

THE ABKARI ACT

(1 OF 1077)

*Amended by Acts**

V of 1091, III of 1106, I of 1109, XIX of 1111, L of 1112, XIII of 1119 and XV of 1124, Proclamation V of 1112, Presidents' Act 1 of 1964, and Acts 10 of 1967, Act 8 of 1968, 16 of 1969, 14 of 1973, 10 of 1975, 24 of 1975, 21 of 1984 12 of 1995, 4 of 1996, 16 of 1997, 7 of 2002, 1 of 2003 and 12 of 2003.

The Act was passed by His Highness the ¹²[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.

Preamble:- WHEREAS it is expedient to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs in the ¹³[State of Kerala] is enacted as follows:-

SYNOPSIS

Preamble - aid in construction ➔ It is one of the cardinal principles of the statutory construction that where the language of an Act is clear, the Preamble cannot be invoked to curtail or restrict the scope of the enactment and only where the object or meaning of an enactment is not clear the preamble may be resorted to explain it.¹⁴ Courts cannot begin with the preamble for construing the provisions of an act, though they would be justified in resorting to it, nay they will be required to do so, if they find that the language used by the Parliament is too general.¹⁵ If the language used by the Parliament is ambiguous, the court can look into the preamble for construing the provisions of an act.¹⁶

* *STATEMENTS OF OBJECTS AND REASONS - SEE PAGE 131.*

12. Substituted for 'Raja' by Act 1 of 1109.

13. Substituted for the words "Cochin State" by Act 10 of 1967.

14 **State of Bihar and others, etc. etc., Appellants v. Bihar Distillery Ltd., etc. etc., Respondents. AIR 1997 SC 1511.**

15 (See: **Burrakur Coal Co. Ltd. v. Union of India, (1962) 1 SCR 44 at page 49 / (AIR 1961 SC 954 at pp. 956-57) and M/s. Motipur Zamindary Co. (P) Ltd. v. The State of Bihar, 1962 Supp (1) SCR 498 at page 504 / (AIR 1962 SC 660).**)

16 **Arnit Das v. State of Bihar, AIR 2000 SC 2264, AIR .. SC 2037/ 2000 CRLJ 2971/ 2000 (5) SCC 488.**

I.— PRELIMINARY AND DEFINITIONS

1. Short title.- This Act may be cited as “the ¹⁷[Abkari Act] 1 of 1077.

Extent.- It extends to the whole of the ¹⁸[State of Kerala].

¹⁹[Commencement.— *x x x*]

2. Repeal of Enactments.- From the date on which this Act comes into force ²⁰[*x x x*], the enactment mentioned in the schedule hereto annexed shall be repealed to the extent specified in the third column of the said Schedule ²⁰[*x x x*]:

Provided that all ²¹[Licences and privileges] granted under any of the said enactments in force on the date on which this Act comes into force ²²[*x x x*] shall continue in force for the periods for which the same have been respectively granted, subject to the provisions of the enactments under which such ²¹[Licences and privileges] were granted:

Provided further that the said repeal shall not affect any act done, or any offence committed, or any proceedings commenced or any claim which has arisen or any penalty which has been incurred, before this Act comes into force.

3. Interpretation.- In this Act, unless there be something repugnant in the subject or context :-

(1) **Abkari Revenue:-** “Abkari Revenue” means revenue derived or derivable from any duty, fee, tax, fine or confiscation, imposed or order under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs.

17. Substituted for the words “Cochin Abkari Act” by Act 10 of 1967.

The Cochin Abkari Act, 1 of 1077 and the rules, orders and notifications made or issued thereunder and in force extended to the whole of Kerala with effect from 11th May, 1967 as per the Cochin Abkari [Extension and Amendment] Ordinance 1967 (Ordinance, No.3 of 1967). The provisions as per Clause (a) of sub-section (2) of Section 1 of Amendment Act, 1967 (Act 10 of 1967) came into force with effect from 15th August 1967 as per Government notification S.R.O. No.233/67 dated 10th August 1967 published in K.G. Ex. dated 10th August 1967 and the remaining provisions of the Amendment Act, 1967 came into force on the 11th May, 1967.

18. Substituted for the words “Cochin State” by Act 10 of 1967.

19. The paragraph “and it shall come into force in any Taluk or other local area within the said State to such extent and from such date as the Diwan by Notification shall direct” omitted by Section 5 (C) of Act, 10 of 1967.

20. Omitted by Act 10 of 1967.

21. Substituted by Act 10 of 1967.

22. Omitted by Act 10 of 1967.

Substituted for ‘Regulation’ throughout the enactment by proclamation V of 1112.

(2) **Abkari officer:-** “Abkari Officer” means the ²³[Commissioner of Excise]

or any officer or other person lawfully appointed or invested with powers under Sections 4 or 5.

²⁴[(2A) **Blending**:- “Blending” means the mixing of two different spirits of the same or different strength;

(2B) **Bonded Warehouse**- “Bonded Warehouse” means a warehouse where liquor is stored in bond.]

(3) **Commissioner** :- ²⁵[[“Commissioner”] means the officer appointed by the ²⁶[Government] under section 4, clause (a).

²⁷(4) **“Collector”** means the Collector of a district and includes any other officer appointed by the Government to exercise the powers and perform the duties of a Collector under this Act];

²⁸[(5) **Compounding**- “Compounding” means the preparation of foreign liquor by the addition of flavouring or colouring matter or both to imported or Indian made spirits.]

(6) **Abkari Inspector**.- “Abkari Inspector” means an officer appointed under section 4, clause (d).

²⁹[(6A) **“Arrack”** means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharma-copoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bonafide medicinal preparation by the Expert Committee appointed under Section 68A of the Act;]

23. Substituted for “Superintendent of Abkari Revenue” by Section 2 of Act III of 1106

24. Clauses (2a) & (2b) inserted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-2003.

25. Substituted for “Superintendent” by Section 2 *ibid*.

26. Substituted for the word “Diwan” throughout the Principal Act by Section 4 of Act 10 of 1967.

27. Substituted for clause “[4] Peishkar:- “Peishkar” means the Peishkar of a Division and includes an acting Peishkar or any Officer placed by the Diwan in temporary charge” by Section 7 (a) of Act 10 of 1967.

28. Clause 5 “Diwan:- “Diwan” includes an acting or officiating Diwan” omitted by Section 7(b) of Act 10 of 1967.

29. Inserted by Act 4 of 1996.

(7) **Imprisonment**:- “Imprisonment” means imprisonment of either

description as defined in the ³⁰[Indian Penal Code.]

(8) **Toddy:-** “Toddy” means fermented or unfermented juice drawn from a coconut, palmyra, date, or any other kind of palm tree.

(9) **Spirits:-** “Spirits” means any liquor containing alcohol and obtained by distillation, ³¹[x x x x].

³²[x x x x]

(10) **Liquor:-** “Liquor” includes spirits of wine, ³³[arrack], spirits, wine, toddy, beer and all liquid consisting of or containing alcohol.

(11) **Beer:-** “Beer” includes ale, stout, porter and all other fermented liquors usually made from malt.

(12) ³⁴[**Country liquor:-** “Country Liquor” means toddy or arrack;]

(13) **Foreign Liquor.-** “Foreign Liquor” includes all liquor other than country liquor.

Provided that in any case in which doubt may arise the Government may declare by notification what, for the purposes of this Act, shall be deemed to be “country liquor” and what “foreign liquor”.

(14) ³⁵[**intoxicating drug** means any intoxicating substance other than a Narcotic drug or a psychotropic substance regulated by the Narcotic Drugs and Psychotropic Substance Act, 1985 (Central Act, 61 of 1985), which the Government may by notification declare to be an intoxication drug.]

(15) **Sale or Selling:-** “Sale or selling” includes any transfer ³⁶[including] gift.

30. The words “Cochin Penal Code” substituted by Act 10 of 1967

31. The words “whether it is denatured or not” added by Act V of 1091 and omitted by Act IV of 1996.

32. Explanation Added by Act V of 1091 and omitted by Act 4 of 1996.

33. For the words “methylated spirit” the word “arrack” substituted by section 2(c) of Act 4 1996.

34. Substituted by section 2(d) of Act 4 of 1996.

35. Substituted firstly by section 2 of Act L of 1112 and again section 2(e) of Act 4 of 1996.

36. Substituted for the words “otherwise than by way of” by section 7(g) of by Act 10 of 1967.

³⁷[(16) **“Import”** means to bring into the State.

(17) **“Export”** means to take out of the State.]

³⁸[(17A) **“Transit”** means to move from one place in a State to another place in that State or to any other state through the territory of the State of Kerala.

Explanation :- In this clause, “State” means a State other than the State of Kerala and includes a Union Territory].

(18) **Transport :-** “Transport” means to move from one place to another within the ³⁹[x x x] State.

⁴⁰[(18A) x x x]

(19) **Manufacture:-** “Manufacture” includes every process, whether natural or artificial, by which any fermented, spirituous, or intoxicating liquor or intoxicating drug is produced, ⁴¹[prepared ⁴²[compounded] or blended] and also redistillation and every process for the rectification of liquor.

⁴³[(19A) **Bottle:-** “Bottle” means to transfer liquor from a cask or other vessel to bottle, jar, flask or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not, and includes rebottling].

(20) **Rectification :-** “Rectification” includes every process whereby spirits are purified or are coloured or flavoured by making any material therewith.

(21) **Place :-** “Place” includes also a house, building, shop ⁴⁴[tent, booth, raft, vehicle and vessel].

⁴⁵[(21A) **Police Station:-** “Police Station” includes any place which the Government may, by notification, declare to be Police Station for the purposes of this Act].

37. Substituted for clause 16 **“import** - “import” means to bring into the Cochin State from Sea or from Foreign Territory and 17 **“Export-“Export”** means to take out of the Cochin State to State to Sea or to Foreign “Territory” by Section 7(h) of Act 10 of 1967.

38. Inserted by Act 10 of 1975 and Substituted by Act 16 of 1997 with effect from 3-6-97.

39. The word “Cochin“ omitted by Act 10 of 1967

40. Inserted by Act V of 1091 and omitted by Act 4 of 1996.

41. Substituted for the words “or pepared” by section 3 (v) of Act V of 1091.

42. Inserted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-2003.

43. Inserted by Section 3(vi) of Act v of 1091.

44. Substituted for the words “tent and vessel” by section 7(j) of Act 10 of 1967.

45. Inserted by Section 3(vii) of Act V of 1091.

(22) **Tap :-** “Tap” means to prepare or manipulate the spathe or other part of

any toddy-producing tree with the object of extracting toddy therefrom. The attaching of pots is not necessary to constitute the act.

⁴⁶[(23) **Rental:-** “Rental” means the rental payable under Section 18A in consideration of the grant of an exclusive or other privilege of manufacturing supplying or selling any liquor or intoxicating drugs.]

⁴⁷[(24) **State:-** “State” means the State of Kerala].

