon reference and application while considering the various contentions raised in these writ petitions. The above mentioned Criminal Miscellaneous Case was tagged along with the writ petitions pursuant to an order of a learned Judge. Virtually, the same contentions raised in the writ petitions have been taken up there while seeking quashment of all proceedings in C.R.No.47 of 2010 of Excise Range, Kilimanoor, Thiruvananthapuram pending before the Court of Judicial First Class Magistrate-II, Attingal. Therefore, it is heard along with the writ petitions.

2. The petitioners in the writ petitions and also the captioned Criminal Miscellaneous Case state that they are manufacturing different medicinal preparations, including `*Arishtams*' and `*Aasavams*' on the strength of the licences granted to each of them by the Drugs Controller under the Drugs and Cosmetics Act, 1940 and/or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the rules framed thereunder. They contend that they are not obliged to take licence under the Kerala Spirituous Preparations (Control) Rules, 1969 (for short `*SPC Rules*'). In certain writ petitions challenge is

also made against the SPC Rules contending that they are *ultra vires* the rule making power under the Abkari Act. In short, the petitioners approached this Court by filing the captioned writ petitions either challenging the SPC Rules or raising grievances against coercive steps as also initiation of prosecution pursuant to the seizure of their medicinal preparations made without obtaining licence for possessing and transporting spirituous preparations and also on the ground that the spirituous preparations contained alcoholic content in excess of the permissible limit. In all cases except W.P.(C)No.22604 of 2013 the petitioners pray for issuance of a writ of mandamus or any other appropriate writ, order or direction commanding the respondents not to take any action against them or their agencies as per the provisions of the Abkari Act (Act 1 of 1077) and the SPC Rules and to strike down it after declaring it as unconstitutional. They are licensees in FORM 25D under the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945 for the manufacture of Ayurvedic/Siddha or Unani Drugs at their Pharmaceuticals. They also possess the following licences:-

Licences in FORM L-2 under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 for the manufacture of Medicinal and Toilet Preparations containing alcohol, opium, Indian hemp and other narcotic drugs. Licences under the Kerala Panchayat Raj Act,

1954 for the purpose of manufacturing Ayurvedic Medicines in their licensed premises. They have obtained Certificate of Registration from the concerned Commercial Tax Officers and Controller of Legal Metrology for the purpose of dealing with Ayurvedic Medicines. Besides the aforesaid licences and certificates they were also forced to take out licences in FORM S.P. VI and SP.VII under the Abkari Act and the SPC Rules. The petitioner in W.P.(C)No.22604 of 2013 is similarly situated to the petitioners in the other writ petitions. However, the contention of the petitioner therein is to the effect that in view of Rule 11(1)(b) of the SPC Rules holder of licence under Rule 154 of the Drugs and Cosmetics Rules, 1945 is entitled to be granted the SP VII licence under Rule 11(1)(b) of the SPC Rules. It is the further contention that refusal to grant the same will be violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. In short, his prayer is for a direction to the respondents to consider his application for grant of SP VII licence and to grant the same. Essentially, the petitioners contend that their medicinal preparations though contained alcohol, being medicinal preparations in terms of relevant pharmacopoeia there can be concoctions to be used as medicine and therefore alcoholic contents in their preparations will not and cannot take them within the term 'liquor' as has been understood for the purpose of the provisions of the Abkari Act. The term 'liquor' has

been defined in Section 3(10) of the Abkari Act and it includes all liquids consisting of and containing alcohol. The learned counsel for the petitioners contend that despite the said definition of 'liquor' in the Abkari Act the rule making power under Section 29 of the Abkari Act does not confer any expressed power to make rules in the nature of SPC Rules. I will consider these and other contentions taken up by the petitioners a little later.

3. It is to be noted that W.P.(C)Nos.20982, 24154 and 26479 of 2008 were earlier considered by a learned Judge of this Court (*Thottathil B Radhakrishnan, J.*) along with a number of other writ petitions. After such consideration, all those writ petitions including the aforesaid three writ petitions were dismissed as per a common judgment dated 27.8.2009. Obviously, all the petitioners therein contended that they manufacture different medicinal preparations after obtaining licences either under the Drugs and Cosmetics Act, 1940 or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the rules made thereunder. They too, contended that they were not obliged to possess licences under the SPC Rules either for manufacturing medicinal preparations or for possessing such preparations and also for transporting such medicinal preparations, without licence under the SPC

Rules or without a licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. In some cases the SPC Rules as a whole was also under challenge evidently, taking up the contention that it was made in excess of the rule making power available under Section 29 of the Abkari Act. It was also contended therein that inasmuch as, enactment of SPC Rules was beyond the scheme of the Abkari Act it could not be characterised as a subordinate legislation. Evidently, various contentions taken up therein were considered in the light of the decisions of this Court in **Thomas Vaidyan and Others v. State of Kerala and Others (1971 KLJ 641)** and **Enoch Pharma v. State of Kerala (ILR 1979 (1) Ker. 655)**. Obviously, in **Enoch Pharma's** case the decision in **Thomas Vaidyan's** case (supra) was quoted with approval. In **Babu and Others v. Excise Inspector and Another (2005 (3) KLJ 459)** this Court held that transport of excess quantity of alcohol than what is prescribed in the licence amounts to violation of conditions of licence and evidently, in that case also the products were passed off as Ayurvedic products. All these aspects were, essentially, taken into consideration by the learned Judge. The learned Government Pleader took up a contention there that no retailer or wholesaler could possess spirituous preparations without a licence under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 based on a decision of this

Court in **Muraleedharan Pillai v. State of Kerala** reported in **2006 (4) KLT 254** and the unreported judgments in **Dr.D.Rajan v. State of Kerala (O.P.No.10595 of 2002)** and **Rajendran and another v. Superintendent of Police and Others (W.P.(C)No.27008 of 2007)**.

On behalf of the petitioners therein an argument was advanced to the effect that the term 'liquor' as defined under Section 3(10) of the Abkari Act would not include any medicine and the rule making power under Section 29 of the Abkari Act did not confer any expressed power to make rules in the nature of SPC Rules. After considering the various contentions therein including the one based on the principle that a subordinate legislation could not overlap the principal legislation it was found that power was exercised only to regulate the preparation of alcohol. It was also found that the implementation of such control is the prime concern having regard to the restriction which are imposed as a public policy relatable to the directive principle of such policy and life and health referable to Article 21 of the Constitution of India. Evidently, in the said judgment dated 27.8.2009 it was noticed that even the Abkari Act contains such a provision in Section 56A and it provides for regulation of dispensation of medicines containing alcohol and to ensure that there is no free for all, in the matter of consumption of such materials. After very elaborate consideration of all such aspects in the

light of the aforementioned decisions it was also held therein thus:-

"The Division Bench and the Full Bench having dilated on the quality of definition of the term 'alcohol' in Section 3(10) of the Abkari Act; firstly judicial discipline obliges me to adopt it. Secondly, and more importantly, I am in complete concurrence with the law laid down by the Full Bench and the Division Bench. The '*bona fide* medicinal preparation' in Section 56A has no bearing on the interpretation of the term 'alcohol' as defined in Section 3(10), as suggested by the learned counsel for the petitioners."