⁴⁸[(25) **Warehouse,-** “Warehouse” means that part of a distillery, brewery, winery or other manufactory where liquor intended for issue is kept and includes a warehouse established under a special licence taken out under the Act or Rules;]

SYNOPSIS

General definitions

- | | |
|----------------------------|------------------------------|
| 1) <i>Abkari Inspector</i> | 7) <i>Bonded Warehouse</i> |
| 2) <i>Abkari officer</i> | 8) <i>Bottle</i> |
| 3) <i>Abkari Revenue</i> | 9) <i>Country Liquor</i> |
| 4) <i>Arrack</i> | 10) <i>Commissioner</i> |
| 5) <i>Beer:</i> | 11) <i>Intoxicating drug</i> |
| 6) <i>Blending</i> | 12) <i>Transit</i> |

“Abkari inspector” means an officer appointed under Sec.4 clause (d) of Abkari Act.

Abkari Inspector: ⇒ Officers specified under Sec.4 (d) are officers invested with powers under Sec.40 to 53 of Abkari Act. As per SRO.No.234/67 dated 10-8-67, all officers not below the ranks of Excise Inspectors are vested with powers under Section 40 to 53. Hence, the following Officers in Excise Department are Abkari Inspectors:

1. Excise Inspector
2. Circle inspector of Excise
3. Assistant Excise Commissioner
4. Deputy Excise Commissioner
5. Additional Excise Commissioner (Additional Excise Commissioner is Joint Excise Commissioner re-designated)
Excise Commissioner.

46. Inserted by Section 2(ii) of presidents Act 1 of 1964.

47. Inserted by Section 7(k) of Act 10 of 1967.

48. Clause (25) inserted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-2003.

“Abkari Officer” means the Commissioner of Excise, any officer, or other person lawfully

Abkari officer appointed or invested with powers under Sec.4 or 5 of Abkari Act. The following are the Abkari Officers appointed or invested with powers under Sec. 4 or 5 of Abkari Act. Excise Commissioner

1. Additional Excise Commissioner (Joint Excise Commissioner re-designated)
2. Deputy Excise Commissioner
3. Assistant Excise Commissioner
4. Circle Inspector of Excise
5. Excise Inspector
6. Assistant Excise Inspector
7. Preventive Officer
8. Excise Guard
9. Police Officers of and above the rank of Sub Inspectors of Police in-charge-of law and Order and working in the General Executive Branch of Police Department within their respective jurisdiction.
10. Revenue Officers of and above the rank of Deputy Collectors in Revenue Department.

6. As per SRO No.321/96 Dated 29-3-96, Government have appointed all Police Officers of an above the rank of Sub Inspectors of Police in-charge-of Law and Order and working in the General Executive Branch of Police Department within their respective jurisdiction, and all Revenue Officers of and above the rank of Deputy Collectors, as Abkari Officers vested with powers under Section 40 to 53. Hence, Excise Inspectors and above in Excise Department, Sub Inspectors and above in-charge-of Law and Order and working in the General Executive Branch in Police Department, and Deputy Collectors and above in Revenue Department, are Abkari Inspectors.^{48A}

Excise duty is revenue levied under Sections 17 and 18 of the Act. Tax namely luxury tax is levied under Sec. 18 (3) & (4). Fee is collected when permits are granted under Sec. 24. Fines are collected while compounding. Rental is defined separately in Sec. 3 (23).

Abkari Revenue: Legislature in its wisdom defined arrack, as potable liquor other than toddy, beer etc. The intention of the legislature appears to be to prohibit arrack of any strength. Hence, it cannot be said that the definition of arrack is vague since no minimum strength is prescribed.⁴⁹

Arrack: “Beer” includes ale, stout, porter, and all other fermented liquors usually made from malt. Malt is germinated barely, where both starch and portion of insoluble proteins are changed into soluble diffusible substance. Malt may be from any cereal, but

48A. *Subash v. State of Kerala*, 2008 (2) KLT 1047.

49. *Asokan v. State of Kerala*, 1998 (1) KLT 330 / ILR 1998 Kerala 395 / 1998 KLJ 390.

malt commonly refers only to barely malt. As per ISI definition, Beer is the product of

alcoholic fermentation of a 'mash' in potable water of malted barely and hops or hops-concentrates with or without the addition of other malted or un-malted cereals or other carbohydrate preparations. Mash is the sugary solution prepared from cereals.

Blending is the mixing of two different spirits of the same or different strength.

Blending: Bonded Warehouse is the place where liquor is stored. Any bond means storing without paying duty, but an execution of a bond as a security for payment.

Bonded Warehouse: Bottle means transfer of liquor from casks or other vessel to bottle, jar, flask, or similar receptacle for sale.

Country liquor means toddy or arrack. Country liquor is not foreign liquor.

Bottle: Commissioner shall subject to the control of the Government, have control over the administration in Abkari Department and the collection of Abkari Revenue. (SRO. No. 239/67 Dated 10.08.1967).

Commissioner: Ganja under the N.D.P.S. Act takes in only the flowering and fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by the tops. In contradistinction to this definition, the definition

Intoxicating drug: of "intoxicating drug" in the Abkari Act is a wider definition, which takes in all parts of the cannabis plant within its fold. Where the ganja seized consists of leaves and seeds, not accompanied by the fruiting or flowering tops, it would still continue to be an "intoxicating drug" as defined under the Abkari Act, even after the coming into force of the NDPS Act on 14.11.1985 and even after the notification under Sec.8 specifying 13.12.1989 as the date from which the prohibition under the N.D.P.S. Act would operate. (State of Kerala vs. Thomas 1995 (2) KLT 873 & State of Kerala vs. Manoharan and others 1998 (2) KLJ 613 overruled. Sivadasan vs. State approved 2003 (3) KLT 100 = ILR 2003 (2) Kerala 480).⁴⁹

Chloral Hydrate is an intoxicating drug under the Abkari Act. It is defined as a poisonous substance under Schedule I of Kerala Poisonous Rules, 1996 published as SRO No. 270/96 dated 13.03.96

"Foreign liquor" includes all liquor other than Country Liquor. As per Foreign Liquor Rules, Foreign Liquor means and includes all wines, spirits, cider, fenny, beer and other fermented liquors, and plain Rectified Spirit including Absolute Alcohol intended to be used for the manufacture of liquors meant for human consumption, imported into the State by sea or land or air, whether manufactured in India or outside.

^{49.} Mary v. State of Kerala, 2005 (4) KLT 39.

The definition in Abkari Act does not take in methyl alcohol or methanol. Methyl alcohol is not a liquor or substance of that character. It is a poisonous substance.⁵⁰

Wash is not liquor but is only a material fit for the purpose of distillation of arrack⁵¹. Wash, which is a liquid containing small percentage of alcohol, is a "matter" or "material". Viewed in

Liquor: this light, keeping or being in possession of wash for distillation will come under S.55 (g).⁵² “Wash” is the raw material for preparation of arrack, which is a potable liquor containing alcohol. In **Paravan v. State of Kerala** the prosecution was able to prove that, the accused was in possession of 20 litres of wash. The conviction recorded by the trial court under S. 55(g) of the Abkari Act confirmed⁵³.

“Police Station” includes any place, which the Government may by Notification; declare to be Police station for the purpose of Abkari Act. As per SRO. No.323/96 published as GO (P) No.72/96/TD Dated 29-3-1996, Government have declared the following offices in the State, as Police Station for the purpose of Abkari Act:

- Police Station*
1. All Excise Range Offices
 2. All Excise Enforcement & Anti Narcotic Special Squad Offices
 3. All Excise Control Rooms
 4. The Narcotic Intelligence Bureau at Adimali
 5. All Excise Check Posts

Transit, under the Act, is movement from one place in a State to another place in that State through the territory of the State of Kerala. If liquor is transported from Karnataka or any other state to Mahe, even though it passes through the territory of Kerala State before it reaches Mahe, no transit permit is required, for there is no movement from one state to the same state, as Mahe is in a different state. When liquor is transported from Pondicherry to Mahe, passes through the territory of Kerala State transit permit is necessary.

Transit: The Excise authorities and the petitioners in **Perumal Wines** were under a mutual mistake in proceeding on the assumption that transit permits are necessary in all cases where liquor passes through the Kerala State to Mahe. When the petitioners realised their mistake and were prevented from transporting liquor to Mahe they challenged the action of the state. It was held that even though such transport did not fall within the definition of Transit’ in the Act and rules, petitioners were well, within their right to challenge the action of the authorities as illegal and unconstitutional. It was held that the principle of estoppel could not be pressed into service in such cases by the state.⁵⁴

50. **Bombay Oil Mills Industries v. Excise Inspector**, ILR 1999 (2) Kerala 199.

51. **State v. Choyunni**, 1980 KLT 107

52. **Kittuni v. State** 1981 KLT SN page 169 case 124

53. **Paravan v. State of Kerala**, 2007 (1) KLT 396

54. **Perumal Wines v. State of Kerala**, 1989 (2)KLT 924 / AIR 1990 NOC 61.

II.— ESTABLISHMENT AND CONTROL

4. ⁵⁵[The Government may, by notification in the Gazette:-]

(a) **The Government may appoint an officer to control the administration of the Abkari Department:-** Appoint an officer, who shall be styled the ⁵⁶[Commissioner of Excise] and who shall, subject to the general control of

the Government have ⁵⁷[Control] of the administration of the Abkari Department and of the collection of the Abkari Revenue or of both;

(b) **May appoint any person other than the Commissioner to perform all or any of his duties :-** Appoint any person other than the ⁵⁸[Commissioner of Excise] to exercise all or any of the powers and to perform all or any of the duties of the ⁵⁸[Commissioner of Excise], subject to the control of the Government.

(c) **May withdraw Abkari powers from commissioner or other officer appointed under clause (a) or clause (b):-** Withdraw from the ⁵⁹[Commissioner] or other officer appointed under clause (a) or clause (b) any or all of his powers in respect of the Abkari Revenue;

(d) **May appoint officer to take action under Sections 40 to 53:-** Appoint officers to perform the acts and duties mentioned in Sections 40 to 53 inclusive of this Act;

(e) **And subordinate officers :-** Appoint subordinate officers of such classes and with such designations, powers and duties under this Act as the Government may think fit.

(f) **May appoint any ⁶⁰[Officer of Government] or persons to act as above :-** Order that all or any of the powers and duties assigned to any officer under clauses (d) and (e) of this section shall be exercised and performed by any ⁶⁰[Officer of Government] or any person.

⁶¹[(g) Delegate to any Abkari Officer all or any of ⁶²[their powers] under this Act;]

55. Substituted for "The Diwan from time to time, by notification applicable to any Taluk or other local area in which this Act is in force, may:-" by Section 8(a) of Act 10 of 1967.

56. Substituted for "Superintendent of Abkari Revenue" by Section 2 of Act III of 1106.

57. Substituted for "Charge" by Section 3(i) of Act L of 1112.

58. Substituted for "Superintendent of Abkari Revenue" by Section 2 of Act III of 1106.

59. Substituted for "Superintendent" by Section 2 of Act III of 1106.

60. Substituted for the words "Sirkar Officer" by Section 8(b) of Act 10 of 1967.

61. Added by Section 3(ii) of Act L of 1112.

62. Substituted for the words "his powers" by Section 8(c) of Act 10 of 1967.

⁶³**[5. The Government may, from time to time, make rules :-** (1) Prescribing the powers and duties under this Act to be exercised and performed by Abkari Officers of the several classes; and

(2) regulating the delegation by the Government or by the Commissioner of Excise of any powers conferred by this Act or exercised in respect of Abkari

Revenue under any law for the time being in force]

⁶⁴[5A. Power of the Government to authorise officers to admit persons arrested to bail:- The Government may, by notification, and subject to such conditions as may be prescribed in such notification empower all or any of the officers or classes of officers or persons mentioned in section 34, either by name, or in virtue of their office, throughout the ⁶⁵[x x x] State or in any local area, to admit a person arrested under the section to bail to appear, when summoned or otherwise directed, before an Abkari Officer having jurisdiction to enquire into the offence for which such person has been arrested, and may cancel or vary such notification].

63. Substituted by Section 4 of Act L of 1112.

64. Inserted by Section 4 of Act V of 1091.

65. The word "Cochin" omitted by Section 9 of Act 10 of 1967.

TABLE SHOWING POWERS AND DUTIES OF OFFICERS

No.	Officers	Local Jurisdiction	Powers & duties	Remarks
1	Commissioner of Excise	Throughout the State of Kerala.	To exercise all the powers conferred under the Act. To have control of the administration of the Department. To have control of the Abkari Revenue	
2	Joint Excise Commissioner. (This post was later re-designated as Additional Excise Commissioner)	Throughout the State of Kerala.	To exercise all the powers and to perform all the duties of the commissioner, concurrently with and subject to the control of the Commissioner	Joint Excise commissioner mentioned here is Additional Excise Commissioner. The present post of Joint Excise commissioner is Secretary (Excise) re-designated consequent to Board of Revenue Abolition act 1996 (Act 14 of 1997).
3	Deputy Commissioners of Excise	Within the area for which they are appointed	Do	The State is divided into 3 excise Zones and each zone is under the jurisdiction of one Dy. Commissioner.

III.- IMPORT, EXPORT AND TRANSPORT

⁶⁶[6. Import of liquor or intoxicating drug:- (1) No liquor or intoxicating drug shall be imported unless the permission of the Government or any of-

<i>No.</i>	<i>Officers</i>	<i>Local Jurisdiction</i>	<i>Powers & duties</i>	<i>Remarks</i>
4	Assistant Excise commissioners	Within the area for which they are appointed	To exercise all the powers and to perform all the duties of the commissioner, concurrently with and subject to the control of the commissioner, in respect of the following: (i) Issue of Import Permits under Sec.6 and Export permits under Sec.7.	The State is divided into 14 Excise Divisions corresponding with the 14 Revenue Districts. Each Division is placed under the jurisdiction of one Asst. Excise Commissioner. Divisional Asst. Excise Commissioners grant Import and Export permits for import to or export from their Divisions. However, for import of IMFL, Asst. Excise Commissioner of KSBC, based on rule 9 of foreign Liquor Rules, grants permits.
		Throughout the State of Kerala	(ii) Issue of Special Transport Permits under Sec.11	Divisional Asst. Excise commissioners grant these Permits.
		Within the area for which they are appointed.	(iii) Issue of Licences for manufacture, possession and sale under sec.12, 13 and 15 respectively	Divisional Asst. Excise Commissioners grant these Licences in their respective Divisions.
		Do	(iv) Supervision and management of licensed distilleries, breweries, wineries or other manufactories or warehouse	Formerly Divisional Asst. Excise Commissioner (Distilleries & Pharmaceuticals) were exercising this power. the post of Asst. Excise Commissioner (D&P) was later abolished and his duties now entrusted to Zonal Dy. Excise commissioners.
		Do	(v) Stay of Abkari cases and release of accused involved in Abkari cases.	From 3.6.97, by Abkari Amendment Act 1997 (Act 16 of 1997), this power became non-exercisable since Sec.40(4) of pre-amended Act conferring this power was deleted and new Sec.40 substituted.

<i>No.</i>	<i>Officers</i>	<i>Local Jurisdiction</i>	<i>Powers & duties</i>	<i>Remarks</i>
5	Excise Inspectors in charge of Ranges	Throughout the State of Kerala	To exercise all the powers and to perform all the duties of the commissioner, in respect of issue of Special Transport Permits under Sec.11, concurrently with and subject to the control of the Commissioner.	Under this empowerment, Range Excise Inspectors can issue Transport Permits. But, they are not exercising this power for the reasons mentioned in the Note below.

Synopsis: Consequent to GO(MS)No.39/96/TD dated 2-3-1996, Board of Revenue (Excise) vide XA1-25000/95/Spl. dated 28-3-1996 entrusted Circle Inspectors in charge of circles, the responsibility of all matters connected with Revenue collection, and Excise Inspectors in charge of ranges, the responsibility of all matters connected with enforcement. Based on this, Circle Inspectors began issuing Permits for transport. Lately, by Executive Order XC1-27111/2003 dated 29-10-2003 of commissionerate of Excise, Circle Inspectors attached to FL-9 were entrusted with the responsibility of issuing Transport Permits for transport of IMFL from FL-9 to other FL shops, instead of by local Circle Inspectors.

6	Excise Inspectors in charge of Distilleries, Warehouses and Breweries, or Wineries	Throughout the State of Kerala	Throughout the State of Kerala To exercise all the powers and to perform all the duties of the Commissioner, in respect of issue of Special Transport Permits under Sec.11 for the transport of liquor made in or issued from the Distilleries, Warehouses and Breweries or Wineries of which they are in charge, concurrently with and subject to the control of the Commissioner.	Though FL (C,B & B) Units are not mentioned in the array of manufactories here, these units also may be treated as coming under the same. Though Excise Inspector is empowered here to issue Permits for transporting IMFL from Distilleries and FL (C,B & B) Units to FL 9, permits are issued by Asst.Excise Commissioner of KSBC.
7	Licensed depot Keepers of Country Spirits and Toddy	Within the area specified in their licence	To exercise all the powers and to perform all the duties of the Commissioner in respect of issue of Special Transport Permits under Sec.11 for the transport of Spirits or Toddy to licensed shops in respect of which the Depot is licensed, concurrently with and subject to the control of the Commissioner.	This power given to a non-Government individual is on the strength of Sec.4 (b). From 1.4.1996, Country Spirit (Arrack) is banned in the State. hence there is no Arrack depot now. From 1.4.2002, Toddy depot also is banned.

<i>No.</i>	<i>Officers</i>	<i>Local Jurisdiction</i>	<i>Powers & duties</i>	<i>Remarks</i>
8	Holders of D-I, D-II and D-III Licences for sale of Denatured Spirit/ Methylated Spirit/ Methyl Alcohol, and holders of VR-I and VR-II Licences for manufacture and sale of varnish.	Throughout the State of Kerala	To exercise all the powers and to perform all the duties of the commissioner, concurrently with and subject to the control of the commissioner, in respect of issue of special transport Permits under Sec.11 for the transport of the said Spirits or Varnish sold by them, as provided for in the conditions of the licence.	This power given to a non-Government individual is also on the strength of Sec.4 (b). Since Methyl Alcohol stands de-linked from the operation of Abkari Act now, no permit for Methyl Alcohol is being granted under Abkari Act.
9	All Excise officers not below the rank of Excise Inspectors.	Within the area for which they are appointed.	To perform the acts and duties mentioned in Sections 40 to 53 inclusive of the Act	Sec.40 to 53 mainly deals with investigation and charge sheeting of crime cases. Only excise Inspectors and higher Officers have this power.
10	Commissioner of Excise, Joint Excise Commissioner, Deputy Excise Commissioners and Asst. Excise Commissioners	EC and JEC throughout the State and DEC and AEC within the area for which they are appointed.	To be Abkari Officers under their respective denominations, for the purpose of sections 31,32,34,35,38,39,53, 59, 67 and 67 A, and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the Sections aforesaid.	Joint Excise Commissioner (JEC) mentioned here is to be taken as Additional Excise Commissioner.

Sec.67 and 67 A refer in that order, to compounding and imposition of fine. When Sec.67 and 67A were in force, Asst.Excise Commissioners exercised the power under these sections. By Abkari (Amendment) Act 1997, Sec.67 and 67 and 67 A were deleted. Later, the Kerala Finance Act 2002 reintroduced Sec.67 partially. However the power under Sec.67 for imposition of fine is vested with the Excise commissioner instead with Assistant Excise Commissioner. Hence, at present no officer other than Excise Commissioner can exercise power under Sec.67.

11	Circle Inspectors of Excise, Excise Inspectors attached to circles, and Excise Inspectors in charge of Ranges.	Within their respective jurisdiction.	To be Abkari Officers under their respective denominations, for the purpose of Sections 31,32,34,35,38,39,53 and 59, and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the Sections aforesaid	There is no Notification giving empowerment to Excise Inspectors of EE & ANS-Squads, Excise Inspectors of EI & IB and of Check posts. (Please see Note below).
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Synopsis Saving clause at the end of the Notification indicates that there is no limit of jurisdiction for Excise Guards and other superior officers to exercise powers under sec.34. Excise Preventive Officers and other superior officers are authorized to exercise powers under Sec.34. Excise Preventive Officers and other superior officers are authorized to exercise powers under Section 31. Further, the Sections 34, 35, 38, 39, 53 and 59 empower all Abkari officers to exercise power or perform duty in relation to the said Sections. Similarly, Section 32 itself empowers all Abkari Officers not be below the rank of Preventive Officers to exercise section 32. Item 9 mentioned in this Table shows that all Excise Inspectors to authorized exercise powers sec.40 to 53. Though item 11 of the Table is silent, Excise Inspectors of EE & ANS-squads, EI & IB and check posts can be treated as Abkari Officers for exercising powers and for discharging duties under Sec.31, 32, 34,35,38,39, 53 and 59 of Abkari Act.

<i>No.</i>	<i>Officers</i>	<i>Local Jurisdiction</i>	<i>Powers & duties</i>	<i>Remarks</i>
12	Excise Inspectors in charge of Distilleries, Breweries, Wineries, other Manufactories or Warehouses mentioned in Sec.14(d)	Within the Range in which the Distillery, Brewery, Winery or other Manufactory or Warehouse is situated	To be Abkari Officers under their respective denominations, for the purpose of Sections 31, 32, 33, 34, 35, 38, 39, 53 and 59, and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the Sections aforesaid.	The power is not limited to within the Manufactory where the officer is working. It extends to the Range. This enables a Distillery Inspector to conduct a search or an inspection for the recovery of any liquor smuggled out from his manufactory and kept outside in any premises within the Range.
13	Excise Preventive Officers on duty within the Kerala State	Within their respective jurisdiction	To be Abkari officers under their respective denominations, for the purpose of Sections 31, 32, 34, 35, 38, 39, 53 and 59, and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the Sections aforesaid.	Irrespective of whether the preventive Officer is working in a Range, Circle, Squad, Check Post, EI & IB or a Manufactory, he can exercise power under these sections, within his jurisdiction.
14	Excise Guards on duty within the State of Kerala	Within the area for which they are appointed.	To be Abkari Officers under their respective denominations, for the purpose of Sections 34, 35, 38, 39, 53 and 59, and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the sections aforesaid.	Excise Guards are not empowered to conduct search without warrant under Sec.31 and inspection of licensed premises under Sec.32, unlike Preventive officers.

ficer authorised by the Government in this behalf is obtained for the importation of such liquor or intoxicating drug and unless the duties, taxes, fees and such other sums as are due to the Government under this Act, in respect of such liquor or intoxicating drug, have been paid ⁶⁷[or a bond for such payment on its importation has been executed.]