Accordingly, all those writ petitions including W.P.(C)Nos.24154, 20982, & 26479 of 2008 among the captioned writ petitions, were dismissed. Later, R.P.No.1149 of 2009 was moved in W.P.(C)No.24154 of 2008. Evidently, the review petition was filed taking up the plea that the change in law resulting out of the amendments to the Drugs and Cosmetics Act has not been considered while rendering the judgment in W.P.(C)No.24154 of 2008 and that the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (referred supra) were rendered before such amendments and further that the said amendments to the central legislation will prevail over the related provisions under the Abkari Act. After considering the review petition it was allowed as per order dated 1.2.2010. The order dated 1.2.2010 would reveal that noticing the fact that W.P.(C)No.24154 of 2008 happened to be disposed of along with other bunch of writ petitions without noticing the aforementioned specific contentions raised by the petitioner it was held that it would only be

appropriate to let the petitioner to have an opportunity to agitate such contentions appropriately. It is in the said circumstances that the judgment in W.P.(C)No.24154 of 2008 was recalled. Accordingly, the judgment dated 27.8.2009 was re-opened to the extent it pertained to the said writ petition and ordered it to be listed for a fresh consideration. Later, R.P.Nos.591 and 639 of 2010 were moved respectively against the judgments in W.P.(C)Nos.20982 and 26479 of 2008. Evidently, the same contentions which were taken up in R.P.No.1149 of 2009 in W.P.(C)No.24154 of 2008 were taken up in those review petitions. Subsequently, as per order dated 17.8.2010 the said review petitions were also allowed and the judgments in W.P.(C)Nos. 20982 and 26479 of 2008 were recalled. Evidently, after recalling judgments in the aforementioned three writ petitions the judgments in so far as they relate to the other writ petitions in the verdict were kept intact. Since those three writ petitions are connected with the other captioned writ petitions they are all now taken up for joint consideration.

4. In the light of the orders in the review petitions moved in W.P.(C)Nos.24154, 20982 and 26479 of 2008 it is evident that the judgment dated 27.8.2009 in so far as it relates to these three writ petitions was recalled and the said judgment in so far as it relates to

other writ petitions was kept intact. Taking note of the specific contentions of the writ petitioners that the judgment dated 27.8.2009 was rendered without considering the change in law resulting out of the amendments to the Drugs and Cosmetics Act and also the fact that the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (referred supra) were rendered prior to those amendments and the judgment dated 27.8.2009 which was kept intact except in the case of W.P.(C)Nos.24154, 20982 and 26479 of 2008 I am of the view that there is no scope for considering the points already covered by the judgment dated 27.8.2009 rendered relying on the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case and such other decisions referred therein, in W.P.(C)Nos.24154, 20982 and 26479 of 2008. In short, the scope is confined to the contentions, if any, raised specifically based on the amendments to Drugs and Cosmetics Act after the decisions of this Court in **Thomas Vaidyan's** case and **Enoch Pharma's** case (referred supra). As regards the other writ petitions it has also to be considered as to whether or not, going by the contentions therein, the judgment dated 27.8.2009 referred above is applicable to them or whether contentions based on the amendments subsequent to **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) are raised therein. For such a proper consideration it is highly inevitable to refer to the

decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra). As a matter of fact, in the light of the Full Bench decision in **Enoch Pharma's** case (supra) a separate consideration of the decision in **Thomas Vaidyan's** case (supra) is not required as in **Enoch Pharma's** case **Thomas Vaidyan's** case has been dealt with elaborately. At the same time, it is true that the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) were rendered by this Court respectively on 27.7.1971 and 2.1.1979 and at that point of time Chapter IVA of the Drugs and Cosmetics Act, 1940 passed by the Parliament for regulating manufacture and sale of Ayurvedic, Sidha and Unani drugs as also certain matters in respect of production and sale, was not brought into force in the State of Kerala. Admittedly, Chapter IVA of the Drugs and Cosmetics Act has been brought into force within the State of Kerala subsequently. Therefore, these cases are to be considered looking into the contentions, if any, based on the amendments to the Drugs and Cosmetics Act subsequent to the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) and bearing in mind the facts that Chapter IVA of the said Act was not in force within the State of Kerala when those cases were decided and subsequently, it was brought into force within the State. The common judgment dated 27.8.2009 was kept intact, in respect of all other writ

petitions except W.P.(C)Nos.24154, 20982 and 26479, of 2008 also cannot be lost sight of.

5. In **Thomas Vaidyan's** case the validity of Sections 12A, 56A and 68A of the Abkari Act (Act 1 of 1077) and also the 'SPC Rules' passed in exercise of the power conferred by Section 29 of the Abkari Act were under challenge. Evidently, the aforesaid sections were challenged on the ground that the State Legislature had no competency to enact them and the 'SCP Rules', on the ground that they impose unreasonable instructions upon the fundamental right of the petitioners to carry on their trade of manufacturing and selling of medicinal preparations. In **Enoch Pharma's** case (supra) the Full Bench took note of the decision of the Division Bench in **Thomas Vaidyan's** case and found that the Division Bench held that the Drugs and Cosmetics Act is an existing law on a concurrent subject, relatable to entry 19 of List 3 in the Seventh Schedule to the Constitution and that the sections of Abkari Act relate to possession, manufacture and sale of intoxicating liquors, whereas the provisions in Chapter IVA of the Drugs and Cosmetics Act relate to the control and manufacture for sale of Ayurvedic, siddha and unani drugs. The findings of the Division Bench that there was no conflict between the two as they deal with different subjects and that the State Legislature in

enacting the impugned provisions had not in any way impinged upon the power of the Parliament and the object of the SPC Rules is to check the widely prevalent practice of manufacturing for sale and sale of intoxicating liquors in the guise of manufacturing and sale of medicinal preparations, both Ayurvedic and allopathetic were also, virtually, affirmed. Besides the same, it was found that the question of conflict with the State Legislation would not arise as Chapter IVA of the Drugs and Cosmetics Act had not been brought into force as far as the State of Kerala is concerned as held by the Division Bench. A close scrutiny of the decision in **Thomas Vaidyan's** case would reveal that the Division Bench held that the SPC Rules do not impose unreasonable restrictions to the right of the petitioners therein to carry on their trade. Paragraphs 5 and 6 of the decision in **Thomas Vaidyan's** case carry the reasons therefor, and they were quoted with approval in **Enoch Pharma's** case by the Full Bench. Thereafter, it was held that the Full Bench was in full agreement with the decision and the Full Bench found no ground to reconsider the decision in **Thomas Vaidyan's** case. The learned counsel for the petitioners contended that the Division Bench as also the Full Bench rendered the aforesaid decisions at a time when Chapter IVA of the Drugs and Cosmetics Act was not in force within the State of Kerala. Chapter IVA of the Drugs and Cosmetics Act, 1940 deals with control

manufacture for sale of Ayurvedic, Siddha and Unani drugs. True that, it deals with the situations wherein Ayurvedic, Siddha or Unani drugs shall be deemed to be misbranded, adulterated or spurious. Section 33-I of the said Act provides the penalty for manufacture, sale etc. of Ayurvedic, Siddha or Unani drug in contravention of the said Chapter and Section 33K provides for confiscation of stock of drugs in respect of which contravention has been made. Evidently, Section 33M(1) of the said Act provides that no prosecution under the said Chapter should be instituted except by an Inspector with the previous sanction of the authority specified under sub-section (4) of section 33G and Section 33M(2) provides that no court inferior to that of a Metropolitan Magistrate or of a Judicial Magistrate of the first class shall try an offence punishable under this Chapter. Essentially, the contention of the petitioners is that when the Drugs and Cosmetics Act, 1940 provides the circumstances whereunder an Ayurvedic, Siddha or Unani drug should be deemed to be misbranded, adulterated or spurious and also provides for the penalties and also the court which is competent to try such offences, it is impermissible to initiate prosecution under the Abkari Act or under the provisions of the SPC Rules where the same factual aspects would attract an offence under the Drugs and Cosmetics Act. The said contention cannot be upheld though it appears to be attractive in view of Section 2

of the Drugs and Cosmetics Act, 1940 and it reads thus:-

"2. Application of other laws not barred.-

The provisions of this Act shall be in addition to, and not in derogation of, the Dangerous Drugs Act, 1930 (2 of 1930), and any other law for the time being in force."

(emphasis supplied)

In such circumstances, merely because in respect of a particular situation the violation can be dealt with under the provisions of the Drugs and Cosmetics Act, 1940 cannot be a reason for contending that the offender cannot be prosecuted under any other law for the time being in force even if prosecution can be launched in accordance with the relevant provisions under such other law and it is that very position that was made clear as per Section 2 of the Drugs and Cosmetics Act, 1940. I am not oblivious of the fact that Sections 12A, 56A and 68A were inserted in the Abkari Act only as per Act 10 of 1967. I will deal with the same with reference to Section 2 of the Drugs and Cosmetics Act, a little later. As noticed hereinbefore, a careful consideration of the decision of the Full Bench in **Enoch Pharma's** case would reveal that the challenge against the legislative competence to pass the Abkari Act and the SPC Rules was repelled by the Full Bench. The contention based on infringement of the fundamental rights under the Constitution of India was also

repelled by the Full Bench. Apart from raising a contention that the SPC Rules is against the Drugs and Cosmetics Act it is to be noted that no specific rule was put under challenge on any definite ground in all the captioned writ petitions. The contention of the petitioners is that since they possess the licences under the Drugs and Cosmetics Act and Medicinal and Toilet Preparations (Excise Duties) Act and the Rules thereunder they got every right to manufacture Ayurvedic medicines like *Asavams* and *Arishtams* and to transport them to their retail outlets and that any interference in exercising such rights would be illegal and violative of Articles 14 and 19(1)(g) of the Constitution of India. It is to be noted that when the Full Bench repelled the contention made against the various provisions under the Abkari Act and the SPC Rules the mere fact that the petitioners are holding licences under the aforesaid enactments cannot be a reason for them to claim immunity from prosecution under any other laws even in case of commission of any offence under the provisions under any other laws especially in view of the specific findings in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) to the effect that the impugned provisions under the Abkari Act and SPC Rules deal with different subjects than the one dealt with under Chapter IVA of the Drugs and Cosmetics Act. I have already taken note of the provisions under Section 2 of the Drugs and Cosmetics Act,

1940 which in unambiguous terms made the position clear that they were made in addition to and not in derogation of, the positions under the Dangerous Drugs Act or any other law for the time being in force. The Abkari Act (Act 1 of 1077) was passed by His Highness the Maharaja of Cochin on the 5th day of August, 1902, corresponding to the 31st day of Karkadagom 1077 and extended to the whole of Kerala as per Act 10 of 1967 which received the assent of the President on 29th July, 1967. Thus, it is evident that Abkari Act was in force from 5.8.1902 though it was extended to the whole of Kerala only as per Act 10 of 1967 which received the assent of the President on 29th July, 1967. It is apposite to note that Sections 12A, 56A and 68A were also inserted in the Abkari Act as per Act 10 of 1967 by which the Abkari Act was extended to the whole of Kerala. It is now relevant to note in this context that Chapter IVA which apply only to Ayurvedic, Siddha and Unani drugs, was inserted in the Drugs and Cosmetics Act only by Section 25 of Act 13 of 1964 with effect from 1.2.1969. Evidently, it was brought into force in the State of Kerala only after the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) rendered respectively on 27.7.1971 and 2.1.1979. Thus, it is abundantly clear that when Chapter IVA was inserted to the Drugs and Cosmetics Act, 1940 with effect from 1.2.1969 the provisions under Sections 12A, 56A and 68A were already there, in the

Abkari Act. If the impact of Section 2 of the Drugs and Cosmetics Act, 1940 is considered in the light of the said indisputable factual position as above, for the application of the provisions under the Abkari Act and SPC Rules made thereunder which deal with different subjects than the subject dealt with under Chapter IVA of the Drugs and Cosmetics Act, as regards same set of facts which attract actions under them, there cannot be any legal impediment. I will also deal with the other reason which makes such application permissible, a little later. In view of the above position the fact that such violations which would attract offences or penal provisions under other laws are also matters which would attract the offences and consequential penal actions under the Drugs and Cosmetics Act, cannot be a reason for claiming non-prosecution under other laws in view of Section 2 of the Drugs and Cosmetics Act referred hereinbefore. If under the guise of preparing/manufacturing medicinal preparations of liquor consisting of alcohol in excess of the permissible limit is made or a liquor calculated to have intoxicating effect has been made the mere fact that such contumacious action would attract the penal provisions under the Drugs and Cosmetics Act would not and could not be a ground for claiming immunity from prosecution under any other laws. The decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) were considered in the judgment dated 27.8.2009 by a

learned Judge of this Court in W.P.(C)No.26479 of 2008 and connected cases. As noticed hereinbefore, apart from those decisions the decisions in **Babu's** case (supra) and **Muraleedharan Pillai's** case (supra) were also considered therein. Paragraphs 4 and 5 therein assume relevance and they read thus:-

"4. With all the aforesaid precedents facing his clients, Advocate K.A.Balan, the learned counsel for the petitioners in some of these matters argued that the SPC Rules are beyond the legislative competence of the State in as much as the provisions thereof are beyond the prescriptions of the Abkari Act and even contradict them. He argued that term 'liquor' as defined in Section 3(10) of the Abkari Act cannot include any medicine and the rule making power under Section 29 of the Abkari Act does not confer any express power to make rules in the nature of the SPC Rules. It is further argued that in **Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & others, JT 2006 (5) SC 41**, a precedent in the field of Abkari laws in the State of Kerala, the Apex Court has categorically laid down that the rule making power of the State cannot be exercised beyond the provisions of the primary legislation and the subordinate legislation cannot change the bounds of the principal legislation. The said doctrine is salutary. There can be no controversy on it. But, the fact of the matter remains that the said decision was rendered considering the question as to whether the workers in a particular category of Abkari shop could be moved to another abkari shop under the compulsion of law. The question then was as to whether there was legislative sanction for the Government to make subordinate legislation to that effect in terms of the Abkari Act. The Apex Court found lack of power to do so. In the cases in hand, I shall

apply the very same judgment to examine the question. The principle enunciated is that the subordinate legislation cannot over leap the principal legislation. Applying that, it needs to be understood that in the cases in hand, the power is exercised only to regulate the transit of alcohol, the implementation of which control, is of prime concern, having regard to the restrictions which are imposed as a public policy relatable to the Directive Principles of State Policy and life and health, referable to Article 21 of the Constitution. It also needs to be noticed that even the Abkari Act, in Section 56A, provides for regulation of the dispensation of medicines containing alcohol and to ensure that there is no free for all, in the matter of consumption of such materials.

5. The Division Bench and the Full Bench having dilated on the quality of definition of the term 'alcohol' in Section 3(10) of the Abkari Act; firstly judicial discipline obliges me to adopt it. Secondly, and more importantly, I am in complete concurrence with the law laid down by the Full Bench and the Division Bench. The term '*bona fide* medicinal preparation' in Section 56A has no bearing on the interpretation of the term 'alcohol' as defined in Section 3(10), as suggested by the learned counsel for the petitioners."