(2) A permission granted by the Government or such officer under subsection (1) shall subject to such conditions and restrictions as may be specified by the Government by notification in the Gazette.

SYNOPSIS

It is import of liquor that invites taxation and not issuance of permit. When permit is issued for import it does not attract tax, but when liquor is imported tax becomes payable. Rate of duty can be imposed after issuance of permit.⁶⁸

Import of liquor or intoxicating drug:



7. Export of liquor or intoxicating drug:- (1) No liquor or intoxicating drug shall be exported unless its export is permitted by the Government or any officer authorised by the Government in this behalf and unless:-

(a) the duties, taxes, fees and such other sums as are due to the Government under this Act, in respect of such liquor or intoxicating drug, have been paid; or

(b) a bond for such payment on its exportation or re-exportation has been executed.

(2) A permission granted by the Government or such officer under subsection (1) shall be subject to such conditions and restrictions as may be specified by the Government by notification in the Gazette.]

SYNOPSIS

Sub-section (1) of S.7 of the Abkari Act permits the distiller to export the liquor outside the State of Kerala if a bond for such payment is executed. Under the instrument the distiller become liable to pay excise duty on the liquor, they take at the point of time at

which _____ it is made.

Bond executed under S. 7(1) & stamp duty:



66. Substituted for Sections 6 & 7 by Section 10 of Act 10 of 1967.

67. Inserted by section 3 of Act 4 of 1996.

68. **D.C. Johar & Sons (P) Ltd. v. State of Kerala, 1965 KLT 196 / 1965 KLJ 317**

/ 1965 (1) KLR 160.

Collection of the amount of excise duty is ordinarily deferred until the liquor is cleared from the respondents' distillery. The bond indemnifies the State of Kerala against loss of excise duty in the event that delivery of the liquor exported is not made to the Excise Officer in

charge of the importer or in the event that the excise duty is not paid to him due to failure of delivery of all or any part of the liquor. The instrument being an indemnity bond must be assessed to duty under the provisions of Entry 32 of the Schedule of the Stamp Act. An instrument, therefore, by which person puts himself under an obligation to pay a sum of money to another on condition that the obligation shall be void if some specific act is, or is not, performed is a bond. If the executants can be sued for that sum of money only upon the strength of the instrument, the instrument is a bond. Judgement of Kerala High Court Reversed.⁶⁹

Stamp Duty Execution of Bonds ⇒ Bonds are documents classified under section 2(a) (ii) of the Kerala Stamps Act 1959, and Stamp Duty at the rate specified by Government, of the value of the document, shall be levied under Article 13 of the Schedule to the Act. The value of the consideration covered by the Bonds represents the Excise Duty. While executing Bonds, Stamp duty may, therefore, be levied for the total Excise Duty covered by the Bond.

General Bond Bonds shall be either General Bonds, which shall remain in force until cancelled, or special Bonds executed for specified occasion or particular consignments only. In the case of General Bond, the duty on the quantity of liquor that may be allowed to be imported/exported at a time covering all consignments shall not exceed the amount for which the Bond is executed. The Special Bond shall be for the total amount of duty covered by each consignment. Though Abkari Act requires Bonds for import and export only, Rules insist for Bonds when Spirit is transported without paying duty from any distillery in the State to any Compounding-Blending-and-Bottling Units, and also when Foreign Liquor manufactured in any compounding Blending-and-Bottling Unit in the State is transported without paying duty to any FL warehouse. Now, since IMFL is transported direct to FL-9 after paying duty, there is no Bonded Warehouse system. The following Table will show a few examples of Under-Bond movements of liquor suggested in various Rules:

TABLE SHOWING UNDER BOND MOVEMENTS OF LIQUOR

No	Movements	Rule	Bond Form
1	Export of Spirits to any other State or to any place out of India	Rule 47(1)(a) and 51 of D & W.Rules, 1968.	General Bond in Form V or Special Bond in Form VI.
2	Transport of spirits to any distillery or warehouse including warehouses under FL (Storage in Bond) Rules, within Kerala	Rule 47 (1) (b) of D&W. Rules, 1968.	General Bond in Form V or Special Bond in Form VI.

69. *State of Kerala v. McDowell and Co. Ltd.*, AIR 1995 SUPREME COURT 1445 / 1995 AIR SCW 2146

No	Movements	Rule	Bond Form
3	Import of Extra-Neutral alcohol, grape spirit or Malt spirit to a distillery in the State	Rule 47A(1)&47A(4) (e) of D&W Rules, 1968	Special Bond in Form VII.
4	Import of spirit to a Foreign Liquor (C,B&B) Unit in the State	Rule 7(1)(i) of FL(C,B&B) Rules 1975.	General Bond in form 11.
5	Transport of spirit to a Foreign Liquor (C,B&B) Unit in the State, from any distilleries in the State.	Rule 7(1)(ii) of FL(C,B&B) Rules 1975.	General Bond in form 11.
6	Export of IMFL from (C,B&B) Unit in the State to outside State.	Rule 11(1)(i) and 11 (4) of FL(C,B&B) Rules 1975.	Bond Form not prescribed
7	Transport of IMFL from C,B&B) Unit in the State to Foreign Liquor Bonded Warehouses in the State.	Rule 11(1)(i) and 11 (4) of FL(C,B&B) Rules 1975	Bond Form not prescribed

Bond for duty of beer In the case of Beer, since duty is calculated at the end of each quarter, based on the quantity produced, the question of realization of duty when transported or exported does not arise. Hence there is no requirement for under-bond permits. In fact, Brewery Rules are silent on under-bond export/transport movement of Beer.

Bond for Warehouses Bonds are also suggested for licensees of foreign Liquor Bonded Warehouses licensed under FL (Storage in Bond) Rules, 1961, and for licensees of Bonded spirit Store licensed under rectified spirit rules 1972. But, these Bonds are separate from the bonds mentioned above, since they involve agreement for the due observance of the provisions of the Abkari Act and Rules including payment of all charges.

Witness sureties in bond While executing general Bonds, the blank space in the Bond should be duly filled up specifically mentioning the exact amount of excise duty and the amount to be remitted, etc. The Bond should contain all the paragraphs specified in the form. Full postal address of the executants, witnesses and sureties should be clearly written in the Bond and should be duly signed by them. (No.XC3-10726/98 dated 17-3-1999 of Commissionerate of Excise).

8. ⁷⁰[(1) Prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc., of arrack.- No person shall manufacture, import export ⁷¹[without permit transit] possess, store, distribute, bottle or sell arrack in any form.]

70. Section 8 omitted by Act 10 of 1967 and again inserted by Act 10 of 1996. By Act 16 of 1997 section 8 renumbered as sub section 1 of that section and sub-section 2 inserted.

71. Substituted for the word "transit" by Act 16 of 1997 with effect from 3-6-1997.

⁷²[(2) If any person contravenes any provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than one lakh.]

SYNOPSIS

Offence under S.8: ⇒ S.8 prohibits manufacture, import export without permit transit, possession, storing, distribution, bottling, or selling arrack in any form. It does not apply to other form of liquor. Possessing and carrying beer is not made an offence under S.8 (1) and S.8 (2) of the Abkari Act.⁷³

In **Jose v. State of Kerala**^{73A} the High Court of Kerala held that arrack is liquor, the possession of which incidental to transportation will squarely attract S. 55 (a) of the Abkari Act. S. 58 of the Act seeks to punish a person for possession of illicit liquor. Further it was observed that except for the ingredient of “knowledge” mentioned in S.8 which is a conscious mental state, there does not appear to be much difference or distinction between S. 8, S.55(a) and S. 58 of the Abkari Act, so far as the transport of arrack is concerned^{73B}.

Mere possession of arrack in any form without any authority would only attract S.8 and not S. 58^{73C}.

Offences under Ss. 8(1) & 58 are not the same, even though definition of the word ‘liquor’ includes arrack^{73D}.

9. Prohibition of the transport of liquor.- The Government may, from time to time, by notification, prohibit the transport of liquor or of intoxicating drugs or of any kind of liquor or intoxicating drugs, from any local area into any other local area.

10. Transporting of liquor or intoxicating drug.- No liquor or intoxicating drug, exceeding such quantity as the Government may, from time to time, prescribe by notification in the ⁷⁴[x x x] Gazette either generally for the whole State or for any local area, shall be transported except under a permit issued under the provisions of the next following section.

72. Section 8 omitted by Act 10 of 1967 and again inserted by Act 10 of 1996. By Act 16 of 1997 section 8 renumbered as sub section 1 of that section and sub-section 2 inserted.

73. **Prasanth v. State of Kerala, 2002(1) KLT 628 / 2002(1) KLJ 312**

73A. **Jose v. State of Kerala, 2007 (2) KLT 202**

73B. -do-

73C. **Gopan v. State of Kerala, 2007 (3) KLT 443**

73D. **Jayakumar v. State of Kerala, 2007 (3) KLT 660**

74. The word “Sirkar” omitted by Section 12(a) of Act 10 of 1967.

⁷⁵[x x x]

11. Permits for transport.- Permits for the transport of liquor or intoxicating drug may be issued by the ⁷⁶[Commissioner] or by any person duly empowered in that behalf.

Such permits shall be either general for definite periods and kinds of liquor or intoxicating drugs, or special for specified occasions and particular consignments only.

Every permit shall specify:-

- (a) the name of the person authorised to transport liquor or intoxicating drugs;
- (b) the period for which the permit is to be in force;
- (c) the quantity and description of liquor or intoxicating drugs for which it is granted;
- (d) any other particulars which the Government may prescribe.

General permits shall be granted only to persons licensed under this Act and shall cover any quantity of liquor transported at any one time within the quantity specified in the permit.

Permits shall extend to and include servants and other persons employed by the grantees and acting on their behalf.