Now, the question is whether the petitioners have raised any new ground based on any amendment brought to the Drugs and Cosmetics Act subsequent to the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra). Certainly, if no specific grounds on such lines are raised reconsideration of the position which was settled by the aforesaid decisions does not arise. As noticed hereinbefore, though the

petitioners contend that Chapter IVA has been brought into force within the State of Kerala subsequent to the said decisions I do not think that it can have any impact on the findings and dictums laid down in those decisions. It is to be noted that evidently, the question as to whether there is conflict between the impugned provisions under the Abkari Act as also the SPC Rules and the provisions of Chapter IVA of the Drugs and Cosmetics Act, was gone into detail in those decisions. It was based on such a consideration that this Court arrived at the conclusion that those impugned provisions and the provisions of Chapter IVA of the Drugs and Cosmetics Act deal with different subjects and further that the State Legislature in enacting the impugned provisions had not in any way impinged upon the power of the Parliament. As noticed hereinbefore, it was also found that the object of the impugned provisions is to check the widely prevalent practice of manufacturing for sale and sale of intoxicating liquors in the guise of manufacturing and sale of medicinal preparations, both Ayurvedic and allopathic. Obviously, on such scrutiny it was also found that the SPC Rules do not impose any unreasonable restriction upon the right of the petitioners to carry on their trade. The petitioners herein are carrying the same trade of the petitioners therein and they are also putting, virtually the same nature of challenge against the provisions under the Abkari Act and SPC Rules. The rules made

under a statute by an authority delegated for that purpose can be challenged on the ground that it is ultra vires of the parent Act, that it is opposed to the fundamental rights and that it is opposed to any other plenary law. A careful analysis of the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) would reveal that the challenge against the legislative competence to pass the Abkari Act as also the SPC Rules was repelled. Evidently, the question whether the SPC Rules impose any unreasonable restriction upon the fundamental right of the petitioners therein to carry on their trade of manufacturing for sale and sale of medicinal preparations, was also considered and the contentions were rejected, as can be seen from the aforesaid decisions. With respect to the challenge against the provisions of the Abkari Act and the SPC Rules on the ground of being violative of Article 14 of the Constitution of India the following aspects have to be taken into consideration. This article guarantees to every person the right not to be denied equality before the law or the equal protection of laws within the territory of India. The guiding principle underlying in this article is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Hence, essentially, it forbids discrimination between persons who are substantially in similar circumstances or conditions. Article 14 does not forbid classification or differentiation

which rests upon reasonable grounds of distinction. A careful scrutiny of the relevant provisions under the Abkari Act and the SPC Rules is required to address and answer the question whether they violate Article 14 of the Constitution. It is to be noted that the challenge against the validity of Sections 12A, 56A and 68A of the Abkari Act and the SPC Rules was considered and rejected by this Court in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra). Section 56A of the Abkari Act reads thus:-

"56A. For allowing consumption of certain preparations in business premises, for the manufacture and stocking of such preparations, etc.:- (1) Whoever being a chemist, druggist, apothecary or keeper of a dispensary or Vaidyasala-

(a) allows any preparation containing liquor or intoxicating drug to be consumed in his business premises otherwise than for the *bona fide* treatment, mitigation or prevention of any disease; or

(b) manufactures or stocks or causes to be manufactured or stocked any such preparation, other than a *bona fide* medicinal preparation, within the premises under his control;

shall, on conviction before a competent court, be punished with imprisonment for a term which may extend to five years, and with fine which shall not less than fifty thousand rupees.

(2) Whoever consumes any preparation containing liquor or intoxicating drug, which is not a bona fide medicinal preparation, in any premises referred to in sub-section (1) shall, on conviction before a Magistrate be punished with fine which may extend to five thousand rupees.

Explanation:- For the purposes of this section, "Bona fide medicinal preparation" shall mean any medicinal preparation-

(a) manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or

(b) manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary medicinal preparations; or

(c) approved as a bona fide medicinal preparation by the Expert Committee appointed under section 68A."

It would reveal that the said provision takes care of *bona fide* medicinal preparations and it provides for penal action only in respect of any preparation containing liquor or intoxicating drug, which is not a *bona fide* medicinal preparation. Section 68A of the Abkari Act also assumes relevance in this context. It provides for constitution of Expert Committee which got certain functions to be performed and one among them is to advice the Commissioner of Excise Department as to whether a medicinal preparation is a *bona fide* medicinal preparation or not. It

also enjoins the committee to advise the Commissioner as to the total requirement of medicinal preparations containing liquor or intoxicating drugs or in which alcohol is self-generated during the process of their manufacture, for the whole of the State during one year. A perusal of the Kerala Spirituous Preparations (Control) Rules, 1969 framed in exercise of the powers conferred by Section 29 of the Abkari Act would reveal that it also envisages penalty under different situations for contravention of the rules or conditions of licence under the said rules. The legislative competence to enact the SPC Rules in exercise of the powers under Section 29 of the Abkari Act was also upheld by this Court in the aforesaid decisions. Evidently, it also provides for action in respect of spurious preparations. What exactly are spurious preparations for the purpose of the said rules are provided under Rule 3 therein. Going by Rule 3(g), 'Expert Committee' for the purpose of said rules means the Committee appointed under Section 68A of the Abkari Act. The question whether a medicinal preparation is a *bona fide* medicinal preparation would also to be referred to the Expert Committee appointed under Section 68A of the Abkari Act in terms of the provisions under the Kerala Spirituous Preparations (Control) Rules. The term 'bonafide medicinal preparation' has been defined under Rule 3(d) therein. It also contains various provisions relating import, export, transport, possession etc.

Rule 11 deals with licences for sale. Evidently, for the purpose of effecting wholesale, licence in FORM SP VI is to be obtained in respect of any spirituous preparation and licence in FORM SP VII is required for effecting retail sale. The term 'spurious preparation' has been defined under Rule 3(I) of the Rules as hereunder:-

““spurious preparation” means any medicinal or toilet preparation containing alcohol or intoxicating drug which;

(i) in the case of those purported to be a preparation manufactured according to a pharmacopoeia, does not conform to the formula laid down in the pharmacopoeia approved by the Government of India or the government of Kerala; and

(ii) in the case of those claiming to be patents or proprietary preparations do not conform to the formula approved by the Government of Kerala; and

(iii) contains any substances which when swallowed, inhaled or injected into a human being produces intoxication, drowsiness, sleep, stupefaction or insensibility, but not approved as a bonafide medicinal preparation;”

The note under Rule 3(I) reads thus:-

“Asavas and Arishtas or other preparations containing alcohol which is only self-generated shall be deemed as spurious preparations if the alcohol content of any such preparation exceeds 12% by volume, unless otherwise declared by the Expert Committee.”

Rule 16 thereunder makes an Abkari Officer not below the rank of a Preventive Officer or Police Officer duly empowered in that behalf to enter and inspect at any time, by day or by night, any place in which a dealer conducts his business in spirituous preparations and for that purpose to inspect, check, examine, test and take samples of any spirituous preparations dealt with by such dealer and also freeze such of the preparations which he has reasonable grounds to suspect as spurious. The penalty for contravention of the rules or any conditions of the licence thereunder are dealt with in Rule 17 of the said Rules. When the provisions clearly safeguard those persons who manufacture only bonafide medicinal preparations under requisite licence and mandated for initiation of penal proceedings only in respect of those who contravenes the specific provisions the petitioners cannot be heard to contend that such provisions are violative of Article 14 of the Constitution of India. In other words, in such circumstances, initiation of proceedings under the Abkari Act and the SPC Rules cannot be challenged as illegal on the ground that the same set of facts would constitute violation or offences punishable under the provisions of the Drugs and Cosmetics Act. It is in this context that prelude to this judgment assumes relevance. As noticed hereinbefore, when the same set of facts constitute

offence/offences under different enactments the offender could be proceeded against one or any of the acts but, at the same time, going by the provisions referred thereunder he could not be punished for more than once for the same set of facts or for the same offence.

6. In the wake of the contentions of the petitioners it is also relevant to refer to a judgment of a Division Bench of this Court in W.P. (C)No.27008 of 2007. In that case also the petitioners were holding licences under the Drugs and Cosmetics Rules and Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. They approached this Court alleging harassment from the part of the Police and Excise Officials. They also contended that they possessed D & O licence issued by the concerned Local Self Government Institutions and some of the petitioners possessed licences issued in FORM SP VI and FORM SP VII under Rule 11 of the Kerala Spirituous Preparations (Control) Rules, 1969 framed under the Kerala Abkari Act, as well. Their grievance is that despite the possession of such licences the Police and Excise Officials are frequently raiding their premises and in the said circumstances, it was prayed for issuance of a writ of mandamus commanding the respondents not to unnecessarily harass the petitioners by conducting inspection, raids and other forms of harassment and humiliation, which

will have the effect of altogether crippling the very running of the establishments of the petitioners set up for manufacture and sale of Ayurvedic medicines. It was stated in the said judgment that as per condition No.12 of SP VI and SP VII licences of the 1st petitioner, the excise officials are entitled to conduct periodical visits in the business premises of the 1st petitioner. After considering the relevant provisions this Court held that the first petitioner therein who is having the requisite licence to manufacture Ayurvedic medicines could manufacture the same and supply the same to persons holding SP VII licence. The 2nd petitioner therein who claims to be the agent for the distribution of the medicines manufactured by the first petitioner was found lacking SP VII licence. In the said circumstances, it was found that he was not entitled to make retail sale of Ayurvedic medicines prepared by the first petitioner. It was also found that going by the SP VII licence conditions the Excise and Police Officers should be conceded power to conduct an inspection to find out whether any irregularity is being committed. It was held therein thus:-

“Even assuming that the petitioner is a reputed institution covered by Ext.P7, the question of seeking permission of the Excise Commissioner arises only if irregularities are found on inspection. Therefore, we agree with the contention of the learned Government

Pleader that without the permission of the Excise Commissioner the excise officials can inspect the manufacturing unit as well as the wholesale and retail shops of the 1st petitioner. Visiting the premises and taking samples cannot be described as any harassment. They are part of the routine duties of the officials concerned."

With such observation the writ petition was dismissed. It is thus obvious from the said decision that a person or institution having a requisite licence under the Drugs and Cosmetics Act and the Rules and the Medicinal and Toilet Preparations (Excise Duties) Act could manufacture Ayurvedic medicines but they could only supply the same to holders of SP VII licencees as for the purpose of effecting retail sale of Ayurvedic medicines a licence under SP VII under Rule 11 of the Spirituous Preparations (Control) Rules framed under the Kerala Abkari Act is required. It is worthwhile to refer to the definitions of "medicinal preparation" and "spirituous preparation" given under Rules 3(i) and 3(k) of the SPC Rules, the required licences for sale under Rule 11 of the SPC Rules and also rules 154 and 157 of the Drugs and Cosmetics Rules, 1945. Rules 3(i) and (k) are as follows:-

"3.(i) "medicinal preparation" includes all drugs containing alcohol or any intoxicating drug, which are a remedy or prescription prepared for internal or external

use of human beings or animals and all substances intended to be used for, or in the treatment, mitigation or prevention of disease in human beings or animals under any of the different systems of medicine, namely Allopathic, Homeopathic, Ayurvedic or any other Indian system of medicine;

(k) "spirituous preparation" means:-

- (i) any medicinal or toilet preparation containing alcohol, whether self-generated or otherwise, or any intoxicating drug; or
- (ii) any mixture or compound of wine with medicinal substances, whether the wine is fortified with spirit or not; or
- (iii) any other substances containing alcohol or intoxicating drug whether self-generated or otherwise notified under Rule 5 to be a spirituous preparation;"

Going by Rule 6 of SPC Rules no person shall manufacture any spirituous preparation except under a licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 and going by Rule 10 thereunder no person shall possess any spirituous preparation except under and in accordance with the conditions of licence or permit issued under the SPC Rules and in excess of the quantity entered in such licence or permit. Rule 11 of the SPC Rules provides for issuance of wholesale licence for the possession and sale of spirituous preparations in FORM SP VI and retail licence for the sale of spirituous preparation in FORM SP VII

and those licences carry prescribed conditions as well. Rule 154 of the Drugs and Cosmetics Rules, 1945 requires licence in Form 25D issued subject to the fulfillment of conditions of Rule 157, to manufacture for sale any Ayurvedic (including Siddha) or Unani drugs. In the light of the aforesaid provisions and also in the light of the decision in W.P.(C) No.27008 of 2007 it is evident that for manufacturing spirituous preparations licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 is required and the SPC Rules do not specifically exclude licences under the Drugs and Cosmetics Rules, 1945 from possession of licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 for manufacturing spirituous preparations, as defined under Rule 3(k) of the SPC Rules. As is evident from SPC Rules and the said judgment for effecting sale of spirituous preparations, either as wholesale or retail, the prescribed licence under Forms SP VI or VII, as the case may be, is required. It is to be noted that some of the petitioners in W.P.(C)No.27008 of 2007 possessed licences issued in Forms SP VI and SP VII under Rule 11 of the SPC Rules besides the licences under the Drugs and Cosmetics Rules and also under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Thus, it can be seen that there is no legal impediment in issuing necessary licences in Form SP VI or in Form SP VII under Rule 11 of the SPC Rules

in the case holders of licences under the Drugs and Cosmetics Rules as also the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. In fact, denial of issuance of such licences to them would put them in trouble unnecessarily and unjustifiably. It is also to be noted that licence in Form 25D is issued under Rule 154 of the Drugs and Cosmetics Rules, 1945 subject to the fulfillment of Rule 157 thereunder, for the purpose of manufacturing of Ayurvedic (including Siddha) or Unani Drugs, for sale. The term 'medicinal preparation' and 'toilet preparation' are defined under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Section 2(g) of the said Act defines 'medicinal preparation' thus:-

“2.(g) “medicinal preparation” includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals;”

The issue of Ayurvedic preparations are dealt with under Rules 64 to 67 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 framed under the said Act. Licence in Form L-1 is to be obtained to manufacture medicinal and toilet preparations containing alcohol, opium,

Indian hemp, and other narcotic drugs and narcotics outside bond for payment of duty and in Form L-2, for manufacturing such preparations outside bond for payment of duty. Form A.L.-2 to is prescribed for applying licence to manufacture Ayurvedic preparations by an Ayurvedic practitioner. In such circumstances, it is evident, as is held in the judgment in W.P.(C)No.27008 of 2007 by a Division Bench of this Court such licencees under the Drugs and Cosmetics Rules and Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 could manufacture Ayurvedic medicines in terms of the licences and could supply the same to persons holding SP VII licences. No restriction is seen made in SPC Rules that it shall be issued to such licencees under the Drugs and Cosmetics Rules as also under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Evidently, for possessing spirituous preparations for effecting their wholesale or retail sale licence in FORM SP VI/SP VII is to be obtained, as the case may be. Non-possession of such required licence while effecting sale would invite initiation of appropriate proceedings as contemplated in SPC Rules. In such circumstances, subject to the satisfaction of conditions for grant of licences there is no reason at all for not issuing appropriate licences to such applicants who hold the aforementioned licences under the Drugs and Cosmetics Rules and also under the Medicinal and Toilet Preparations (Excise Duties)

Rules, 1956. But, at the same time, in the light of the provisions under the aforementioned enactments and the judgment in W.P.(C)No.27008 of 2007 I do not find any merit in the contentions that licencees under the aforesaid Rules do not require licence under SPC Rules for effecting sale.