SYNOPSIS

*Transporting of liquor or into-
xicating drug:* → An ex-serviceman cannot say that he can possess liquor in excess of the quantity mentioned in the notification issued by Government. The arrangement that the entire quantity of liquor ex-servicemen can purchase in a month has to be purchased by him at a time does not permit him to infringe the conditions in the notification.⁷⁷ However, Sec. 55(a) is not attracted in such cases.⁷⁸ Transport exceeding permissible limit is barred. Government have

75. Proviso omitted Section 12(b) of Act 10 of 1967. The Proviso ran as follows : “Provided that in the case of foreign liquor for bonafide private consumption or for sale at any pace at which the sale of such liquor is duly licensed or permitted under the provisions of this Act such permits shall be dispensed with, unless the Diwan shall, by notification, otherwise direct with respect to any local area”.

76. Substituted for “Superintendent” by section 2 of Act III of 1106.

77. [Balan v. State of Kerala, 2002 (3) KLT 161 / 2002 (2) KLJ 196 / ILR 2002 (3) Kerala 438.] Overruled in Mohanan v. State of Kerala.

78. Mohanan v. State of Kerala, 2007 (1) KLT 845

notified the maximum quantity of liquor one can transport without permit. (SRO No. 127/99 published in G.O. (P) 22/99/TD dated 05.02.99, SRO 492/99 published as G.O. (P) No. 88/99/TD dated 03.06.99 and SRO No. 725/2002 published as G.O. (P) No. 127/03/TD dated 02.08.2003.

TABLE SHOWING NOTIFIED LIMIT FOR TANSPORT WITHOUT PERMIT

<i>No.</i>	<i>Liquor</i>	<i>Maximum Quantity</i>
1	Toddy	2.5 litres
2	IMFL	3 litres
3	Beer	7.8 litres
4	Wine	7.8 litres
5	FMFL	4.5 litres
6	Coco-brandy	1.5 litres

Maximum quantity one can possess can be increased from time to time by notification⁷⁹

IV.- MANUFACTURE, POSSESSION AND SALE

12.⁸⁰[(1)] **Manufacture of liquor or intoxicating drug prohibited except under the provisions of this Act:-** No liquor or intoxicating drug shall be manufactured.

⁸¹[x x x]

no toddy producing tree shall be tapped;

no toddy shall be drawn from any tree;

⁸²[no distillery, brewery, winery or other manufactory in which liquor is manufactured shall be constructed or worked;]

⁸³[x x x]

⁸⁴[no liquor shall be bottled for sale; and]

79. SRO. No. 128/99 published as G.O.(P) No.23/99/TD dated 05.02.1999, SRO No. 492/99 published as GO (P) No. 88/99/TD dated 03.06.99, SRO. No. 963/20002 published as GO (P) No. 173/2002/ TD dated 30.11.2002 and SRO No. 725/2003 published as GO (P) 127/03/TD dated 02/08.2002.

80. Numbered as sub section (1) by section 3(2) of Act XIX of 1111.

81. Provisions regarding prohibition of cultivation and collection of hemp and coca plants omitted by section 3(1) of Act XIX of 1111.

82. Substituted for the words “no distillery or brewery shall be constructed or worked” by Section 13 of Act 10 of 1967.

83. The word “and” was deleted by Section 5(iii) of Act V of 1091.

84. Inserted by Section 5(iii) of Act v of 1091

no person shall use, keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any liquory other than toddy or any intoxicating drug;

except under the authority and subject to the terms and conditions of a licence granted by the ⁸⁵[Commissioner] in that behalf, or under the provisions of Section 21;

Provided that the Government may, by notification, direct that in any local area it shall not be necessary to take out a licence for the manufacture of liquor for *Bona-fide* home consumption.

⁸⁶[Licences granted under this section shall extend to and cover servants and other persons employed by the licencees and acting on their behalf]

⁸⁷[x x x]

SUMMARY OF SECTIONS 12, 12A AND 12B

Sec.12	Manufacture of liquor or intoxicating drug without licence prohibited.
Sec. 12A	Manufacture of Preparations containing liquor or intoxicating drug, exceeding specified quantity, prohibited.
Sec.12B (1)	In the manufacture of preparations, utilization; of liquor or intoxicating drugs in excess, prohibited.
Sec.12B (2)	Possession of Preparations containing liquor or intoxicating drug excess, prohibited.

⁸⁸**[12A. Manufacture of preparations containing liquor or intoxicating drug:-** No preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self generated during such process shall be manufactured in excess of the quantity specified by the Commissioner:

Provided that in specifying the quantity of a medicinal preparation, the Commissioner shall have due regard to the total requirement of that preparation for consumption or use in the State.

12B. Utilisation of liquor or intoxicating drug in the manufacture, and limit of possession, of certain preparations:- (1) No person shall utilise liquor or intoxicating drug in the manufacture of any preparation in excess of the quantity specified by the Commissioner and except under and in accordance with the terms and conditions of a licence granted by the Commissioner in that behalf:

85. Substituted for "Superintendent" by Section 2 of Act III of 1106.

86. Added by Section 5(iv) of Act V of 1091.

87. Added by Section 3(2) of Act XIX of 1111 and deleted by Section 2(2) of Act 22 of 1124.

88. Inserted by Section 14 of Act 10 of 1967.

Provided that where such preparation is a medicinal preparation, the Commissioner shall, in specifying the quantity of liquor or intoxicating drug, have due regard to the total requirement of such medicinal preparation for consumption or use in the State.

(2) No person shall possess any preparation containing liquor or intoxicating drug, other than a medicinal preparation for the *bona-fide* treatment, mitigation or prevention of disease in human beings or animals, in excess of the quantity specified by the Commissioner.]

SYNOPSIS

Manufacture of liquor or intoxicating drug:

⇒ There is no conflict between chapter IVA of Drugs and Cosmetics Act as they deal with different subjects.⁸⁹ There is no conflict between entry 84 list 1 and entry 8 of list 11 of the constitution. The spheres of operation of the medicinal and Toilet preparation Act and the rules framed there under and the Drugs Act and the impugned section of Abkari Act are quite different. No conflict of legislative jurisdiction is concerned. The provision are meant to control and prevent abuse of intoxicating liquor under entry 8 of list 11 and amount to reasonable restrictions on the exercise of the fundamental right under Article 19 (1) (f) of the Constitution.⁹⁰

13. Possession of liquor or intoxicating drugs in excess of the quantity prescribed by the Government prohibited:- No person not being a licensed manufacturer or vendor of liquor or intoxicating drugs shall have in his possession any quantity of liquor or intoxicating drugs in excess of such quantities as the Government may from time to time, prescribe by notification, either generally⁹¹[or specially with regard to persons, places or time] in respect of any specified description or kind of liquor or intoxicating drug, unless under a licence granted by the⁹²[Commissioner] in that behalf :

Provided that-

(1) **No fee to be charged for license for possession for private consumption:-** No fee shall be charged for any such license granted for the possession of such liquor or intoxicating drugs for *bona-fide* private consumption or use.

⁸⁹. **Thomas Vaidyan and others v. State of Kerala, ILR 1971(2) Ker. 261 / 1971 KLJ 641.**

⁹⁰. **Enoch Pharma v. State of Kerala, ILR 1979 (1) Kerala 655.**

⁹¹. Substituted for the words "for the whole state or for any Taluk or other local area" by section 6(i) of Act 5 of 1091.

⁹². Substituted for "Superintendent" by Section 2 of Act III of 1106.

(2) **Proviso as regards foreign liquor:-** Nothing in this section extends to any foreign liquor ⁹³[other than denatured spirit] in the possession of any warehouse man as such ⁹⁴[x x x].

⁹⁵[**13A. Power to prohibit possession of liquor or drugs.-** The Government may, by notification, prohibit the possession by any person or class of persons either throughout the whole State or in any local area, of any liquor or intoxicating drug either absolutely or subject to such conditions as ⁹⁶[the Government may prescribe]].

⁹⁷[**14. Establishment and control of distilleries breweries, warehouses, etc.-** The Commissioner may, with the previous approval of the Government.

(a) establish public distilleries, breweries or wineries, or authorise the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured under a licence granted under this Act;

(b) establish public warehouses or authorise the establishment of private warehouses wherein liquor may be deposited and kept ⁹⁸[with or] without payment of duty under a licence granted under this Act;

(c) Discontinue any public or private distillery, brewery, winery or other manufactory or warehouse so established;

(d) prescribe the mode of supervision that may be necessary in a distillery, brewery, winery or other manufactory or warehouse so established, or in any other manufactory where preparations containing liquor or intoxicating drugs are manufactured, to ensure the proper collection of duties, taxes and other dues payable under this Act or the proper utilisation of liquor or intoxicating drugs;

(e) prescribe the size and nature of the establishment necessary for such supervision and the cost of the establishment and other incidental charges in connection with such supervision to be realised from the licensees; and

(f) prescribe the allowance for wastage of alcohol that may occur in-

(i) the process of manufacture of alcohol;

93. Inserted by Section 6(ii) of Act V of 101.

94. The words "or of any person for his bona-fide private consumption and not for sale" omitted by Act XV of 1124.

95. Inserted by Section 7 of Act XV of 1124

96. Substituted for the words "he may prescribe" by section 15 of Act 10 of 1967.

97. Substituted by Section 16 of Act 10 of 1967.

98. Inserted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-2003.

(ii) the process of manufacture of any preparation containing alcohol;
and

(iii) the storage, transport and use of non-duty paid alcohol].

TABLE SHOWING RULES REGARDING SUPERVISION

NO	SUBJECT	RULES
1	Size of Supervisory establishment in a Distillery	Rule 13 of D&W.Rules 1968.
2	Payment of Cost of Establishment to Supervisory Staff in a distillery	Rule 14(1) of D&W.Rules 1968
3	Size of Establishment in the warehouse in a Distillery	Rule 21 of D&W.Rules 1968
4	Supervision in the Warehouse in a distillery	Rule 18 of D&W.Rules 1968
5	Posting of supervisory officers in the distillery and Warehouses	Rule 24 of D&W.Rules 1968
6	Supervisory control in Distilleries and Warehouses.	Rule 29 of Part-I and rule 2 of Part-II of D&W.Rules 1968
7	Claim of Overtime Fees by Supervisory officers in a distillery.	Rule 128 of Part-II of D&W.Rules 1968
8	Supervisory control in Breweries.	Rule 4 of main rules and rule 1 of additional rules to Brewery rules 1967
9	Payment of Cost of Establishment to Supervisory Staff in a Brewery.	Rule 21 a of brewery rules 1967.
10	Claim of Overtime fees by Supervisory officers in a Brewery.	Rule 31 A of Additional Rules to Brewery Rules.
11	Posting of Supervisory officers and payment of their Cost of Establishment in FL-9 shops.	Rule 13(9a) of Foreign Liquor Rules 1953.
12	Supervision and Payment of Cost of Establishment of supervisory staff in a FL (C,B7B) Unit.	Rule 6 of foreign Liquor (Compounding, Blending & Bottling) Rules 1975.
13	Entitlement for Overtime fees by supervisory staff in FL(C,B7B) Unit.	Rule 6 A of foreign Liquor (Compounding, Blending & Bottling) Rules 1975
14	Posting of supervisory officers, and payment of their Cost of Establishment, in respect of Foreign Liquor Bonded Warehouses and KSBC Head Office.	Rule 9 of foreign Liquor (Storage in Bond) rules 1961.
15	Supervision and Payment of Cost of Establishment and Overtime fees of supervisory staff in a Bonded Spirit Store.	Rule 16 of Rectified Spirit Rules 1972.
16	Supervision and control in a Winery.	Rule 17 of Winery rules 1970.
17	Payment of cost of Establishment to supervisory staff in a Winery.	Rule 38 of Winery rules 1970.