7. It was after the decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) that O.P.No.25547 of 2000 and connected cases which were heard and decided earlier along with W.P.(C)No.24154, 20982 and 26479, of 2008 were filed. As noticed hereinbefore, the main contention of the petitioners in those writ petitions, as noted in the common judgment dated 27.8.2009, was that they manufacture different medicinal preparations including '*Arishtams*' and '*Aasavams*' on the strength of licenses granted by the Drugs Controller under the Drugs and Cosmetics Act, 1940 or the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the Rules framed thereunder. In some other cases the *vires* of the SPC Rules as a whole, was challenged taking up the contention that they are made in excess of the rule-making power under the Abkari Act and that they could not be characterised as a subordinate legislation inasmuch as, those rules had gone beyond the scheme of Abkari Act were also taken. A scanning of the judgment dated 27.8.2009 whereby

O.P.Nos.25547 of 2000 and connected cases were dismissed, would reveal that the petitioners therein took up the argument thus:-

"2. The learned counsel appearing for the petitioners argued that the products manufactured by the petitioners as 'arishtam' and 'aasavam' are essentially medicinal preparations in terms of the relevant texts prescribing the concoctions to be used as medicines and any alcohol content as an ingredient of such a produce cannot come within the pale of the term 'alcohol' for the purpose of the Abkari Act and hence, the SPC Rules cannot apply. In furtherance of this contention is the challenge to those rules, including on the ground that it is contradictory to any object sought to be achieved either by the imposition of restrictions as per the Abkari Act or the enabling provision to make rules under that Act."

After referring to, **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) a later decision of this Court viz., **Babu & Others v. The Excise Inspector & another** reported in **(2005 (3) KLJ 459)** was also taken into consideration by the learned Judge. **Babu's** case was also a case relatable to products passed off as Ayurvedic products and evidently, in that case this Court held that transport of excess quantity of alcohol than prescribed in the licence amounts to violation of a condition of the licence. Evidently, while considering W.P.(C)No.25547 of 2000 and connected cases the learned Government Pleader took up the contention that no retailer or wholesaler could possess spirituous preparations

without a licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 relying on decisions dealing with Ayurvedic medicines such as the judgments **Muraleedharan Pillai v. State of Kerala (2006 (4) KLT 254)** and unreported judgments in **Dr.D.Rajan v. State of Kerala (O.P.No.10595/2002)** and **Rajendran and another v. The Superintendent of Police & Others (W.P.(C) No.27008/2007 (DB))**. It was found in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra) that there is no conflict between the provisions under those Acts as they deal with different subjects. Though an observation was made to the effect that the question of conflict with the State Legislature would not arise as Chapter IVA of the Drugs and Cosmetics Act had not been brought into force in State of Kerala a close scrutiny of the said decisions would undoubtedly reveal that the said observation was made only as an additional reason and in fact, after an elaborate discussion it was specifically held thereunder that there was no conflict between the impugned provisions under the Abkari Act as also SPC Rules and the provisions of Chapter IVA of the Drugs and Cosmetics Act as they deal with different subjects. In such circumstances the mere fact that such an observation was made earlier and thereafter Chapter IVA of the Drugs and Cosmetics Act was brought into force within the State of Kerala would not make any change in the position settled by the

decisions in **Thomas Vaidyan's** case and **Enoch Pharma's** case (supra). I have also found hereinbefore that Section 2 of the Drugs and Cosmetics Act would also reveal absence of impediments in taking action under other laws.

8. Now, it is only apposite to see the prayers made in the captioned writ petitions. W.P.(C)Nos.20982, 24154, 24318, 26479,30619 of 2008 and 7491 of 2009 carry virtually the same prayers as follows:-

- "i. issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents not to take any action against the petitioner or his agencies as per the provisions of the Abkari Act 1 of 1977 and the Kerala Spirituous Preparations (Control) Rules, 1969.
- ii. declare that the Spirituous Preparations (Control) Rules, 1969 are unconstitutional and strike them down."

In W.P.(C)No.26622 of 2008 the prayer is as follows:-

"Issue a writ in the nature of mandamus commanding the respondents not to take any action against the petitioner or his agencies as per the provisions of the Abkari Act 1 of 1977 and the Kerala Spirituous Preparations (Control) Rules, 1969."

In W.P.(C)No.11615 of 2014 the challenge against Ext.P27 which is the order suspending the licence, has been sought for in addition to the same prayers sought for in W.P.(C)Nos.20982, 24154, 24318, 26479, 30619 of

2008 and 7491 of 2009. In W.P.(C)No.18619 of 2014 besides seeking a declaration that the Spirituous Preparations (Control) Rules, 1969 are unconstitutional the following prayers are sought for:-

- "i) issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents not to take any action against the petitioner or his agencies or dealers or branches as per the provisions of the Abkari Act 1 of 1077 and the Kerala Spirituous Preparations (Control) Rules, 1969.
- ii) declare that ayurvedic medicines containing self generated alcohol having below 12% V/V alcohol strength is not a liquor coming under the purview of the Abkari Act 1 of 1077 and hence no action shall be taken against the petitioner or his agencies or dealers or branches as the petitioner is a licensee in FORM 25 D under the Drugs and Cosmetics Act, 1940.
- iii) declare that the 4th respondent and Drug Inspectors (ASU) under his control are the only authorities competent under the Drugs and Cosmetics Act, 1940 to proceed against the licensees under the Drugs Act, 1940 relating to any offence under the said Act.
- iv) declare that the provisions of the Abkari Act 1 of 1077 dealing with ayurvedic medicines containing alcohol duly manufactured under license in FORM No.25 D under the Drugs Act, 1940 are repugnant to the provisions of the Drugs Act, 1940 and hence void."

In W.P.(C)No.34877 of 2010 it is prayed as follows:-

- "a) A writ, in the nature of Mandamus commanding the

1st respondent to take a decision on merit, without further delay, in amending Rule 11(1)(b) of Kerala Spirituous Preparations (Control) Rules, 1969, in tune with Exhibit-P5B recommendations rendered by the Subject Expert Committee, constituted by the 1st respondent for this purpose;

- (b) A writ in the nature of prohibition interdicting the respondents 1 to 3 from initiating coercive action for the violation of Rule 11(b) of the Kerala Spirituous Preparations (Control) Rules, 1969, pending amendment of the Rule on accepting Exhibit-P5B recommendations of the Subject Expert Committee constituted by the Government for this purpose."

In W.P.(C)No.22604 of 2013 the petitioner therein sought for the following prayers:-

- "i) To issue a writ in the nature of mandamus commanding the respondents 1 to 3 to desist from initiating coercive action for the violation of Rule 11(1)(b) of the Kerala Spirituous Preparations (Control) Rules, 1969, pending amendment of the Rule on accepting Exhibit P7 recommendations of the Subject Expert Committee constituted by the Government for this purpose;
- ii) To declare that the petitioner as holder of a valid license under the Drugs and Cosmetics Act and Rules is entitled to be granted the SP.VII license as prescribed under Rule 11(1)(b) of the Kerala Spirituous Preparations (Control) Rules, 1969 and to direct the respondents to consider the petitioner's application for grant of SP.VII license and pass appropriate orders thereon in accordance with such declaration."

Apart from the positions obtained from **Thomas Vaidyan's** case, **Enoch Pharma's** case (supra) and the judgment dated 27.8.2009 mentioned hereinbefore, there is yet another reason for turning down the challenge against the Abkari Act and SPC Rules. The fact that a State Legislature can make clause regulating the use and possession of medicinal preparations which can be used as alcoholic beverages cannot be disputed in the light of the decision of the Hon'ble Apex Court in **State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd. (AIR 2005 SC 932)**. In the said decision the Hon'ble Apex Court held that the State Legislature is entitled to regulate the use and possession of medicinal preparations which are capable of being used as alcoholic beverages. Further, it was held that the use/misuse of ayurvedic preparations as alcoholic beverages could become the subject matter of regulation and control by the State. Evidently, such a legislation is available for challenge only on twin grounds, firstly, on the ground of being violative of any provisions of the Constitution and secondly, on the ground of being violative of the enabling Act. The said contentions are not available, to be urged before this Court any further, with respect to the impugned provisions under the Abkari Act and the SPC Rules based on Chapter IVA of the Drugs and Cosmetics Act in the light of the decisions

in **Thomas Vaidyan's** case and **Enoch Pharma's** case and also in **Shree Baidyanath Ayurved Bhawan's** case (supra).

9. It is to be noted that the judgment dated 27.8.2009 mentioned hereinbefore, was recalled in W.P.(C)No.24154, 20982 and 26479, of 2008 only to enable consideration of the challenge mounted based on the amendments brought into the Drugs and Cosmetics Act, subsequent to the decisions in **Enoch Pharma's** case and **Thomas Vaidyan's** case (supra). However, in none of the above cases any specific challenge has been made against any of the provisions either in the Abkari Act or in the SPC Rules on the above mentioned lines. The arguments advanced before me would reveal that the main contention is that the provisions of Abkari Act (Act 1 of 1077) or the SPC Rules are not applicable to licencees under the Drugs and Cosmetics Act and the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the Rules made thereunder and I have already found the same as one sans merit. Evidently, a contention was also raised to canvass the position that Police or Excise Officials got no authority to interfere either with the manufacture for sale of Ayurvedic medicines by the licencees under the Drugs and Cosmetics Act and/or Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the Rules made thereunder and naturally, with

their marketing of such manufactured Ayurvedic medicines. It is further contended that '*Arishtam*' and '*Aasavam*' are Ayurvedic medicines and in the case of *Mrithasanjeevani Sura* alcoholic content is permissible. But, at the same time, a perusal of Rule 161 in Chapter XVII of the Drugs and Cosmetics Rules would reveal that it prescribes a limit for the alcoholic content even in respect of *Mrithasanjeevani Sura*. Rules 162 to 164 of the Drugs and Cosmetics Rules are also relevant. A contention is taken up in the light of the fact that Section 153 of the Drugs and Cosmetics Act deals with the manufacture for sale and Rule 16 in Chapter IV of the Drugs and Cosmetics Rules the standards of quality have been prescribed. Rule 17 deals with misbranded drugs and Rules 17A and 17B deal with adulterated drugs and spurious drugs. In the light of such provisions it is contended that if a particular Ayurvedic medicinal preparation of a licensee thereunder falls within misbranded drugs on inspection or if it is an adulterated drug or spurious drug the authority under the Drugs and Cosmetics Act alone could proceed against such offenders. In short, the crux of the contention is that even if in a medicinal preparation the concerned pharmacopoeia does not provide for adding of alcohol or even in cases where addition of alcohol is permitted but the alcoholic content actually exceeded the permissible limit, the authority to consider such aspects and to take appropriate action vests

solely and exclusively with the authority under the Drugs and Cosmetics Act. Accepting the said contention would mean that even if a particular act of a licensee or a dealer attracts the offences under the Abkari Act and SPC Rules the authorities competent under the said Act and the Rules have to remain as mute spectators. When this Court has already repelled the challenge against the provisions referred hereinbefore under the Abkari Act and the SPC Rules the mere reason that initiation of proceedings is also permissible under the Drugs and Cosmetics Act on the same set of facts cannot be a reason for this Court to uphold the contentions of the petitioners in the light of the reasons mentioned hereinbefore. If under the guise of manufacture of Ayurvedic medicines for sale, in blatant violation of the provisions under the relevant Act, an intoxicating drug or liquor or preparation is made it would render the same deleterious to human health and thereby taking it out of the category of medicinal preparations following the Indian Pharmacopoeia and in such circumstance, when such preparation is attempted to be passed off as Ayurvedic preparation the competent Police authorities as also Excise authorities cannot be mute spectators holding that the persons manufacturing them or marketing them are holding required licences under the Drugs and Cosmetics Act or the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. True that, in the strict sense

`*Arishtam*' and `*Aasavam*' could not be treated as liquor for the purpose of Section 3(10) of the Abkari Act as they are Ayurvedic medicines. That does not mean that the preparations by the licencees under the Drugs and Cosmetics Act and the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 would not at any circumstance fall within the definition of `liquor' under Section 3(10) of the Abkari Act even if under the guise of preparation of Ayurvedic medicinal preparation what was actually prepared is not a medicinal preparation but only a preparation having the effect of intoxication. The mere fact that such a preparation has been made by a licencee under the Drugs and Cosmetics Act or Medicinal and Toilet Preparations (Excise Duties) Act, 1955 by itself cannot take it out of the definition of `liquor' under Section 3(10) of the Abkari Act if that preparation is nothing but a preparation which squarely falls under the definition of `liquor' and by virtue of its contents and going by the relevant provisions under the Abkari Act and SPC Rules. If the preparation is of Ayurvedic medicines viz. either `*Arishtam*' or `*Aasavam*' there is only a little excess in the alcoholic content certainly, that would not change the nature of the preparation so as to make it fall within Section 3(10) of the Abkari Act and if predominantly it is `*Arishtam*' or `*Aasavam*' but, at the same time, alcoholic content is merely seen and if in a medicinal preparation where addition of alcohol to

a certain limit is permissible but, alcoholic content exceeds the limit still they cannot be treated as 'liquor' under Section 3(10) of the Abkari Act. In the contextual situation it is relevant to refer to paragraph 6 of the decision in **Thomas Vaidyan's** case which was quoted with approval by the Full Bench in **Enoch Pharma's** case (supra). It reads thus:-

"6. We do not think that these rules impose any unreasonable restriction upon the right of the petitioners to carry on their trade. They are intended to prevent the illegal manufacture for sale and sale of liquor and intoxicating drugs under the guise of manufacturing for sale or sale of bona fide medicinal preparations. The contention that the Note to R.2(1) is an unreasonable restriction to carry on the petitioners, trade, as all arishtams and asavams or other preparations are deemed spurious preparations if their self generated alcohol content exceeds 12% by volume, has also no substance, In "Encyclopaedia of Chemical Technology" by Kirk and Othmer, it is stated: "Ethyl alcohol may be derived from four classes of raw materials:-

(1) Saccharine materials (containing sugar, such as molasses, sugar beets, sorgo, sugar cane), (2) Starchy materials (cereal grains, potatoes, etc.), (3) Cellulosic materials (wood, agricultural residues) and the waste sulfite liquor from paper-pulp mills, which contains sugars from hydrolysis of cellulose and hemicellulose; and (4) hydrocarbon gases (either by hydration of ethylene, or by conversion of the gases to a mixture of carbon monoxide and hydrogen, which is then passed over a hydrogenation catalyst (Fischer - Tropsch or 'Synthine' or 'Synthol' process).

With the first three classes of raw materials, alcohol is produced by the fermentation of sugars with yeast. Raw materials of the first class are directly fermentable. The second class consists of the more complex carbohydrates, such as starch, which must first be converted to fermentable sugars by enzymatic action using malt, or by the use of molds or of mineral acids. The cellulosic materials of the third class are converted to fermentable sugars by hydrolysis with mineral acids. With the fourth class of raw materials, the processes used are entirely different, and no biological organisms are used.