SYNOPSIS

Wastage Allowances ⇒ Sec.14 (f) allows wastage in the manufactories. It lays down that with the previous approval of Government, Commissioner may prescribe the allowances for wastage of Alcohol occurring in the following instances:-

- (i) In the process of manufacture of alcohol;
- (ii) In the process of manufacture of any Preparation containing alcohol;
- (iii) In the storage, transport and use of non-duty paid alcohol.

The Section does not allow Excise Commissioner to prescribe allowance for import or export. As per Rules, allowance is prescribed for import, export, transport, manufacture and storing. Prior to 24-1-2005, wastage was not allowed for import. However, in WA No.1750/03 Dated 19.04.04, the Hon'ble High Court held that, the absence of word Import in Rule 55 cannot have the effect of denying the right to claim wastage allowance in the case of spirit allowed to be imported. Consequently, Government amended rule 55 of Distillery and Warehouse Rules, Whereby wastage is now allowed for import also.

The following Table will show the existing rate of Wastage Allowances prescribed under Sec.14(f).

TABLE SHOWING THE LICENCES GRANTED UNDER ABKARI ACT

<i>No</i>	<i>Name of licence</i>	<i>Rule</i>	<i>Licensing Authority</i>
1	Toddy Shop Licence for sale of toddy for consumption within the premises	Abkari Shops Disposal Rules, 2002	Assistant Excise Commissioner of the Division, upon confirmation of sale of shop by Commissioner and on execution of Agreement by grantee of privilege.
2	FL-1 licence for sale of Foreign Liquor in sealed bottles, without the privilege of consumption within the premises	Abkari Shops Disposal Rules, 2002 & rule 13(1) of Foreign Liquor Rules	Assistant Excise Commissioner of the division, upon confirmation of sale of shop by the Commissioner and on execution of Agreement by the grantee of privilege.
3	FL-3 licence for sale of Foreign Liquor in Bar Hotels for consumption within the premises	Rules 13(3) of Foreign Liquor Rules.	Excise Commissioner, under orders of government. On obtaining Government order, Commissioner will sanction the licence and direct the Assistant Excise Commissioner to grant the licence in prescribed form.

<i>No</i>	<i>Name of licence</i>	<i>Rule</i>	<i>Licensing Authority</i>
4	FL-4 licence for sale of Foreign Liquor in Sea Men's and Marine Officer's Club, for consumption within the premises	Rules 13(4) of Foreign Liquor Rules	Excise Commissioner issues licence. But he may seek permission from Government beforehand. On obtaining permission, he will sanction the licence and direct the Asst. Excise Commissioner of the Division issues the licence.
5	FL-4A Licence for sale of Foreign Liquor in clubs to its members and to their guests, for consumption within premises.	Rule 13(14A) of Foreign Liquor Rules.	Excise Commissioner under orders of Government. On obtaining Government order, Commissioner will sanction the licence and direct the Assistant Excise Commissioner to grant licence in prescribed form. Accordingly, Assistant Excise Commissioner of the Division issues the licence.
6	FL-5 Licence for sale of Medicated Wines and similar preparations as tonic or medicines.	Rule 13(5) of Foreign Liquor Rules.	Excise Commissioner.
7	FL-8 Licence for the sale of Foreign Liquor, in Military canteens and Messes attached, to Defence personnel and Ex-Service men.	Rule 13(8) of Foreign Liquor Rules.	Rule specifies that Assistant Excise Commissioner can grant licence but issue of every such licence be immediately reported to Excise Commissioner. Though power for granting licence is vested with Asst. Excise Commissioner, he exercises the power only on getting orders from Excise Commissioner.
8	FL-9 Licence to KSBC for wholesale sale of Foreign Liquor to FL-1, FL-3, FL-4, FL-4A, FL-11 and FL-12 Shops.	Rule 13(9) of Foreign Liquor Rules.	Excise Commissioner.
9	FL-10 Licence, for sale of foreign liquor in bulk by authorized distributors of distillery, Brewery, Winery and (C,B&B) Units in the State to FL-9 licensees in the State.	Rule 13(10) of Foreign Liquor Rules.	Excise Commissioner. This licence is not granted now since KSBC, which is the monopoly supplier, gets the IMFL direct from the manufactory instead from any intermediary stockholder.
10	FL-11 Licence for sale of Beer/ Wine for consumption by public in a separate room meant for consumption.	Rule 13(11) of Foreign Liquor Rules.	Excise Commissioner under orders of Government.
11	FL-12 Licence for sale of Beer in bottles, without the permission for consumption in the premises	Rule 13(12) of Foreign Liquor Rules.	Excise Commissioner. But he may seek permission from Government before hand.

<i>No</i>	<i>Name of licence</i>	<i>Rule</i>	<i>Licensing Authority</i>
12	FL-13 licence for sale of Beer in Pub-Beer Parlours for consumption within the premises	Rule 13(13) of Foreign Liquor Rules.	Excise Commissioner. But he may seek permission from Government beforehand.
13	RS-1 Licence for possessing and selling Duty-paid Rectified Spirit.	Rule 15 of Rectified Spirit Rules.	Assistant Excise Commissioner upon getting orders from Excise Commissioner. RS-1 licence is granted also for possessing and using rectified Spirit for bona-fide medicinal, scientific and industrial and such like purposes.
14	SP-VI Licence for wholesale of Spirituous Preparations.	Rule 11(1) (a) of Kerala Spirituous Preparations (Control) Rules, 1969.	Assistant Excise Commissioner upon getting prior approval of Excise Commissioner.
15	SP-VII Licence for retail sale of Spirituous Preparations.	Rule 11(1)(b) of Kerala Spirituous Preparations (Control) Rules, 1969.	Assistant Excise Commissioner upon getting prior approval of Excise Commissioner.
16	D-II licence for the wholesale sale of Denatured Spirit or Methylated Spirit or Methyl Alcohol.	Rule 7 of the Cochin Denatured Spirit and Methyl Alcohol Rules, 1965	Assistant Excise Commissioner upon getting prior approval of Excise Commissioner.
17	D-III licence for the retail sale of Denatured Spirit or Methylated Spirit or Methyl Alcohol for bona-fide medicinal, scientific or industrial purposes.	Rule 8 of the Cochin Denatured Spirit and Methyl Alcohol rules, 1965.	Assistant Excise Commissioner upon getting prior approval of Excise Commissioner.

15. Sale of liquor or intoxicating drug without licence prohibited, Power to exempt toddy:— No liquor or intoxicating drug shall be sold without a licence from the ⁹⁹[Commissioner], provided that a person having the right to the toddy drawn from any tree may sell the same without a licence to person licensed to manufacture or sell toddy under this Act ¹⁰⁰[x x x x].

¹⁰¹[x x x x]

99. Substituted for “Superintendent” by Section 2 of Act III of 1106

100. Omitted by Section 4 of Act XIX of 1111.

101. First proviso omitted by Section 8(2) of Act V of 1091.

Provided ¹⁰²[also] that the Government may ¹⁰³[by notification] declare that any or all of the provisions of this Act, shall not apply in any local area to trees tapped, or to toddy drawn ¹⁰⁴[under such conditions as the Government may prescribe.]

¹⁰⁵[Nothing in this section applies to the sale of any foreign liquor legally procured by any person for his private use and sold by him or by auction on his behalf or on behalf of his representatives in interest upon his quitting a station, or after his decease]

¹⁰⁶[x x x x]

¹⁰⁷[**15A. Consumption or use of liquor by persons under the age of 18 years prohibited:-** No person under the age of 18 years shall consume or use any liquor.

15B. Sale of liquor to person under 18 years of age prohibited:- No person licensed to sell liquor and no person in the employ of such licensed person or acting with the express or implied permission of such licensed person on his behalf shall sell or deliver any liquor to any person under the age of eighteen years.

15C. Consumption of liquor in public places:- No person shall consume liquor in any public place unless consumption of liquor in any such place is permitted under a licence granted by the Commissioner.

Explanation 1:- For the purpose of this section, “public place” means any street, Court, Police Station ¹⁰⁸[or other public office or any club] or any place of public amusement or resort or on board any passenger boat or vessel or any public passenger vehicle, or a dining or refreshment room in a restaurant, hotel, rest-house, travellers’ bungalow or tourists’ bungalow where different individuals or groups of persons consume food, but shall not include any private residential room.

102. Substituted for “further” by Section 8(3) of Act V of 1091.

103. Substituted for “in like manner” by section 8(3) of Act V of 1091.

104. Substituted for “in pots or other receptacles freshly coated internally with time, for the purpose of manufacture of Jaggery” by section 6(1) of Act L of 1112.

105. Added by Section 8(iv) of Act V of 1091.

106. Added by Act L of 1112 and omitted by Section 5 of Act 4 of 1196. It ran as follows,-
“Explanation:- The supply of liquor by clubs to their members on payment of price or of any fee or subscription is not a sale within the meaning of this Section but a fee according to a scale of fees to be fixed by the Government shall be levied from Clubs by the Commissioner”.

107. Inserted by Section 17 of Act 10 of 1967.

108. Substituted by section 6 of Act 4 of 1996.

Explanation II:- For the purposes of explanation I, “public passenger vehicle” means a vehicle used for carrying passengers for hire or reward other than a vehicle which carries passengers for hire or reward under a contract, express or implied for the use of vehicle as a whole at or for a fixed or agreed rate or sum.]

SYNOPSIS

Consumption of liquor in public places: Public place what is ? → A private car parked by the side of a road cannot be termed, as a “Public Place” Consumption of liquor in a private car parked by the side of road does not amount to an offence¹⁰⁹. It is clear from Explanation I to S.15(c) that a dining or refreshment room in a restaurant is a public place where consumption of liquor is prohibited without permission under the licence granted by the Commissioner. Licence issued to the licensees do not permit the sale or consumption of alcohol in any other room in a hotel except the bar room specifically described in the schedule. Therefore, vending and consumption of alcohol in the restaurant without any permission from the competent authority is prohibited and is punishable under Section 15 (C) of the Abkari Act.¹¹⁰

TABLE SHOWING PUBLIC PLACES

PUBLIC PLACES	
Street	Court
Police Station	Public Offices
Club	Place of Public amusement
Resort places	On board any passenger boat
On board any passenger vessel	On board any public passenger vehicle
Public Place mentioned in the Act, means and includes dining or Refreshment Room in a Restaurant, Hotel, Rest House, Travellers Bungalow or Tourist Bungalow where different individuals or groups of persons consume food.	

¹⁰⁹. *Manikandan v. State of Kerala*, 1999 (2) KLT 592 / 1999 (2) KLJ 188.

¹¹⁰. *Rajan v. Circle Inspector of Police*, 1999 (2) KLT 704 / 1999 (2) KLJ 234.

¹¹¹[16. x x x x]

¹¹²[V.— DUTIES, TAXES AND RENTALS]

¹¹³[17. Duty on liquor or intoxicating drugs.- A duty of excise or countervailing duty and/ or luxury tax shall be levied, in such manner as may be prescribed, on liquors or intoxicating drugs,-

111. Section 16 “Exclusive privileges of manufacture, etc. may be granted :- It shall be lawful for the Diwan to grant to any person or persons on such conditions and for such period as may seem fit, the exclusive or other privileges -

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail;

(iii) of manufacturing or supplying by wholesale and selling by retail; any country liquor or intoxicating drugs within any local area.

No grantee of any privilege under this Section shall exercise the same until he has received a licence in that behalf from the Commissioner.

In such cases, if the Diwan shall by notification so direct, the provisions by Section 12 relating to toddy and toddy producing trees shall not apply”. Omitted by Section 3 of Presidents Act 1 of 1964.

112. Substituted for the heading “V. DUTIES” by Section 4 of Act 1 of 1964.

113. Section 17 substituted by Finance Act 2003 (Act 12 of 2003) (w.e.f.1-4-2003). It was :

[17. Duty on liquor or intoxicating drugs:—* *[A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs-]*

(a) permitted to be imported under ****[x x x]* Section 6; or

(b) permitted to be exported under ****[x x x]* Section 7; or

(c) permitted under Section 11 to be transported; or

(d) manufactured under any licence granted under Section 12; or

(e) manufactured at any *****[distillery, brewery, winery or other manufactory]* established under Section 14; or

(f) issued from a ******[distillery, brewery, winery or other manufactory or warehouse]* licensed or established under Section 12 or Section 14; or

(g) sold in any part of the *+[x x x]* State:]

++[Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol which is not intended to be used for the manufacture of potable liquor meant for human consumption.]

+++[Explanation :- For the purposes of this section and Section 18, the expression “duty of excise”, with reference to liquor or intoxicating drugs, include countervailing duty on such goods manufactured or produced elsewhere in India and brought into the State].

** Substituted by Section 9 of Act V of 1091.*

*** Substituted by section 5(i) of Presidents Act 1 of 1964.*

**** The words “the proviso to” omitted by section 18(a) of Act 10 of 1967.*

***** Substituted for the word “distillery” by section 18(b) of Act 10 of 1967.*

****** Substituted for the words “distillery or warehouse” by Section 18(c) of Act 10 of 1967.*

+ The word “Cochin” omitted by section 18(d) of Act 10 of 1967.

++ The proviso added by Act L of 1112 and substituted by Section 7 of Act 4 of 1996.

+++ Inserted by Section 5(ii) of the President Act 1 of 1964.

- (a) permitted to be imported under section 6, or
- (b) manufactured under any licence granted under section 12; or
- (c) manufactured at any distillery, brewery, winery or other manufactory established under section 14.

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol, which is not intended to be used for the manufacture of potable liquor meant for human consumption.

Explanation.- No liquor or intoxicating drug shall be permitted to be exported unless the duties, taxes, fees and such other sums as are due to the Government under this Act in respect of such liquor or intoxicating drug have been paid or a bond for such payment on its exportation or re-exportation has been executed.]

SYNOPSIS

Duty on liquor or intoxicating drugs:

⇒ Duty has to be levied and paid for the entire quantity of spirit used for the manufacturing process. However, certain provisions like R.9(17), R.10(5), and R.13(5) of Foreign Liquor (Compounding, Blending, and Bottling) Rules, 1975 enable the manufacturer to claim exemption from levying duty on the ground of wastage during blending, bottling, or storage as the case may be. Reducing operations and blending operations are different. For blending operations and bottling operations, specific provision is available in the rules to give exemption to the extent of 1 % wastage. However, there is no rule, which provides for such exemption for wastage in respect of reducing operations. Therefore, levying of duty and consequent recovery is unjustifiable and demand for remittance of amount thereunder cannot be stated to be arbitrary¹¹⁴. Indian made foreign liquor that has already been subjected full levy of duty in the hands of Beverages Corporation when they issued and sold the same to the licensees, cannot be again subjected to further duty. The increased rates are applicable only to the liquor to which the charging section is applicable and not to the liquor, which has already been subjected to charge of full duty of excise under S.17. Therefore, demand of duty of excise on the liquor that has been subjected to full duty of excise before 31.3.1996 cannot be made on the stock remaining unused in the licensed premises¹¹⁵ Under Section 17; manufacture of arrack attracts liability to pay excise duty. The quantity is ascertained when it is manufactured under excise supervision. The liability

114. *Seven Seas Distillery (P) Ltd. v. State of Kerala*, 2002(2) KLT 683

115. *Babu P. Thomas and Others v. State of Kerala and Others*, 1998 (1) KLJ 307

continues when arrack is transferred. Sec. 17 does not authorise to levy excise duty on arrack at the rates applicable to rectify spirit. Duty imposed on alcohol less in excess of the specified quantity at the tariff rate in force is illegal.¹¹⁶

*Endorsement by
govt. sanctioning
extra quota, a
departmental
instruction* ⇒ Endorsement by the Government on a reference made by the Board of Revenue, sanctioning extra quota of foreign liquor to wholesale licensees, is nothing but a departmental instruction. It is an instruction to the excise authorities that they may allow extra quota to licensees. An impost not authorized by law cannot be regarded as a reasonable restriction. The impost being an executive order, devoid of authority of law to support it was held illegal.¹¹⁷ The moment the liquor is produced, excise duty becomes payable.¹¹⁸

*Concluded
contract what is* ⇒ Abkari contractor, bidding at the auction either individually or jointly and the bid having been knocked down in his favour, becomes liable to pay abkari dues. Even if no contract in writing is entered into in pursuance of the auction as soon as the hammer fell, there was a concluded contract between the highest bidder and the State.¹¹⁹ Even drastic restrictions are permissible with regard to trade in Liquor. Farming out right to vend liquor is a reasonable restriction and section is valid.¹²⁰ A person who bids at the auction based on the section and conducts the trade for some time cannot question the constitutional validity of the section. Having taken the benefit of the contract the monopoly of the trade, he cannot repudiate the liability under the contract. There is no question of taking only the benefit and discarding the liability under the contracts.¹²¹

*Increase of
excise duty* ⇒ Where the State Government found it appropriate to enhance the rate of excise duty from Rs. 5 per bulk litre to Rs. 10 per bulk litre of arrack, such a decision could not be assailed.¹²² Grant of permit to import or purchase a designated quantum of duty paid rectified spirit during the Excise Year 1993 - 94 at the contractor's requests subject to the condition that they would remit the excise duty on such quantum in each month. Having accepted the said terms, the contractors are not entitled to deny their liability to pay the excise duty by way of kist and challenge the legality of the levy. The contractors were liable to pay the duty on even unlifted portion of the designated quantum of rectified spirit.¹²³

116. *Paulson Distillery v. State of Kerala*, 1989 (1) KLT 962 (DB).

117. *State of Kerala v. P.J. Joseph*, 1958 KLT 362 / 1958 KLJ 543.

118. *M/s McDowel & Co. Ltd. v. Additional Secretary, Excise*, ILR 1979 Kerala 345.

119. *Ravunni Nair v. State of Kerala*, 1973 KLT 451 / 1972 KLJ 549.

120. *Madhavan v. Assistant Excise Commissioner Palaghat and others*, ILR 1969 (2) Kerala 71/1969 KLJ 289.

121. *Damodaran v. State of Kerala*, ILR 1969 (2) Kerala 95 / 1969 KLJ 686 / 1969 KLT 587.

122. *Solomon Antony and others v. State of Kerala and others*, 2001 (3) SCC 694.

123. *Solomon Antony and others v. State of Kerala and others*, 2001 (3) SCC 694.

Beverages corporations exclusive privilege to sell liquor ⇒

The liquor that is manufactured by the manufacturers has to be sold to the Beverages Corporation, which is the sole selling agent or the canalizing agency. The liquor manufactured is removed to the bonded warehouse of the Beverages Corporation. At the time when the liquor is removed from that bonded warehouse, the Beverages Corporation pays the excise duty. In the notices which were sent to the sellers, it was stated that this excise duty which was paid by the Beverages Corporation really forms part of the turn over of the respondents in the sale of liquor by them to the Beverages Corporation and, therefore, turn over tax was payable on this element as well. The contention of the State was that this excise duty was really an obligation of the manufacturer and merely because the obligation was discharged by, the Beverages Corporation would not mean that the same would not form part of the turn over of the manufacturer. The High Court came to the conclusion that this excise duty which was in fact paid by the Beverages Corporation would not be regarded as being part of their turn over for the purpose of levy of turn over tax. Hon'ble Supreme Court partly allowed the appeals and declared that the manufacturers/distillers were liable to pay turnover tax. It was held that the respondents-manufacturers were liable to include in their turnover the amount of duty paid to them by KSBC and included in the consideration for sale of IMFL to the previously mentioned Corporation with effect from January 5, 1999 and pay the turnover tax accordingly. The levy of turnover tax on such amount of excise duty was sought to be quashed as being ultra vires and beyond the legislative competence and therefore unconstitutional. The principle question involved was whether the imposition of duty under S. 17 of the Abkari Act was really a "duty of excise". Held, the duty imposed is not a duty of excise but represents the privilege price charged by the Government from KSBC as a consideration for parting with its exclusive privilege to sell liquor by wholesale in the State of Kerala, the IMFL manufacturers are not liable to include that duty paid by the KSBC in their turnover.¹²⁴

18. ¹²⁵[How duty or countervailing duty may be imposed]:- ¹²⁶[(1)] ¹²⁷[Such duty of excise or countervailing duty may be levied and collected:]

124. AIR 2005 SUPREME COURT 2594 "State of Kerala v. Maharashtra Distilleries Ltd."

125. Substituted for the marginal heading "How duty may be Imposed" by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984.

126. Renumbered by section 6 of Presidents Act 1 of 1964.

127. Substituted for the words "Such duty of excise may be levied" by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984. Earlier it is substituted by Section 6(1)(i) of Presidents Act, 1 of 1964.