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When the concentration of ethyl alcohol reaches about 12% by volume the activity of the yeast ceases, and in general practice 9% is not usually exceeded. This introduces an upper limit to the concentration of alcohol that can be produced by a fermentation process."

Besides, the limit of self generated alcohol to 12% by volume is not inexorable as the Expert Committee can vary it in appropriate cases."

But, at the same time, if under the guise of manufacturing for sale of Ayurvedic medicines what is prepared is nothing but a liquor under a pseudo name viz., name of any '*Arishtam*' or '*Aasavam*' or any Ayurvedic preparation certainly, it cannot escape appropriate action under the relevant rules either by the Police authorities or by the Excise authorities or by any other competent authorities, in accordance with law. In such cases definitely they will have the bounden duty to book

the culprits. Merely because what is attempting to be passed off bears the labels of '*Arishtam*' or '*Aasavam*' or any other Ayurvedic medicines that by itself is no ground for those who manufacturers to manufacture it and market it with impunity, if in troth, they are not having the characteristics of '*Arishtam*' or '*Aasavam*' or other Ayurvedic preparations but, would attract offences under relevant provisions in the Abkari Act and/or SPC Rules going by the nature of the said preparation. In such circumstances, I am of the view that merely because they being the licencees under the Drugs and Cosmetics Act and the Rules the authorities under the Drugs and Cosmetics Act could book them in case violation of the provisions under the Act and the Rules cannot be a reason for them to make such preparations which would attract the penal provisions under the Abkari Act and SPC Rules for sale and marketing. Such label of '*Arishtam*' or '*Aasavam*' cannot be a licence for manufacturing and marketing an intoxicating drug or liquor, in derogation of the mandates of law and with impunity. But, at the same time, evidently, bonafide medicinal preparations as defined under Rule 3 (d) of the SPC Rules would be a statutory, protective sheathing to escape from such penal proceedings. The circumstances extracted above would also suggest that the officers competent who conduct inspection have to act prudently. Such official authorities shall bear in mind that the

licencees under the Drugs and Cosmetics Act and the Rules who are bonafidely manufacturing Ayurvedic medicines for sale in accordance with the relevant pharmacopoeia and marketing them in accordance with conditions of the relevant licences or permits must have earned a reputation and goodwill which cannot be achieved on a single day and it requires a constant and consistent endeavour to achieve the same and it shall not be spoiled in a second by some reckless action. Availability of rotten fruit in a carton cannot and will not make the rest non-edible. The rich tradition and credibility of Ayurvedic System of Medicine virtually developed into a culture in this State and the same shall not be dampened or destroyed. In such circumstances, it is only prudent to take samples from the suspected preparation if the officer bonafidely entertain suspicion and to take appropriate steps to subject it to analysis, in accordance with law. A perusal of the Abkari Act and SPC Rules would reveal that procedures have been prescribed thereunder in the matter of inspection, search, sampling etc. and as held by the Division Bench in the judgment in W.P.(C)No.27008 of 2007 visiting the premises and taking samples and taking recourse to appropriate legal proceedings in accordance with law cannot be described as harassment. They also cannot be taken as unwarranted interference. Needless to say that while doing so, all the statutory mandates have to be followed with a view to

prevent unauthorised and illegal activities in the matter of manufacturing of preparations which are deleterious to human life under the pseudo name of medicinal preparations. The long and short of the discussion is that if the suspected preparation is Ayurvedic medicine, '*Arishtam*' or '*Aasavam*' and merely because they contain any constituent which was not permissible under the Pharmacopoeia that is a matter for the authority under the said Act to handle. But, at the same time, if under the guise of preparation of Ayurvedic medicines what was prepared is not an Ayurvedic preparation but one capable partaking the characteristics of a liquor under Section 3(10) or intoxicating drug or liquor and merely because the receptacle bears the label '*Arishtam*' or '*Aasavam*' or any other medicinal preparation cannot and will not be a reason for such offenders to indulge in such activities with impunity and escape from the clutches of law under the cover of being a licensee under any of the aforementioned statutes. Certainly, in latter cases the Police and Excise officials have to act to take prompt and proper action to book such culprits and in such circumstances, the contention that they could be proceeded under the Drugs and Cosmetics Act or other Medicinal Preparation Act by the authorities concerned cannot be a reason for refraining the Police or Excise authorities to take appropriate action. It is in such circumstances that the prelude to the judgment made with

reference to Constitution of India, General Clauses Act and Indian Penal Code assumes relevance. In the said circumstances, the stress is for the requirement of making the confiscated liquid subject to analysis to decide whether the person/persons concerned is/are to be proceeded against under the provisions of the Abkari Act or SPC Rules, in accordance with law and expeditiously. In such circumstances, it is only prudent to conduct such analysis to ensure that what was actually prepared is not a medicinal preparation but a preparation intended to have intoxicating effect. This will certainly avert the unnecessary booking of the *bona fide* manufacturers as also, of the trauma of facing a trial and above all, from losing the hard earned reputation and goodwill. In the result, all the writ petitions have to fail to the extent they mounted challenge against the provisions of Abkari Act and also against the SPC Rules in the light of the provisions under the Drugs and Cosmetics Act. So also, the petitioners are not entitled to any relief relating direction to the respondents not to take any action against them or their agencies or dealers or branches as per the provisions of the Abkari Act (1 of 1077) and the SPC Rules and also to declare the competent authorities under them as incompetent to proceed against them or their agencies or dealers or branches under the aforesaid provisions of law. The prayer to issue writ in the nature of mandamus commanding the State of Kerala to amend the provisions

under the SPC Rules also have to fail. In other words, the petitioners are not entitled to any such reliefs. At the same time, in the light of the discussions as above it is made clear that in the case of the petitioners who are licencees under the Drugs and Cosmetics Act and also the Medicinal and Toilet Preparations (Excise Duties) Act and the Rules thereunder any application for issuance of licences either in FORM SP VI or FORM SP VII under Rule 11 of the SPC Rules, is pending it shall be considered and appropriate action shall be taken thereon expeditiously, at any rate, within a period of one month from the date of receipt of copy of this judgment in the matter of its grant. If any such application of any of the petitioners are already rejected, in case of submission of fresh application the same shall be considered afresh disregarding the earlier rejection. But, in all such cases the grant will certainly be subject to fulfillment of all statutorily prescribed conditions. Though the challenge against the Abkari Act and SPC Rules and the other prayers are declined the writ petitions are disposed of subject to the above observations,.

10. As noticed hereinbefore, in CrI.M.C.No.262 of 2011 quashment of the proceedings in C.R.No.47 of 2010 of Excise Range, Kilimannoor, Thiruvananthapuram pending before the Court of Judicial First Class Magistrate-II, Attingal has been sought for, virtually raising the

same contentions. I have also heard the learned counsel for the petitioner. In the light of the contentions and findings mentioned hereinbefore, I am of the view that the proceedings in C.R.No.47 of 2010 cannot be terminated abruptly. At the same time, after the filing of the final report in case any other grounds are available for challenging the continuance of the criminal proceedings it will be open to the petitioner to take recourse to appropriate legal remedies, if so advised. At the same time, as of now, there is absolutely no reason or ground to interfere with the proceedings in C.R.No.47 of 2010 of Excise Range, Kilimannoor, Thiruvananthapuram in invocation of the power under Section 482 of the Code of Criminal Procedure. Without prejudice to the right of the petitioner in that regard and subject to the observations made hereinbefore the Crl.M.C. is disposed of.

Sd/-
C.T.RAVIKUMAR
Judge

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