¹²⁸[(a) in the case of spirit or beer, either on the quantity produced in or

passed out of a distillery, brewery, winery or other manufactory licensed or established under section 12 or section 14, as the case may be or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort on the value of liquor, as the case may be, as the Government may prescribe;]

¹²⁹[(b) in the case of intoxicating drugs, on the quantity produced or manufactured under a licence granted under section 12 or issued from a warehouse licensed or established under section 12 or section 14;]

¹³⁰[(c) x x x x]

¹³⁰[(d) x x x x]

(e) in the case of toddy, or spirits manufactured from toddy, ¹³¹[in the form of a tax on each tree from which toddy is drawn], to be paid in such instalments and for such period as the Government may direct; or

¹³²[(f) in the case of import of spirits, beer or intoxicating drugs, in such manner as may be prescribed;]

¹³³[x x x x]

128. Clause (a) substituted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984. Earlier it was : “(a) [x x] in the case of spirits or beer, either on the quantity produced in or passed out of [a distillery, brewery or warehouse licensed or established under Section 12 or Section 14] as the case may be or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash [or wort, or on the value of the liquor] as the case may be, as the Government may prescribe;”

129. Clause (b) substituted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984. Earlier it was : “(b) in the case of intoxicating drugs [x x x] on the quantity produced or manufactured [or issued from a warehouse licensed or established under Section 14;”

130. Omitted by Section 6(1)(iv) of Presidents Act 1 of 1964.

131. Substituted for the words “by a tax on each tree from which toddy is drawn” by Section 6(1)(v) of Presidents Act 1 of 1964.

132. Clause (f) substituted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984. Earlier it was: “(f) by [import, export or] transport duties assessed in such manner as the Government may direct;”

133. The proviso omitted by Section 6(1)(vi) of Presidents Act 1 of 1964.

¹³⁴[(2) The duty of excise or countervailing duty under sub-section (1) shall

be levied and collected at such rates as may be fixed by the Government, from time to time, by notification in the Gazette, not exceeding the rates specified below:-

<i>Duty of excise</i>	<i>Maximum Rates</i>
(i) *Duty of excise on liquors (Indian made)	Rs. 200 per proof litre or an amount equal to 200 per cent of the value of the liquor whichever is higher
(ii) Duty of excise on intoxicating drugs	Rs.1.50 per gram

* **As per the New Abkari Policy 2008-09 order issued under G.O.(MS) No. 38/08/TD. dt. TVM, dt. 29-02-2008 the Duty of Excise on liquors revised as follows:**

1) Rs. 235 and above but below Rs. 250	14.5% of the value of a case of liquor per proof litre subject to the minimum of Rs. 34.5
2) Rs. 250 and above but below Rs. 300	15.5% of the value of a case of liquor per proof litre subject to the minimum of Rs. 40
3) Rs. 300 and above but below Rs. 400	16% of the value of a case of liquor per proof litre subject to the minimum of Rs. 53
4) Rs. 400 and above but below Rs. 500	16% of the value of a case of liquor per proof litre subject to the minimum of Rs. 66
5) Rs. 500 and above but below Rs.1000	16% of the value of a case of liquor per proof litre subject to the minimum of Rs. 80
6) Rs. 1000 and above	16% of the value of a case of liquor per proof litre subject to the maximum of Rs. 165

(PLEASE REFER ABKARI POLICY FOR THE YEAR 2008-09 - SEE PAGE 1189)

134. Sub-sections (2) and (3) substituted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-1984. Earlier it ran as follows:

¹[(2) The luxury tax on liquor or intoxicating drugs shall be levied:

²(i) in the case of any liquor in the form of a fee for licence for the sale of the liquor and in the form of a gallonage fee or vending fee, or in any one of such forms; and:]

(ii) in the case of an intoxicating drug, in the form of a fee for licence for the sale of the intoxicating drug.]

³(3) The duty of excise under sub-section (1) and the luxury tax under sub-section (2) shall be levied at such rates as may be fixed by the Government, from time to time, by notification in the Gazette, not exceeding the rates specified below:-

<i>(1) Duty of excise</i>	<i>maximum rates</i>
(i) Duty of excise on liquors (Indian made)	⁴ [Rs. 200 per proof litre or an amount equal to 200 percent of the value of the liquor.]
(ii) Duty of excise on intoxicating drugs.	Rs.1 per gram or Rs. 933.10 per seer.
(iii) Duty of excise in the form of tax on trees tapped for toddy	Rs. ⁵ [50] per tree per half-year or part thereof.

(2) *Luxury tax:*

(a) When levied in the form of a fee for licence for sale of foreign liquor.-

1. Inserted by section 6(2) of Presidents Act 1 of 1964.

2. Substituted by Act 16 of 1969 w.e.f. 26-1-1950.

3. Inserted by Section 6(2) of Act 16 of 1969.

4. Substituted by Section 8(2)(a) of Act 4 of 1996.

[Contd..]

(iii) Duty of excise in form of tax on trees tapped for toddy	Rs. 50 per tree per half-year or part thereof.
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Provided that the excise duty or countervailing duty shall be payable by manufacturer or importer of the liquor or intoxicating drugs as the case may be;

Provided further that such duty or countervailing duty may be paid by any subsequent dealer on behalf of the manufacturer or importer, as the case may be.

Explanation,- where any liquor is chargeable with duty of excise

(i) for licence for sale of foreign liquor in wholesale	Rs. ⁵ [15000] for a year or part thereof
(ii) for licence for sale of foreign liquor in hotels or restaurants.	Rs. ⁵ [12000] for a year or part thereof.
(iii) for licence for sale medicated wines	Rs.1,000 for a year or part thereof.
(iv) for licence for sale of foreign liquor in non-proprietary clubs to members	Rs. ⁵ [1500] for a year or part thereof.
(v) ⁶ [x x x x]	
(b) when levied in the form of gallonage fee	Rs.10 per bulk litre or Rs.45.46 per bulk gallon.
⁷ [(c) When levied in the form of a fee for licence for the sale of Foreign Liquor (Foreign made)	
(i) in wholesale	Rs. 25,00,000 (Rupees Twenty five lakhs) for a year or part thereof
(ii) in retail	Rs.10,00,000 (Rupees Ten lakhs) for a year or part thereof
(iii) in hotels or restaurants	Rs.25,00,000 (Rupees Twenty five lakhs) for a year or part thereof
(iv) in non-proprietary clubs to its members	Rs.10,00,000 (Rupees Ten lakhs) for a year or part thereof
(v) in seamen's and Marine officer's clubs to its members	Rs.10,00,000 (Rupees Ten lakhs) for a year or part thereof
(d) When levied in the form of gallonage fee	
(1) Foreign Liquor (Foreign made) other than Beer and wine	Rs.200 (Rupees two hundred) per bulk litre
(2) For Foreign made beer and wine	Rs.25 (Rupees twenty five) per bulk litre]

Provided that where there is a difference of duty of excise or luxury tax as between two licence periods, such difference may be collected in respect of all stocks of ⁸[Indian made foreign liquor] or intoxicating drugs, held by licences at the close of the former period]

⁹[Note:- The expression 'Foreign Liquor (Foreign made)' means any liquor produced, manufactured, or blended and compounded abroad and imported into India by land, air or sea.]

¹⁰[Explanation:- Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited purchases such liquor from the suppliers and in case any such liquor is not purchased by the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited such value shall be the value fixed by the Commissioner:]

5. Substituted by Act 16 of 1969.

6. Item "(v) For special licence for sale of foreign liquor Rs. 500 for a year or part thereof" omitted by section 8(b)(i) of Act 4 of 1996.

7. Inserted by Finance Act, 2002 (Act 7 of 2002) w.e.f. 1-4-2002. Earlier sub-clause (c) omitted by section 8(3)(ii) of Act 4 of 1996. it was : "(c) When levied in the form of Vending fee on denatured spirit including methylated spirit Rs. 1 per bulk litre or Rs. 4.54 per bulk gallon"

8. Substituted for the words "country liquor" by Section 8(c) of Act 4 of 1996.

9. Note inserted by Finance Act, 2002 (Act 7 of 2002) w.e.f. 1-4-2002.

10. Added by Act 4 of 1996.

countervailing duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited purchases such liquor from the supplier and in case any such liquor is not purchased by the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited such value shall be the value fixed by the Commissioner.

(3) The luxury tax on liquor or intoxicating drugs shall be levied and collected,-

(i) in the cases of any liquor in the form of a fee for licence for the sale of the liquor and in the form of a gallonage fee or vending fee or in any one of such forms and.

(ii) in the case of an intoxicating drug, in the form of a fee for licence for the sale of the intoxicating drug.

(4) The luxury tax under sub-section (3) shall be levied at such rates as may be fixed by the Government, from time to time, by notification in the gazette, not exceeding the rates specified below:-

Luxury tax

- | | |
|--|---|
| (a) when levied in the form of fee for licence for sale of foreign liquor (Indian made) | |
| (i) for licence for sale of foreign liquor in wholesale | Rs.15,000 (Rupees fifteen thousand) for a year or part thereof |
| (ii) for licence for sale of foreign liquor in hotels or restaurants | Rs.12,000 (Rupees twelve thousand) for a year or part thereof |
| (iii) for licence for sale of medicated wines | Rs. 1,000 (Rupees one thousand) for a year or part thereof. |
| (iv) for licence for sale of foreign liquor in non-proprietary club to members | Rs.1,500 (Rupees one thousand and five hundred) for a year or part thereof. |
| (b) when levied in the form of gallonage fee | Rs. 10 (Rupees ten) per bulk litre or Rs.45.46 per bulk gallon |
| (c) When levied in the form of a fee for licence for the sale of foreign liquor (foreign made) | |
| (i) in wholesale | Rs.25,00,000 (Rupees twenty five lakhs) for a year or part thereof |
| (ii) in retail | Rs.10,00,000 (Rupees Ten lakhs) for a year or part thereof. |
| (iii) in hotels or restaurants | Rs, 25,00,000 (Rupees Twenty five Lakhs) for a year or part thereof. |
| (iv) in non-proprietary clubs to its | Rs.10,00,000 (Rupees Ten lakhs) for |

- members a year or part thereof.
- (v) in Seamen's and Marine Officer's club to its members Rs. 10.00,000 (Rupees Ten lakhs) for a year or part thereof
- (d) When levied in the form of gallonage fee
- (i) foreign liquor (foreign made) other than beer and wine Rs. 200 (Rupees two hundred) per bulk litre
- (ii) for foreign made beer and wine Rs. 25 (Rupees Twenty five) per bulk litre

Provided that where there is a difference of duty of excise, countervailing duty or luxury tax as between two licence periods such difference may be collected in respect of all stocks of foreign liquor or intoxicating drugs held by licencees at the close of the former period.

Explanation.- The expression "Foreign Liquor" (foreign made) means any liquor produced, manufactured or blended and compounded abroad and imported into India by land, air or sea.]

SYNOPSIS

The primary purpose of S. 18 is to restrict the sale and consumption of foreign liquor. If *Scope* ⇒ restrictions are imposed for the sake of health and safety of the society, the fact that bidders may voluntarily bid for a profitable exemption from such restrictions does not affect the restrictions and incidentally the bids made thereunder. The provision for auction embodied in the section is for restriction and control of trade in liquor and therefore, constitutionally valid.¹³⁵

Foreign liquor licence is to be viewed as a statutory impost, as a luxury tax under S. 17(g) *The levy of differential duty* ⇒ read with S.18 (3) of the Act. Notification enhancing license fee in the course of the financial year is legal.¹³⁶ The levy of differential duty under proviso to Section 18 (3) is not a case of fresh impost of excise duty on the licensees. The impost of excise duty is only on the manufacturer and the proviso only enables the department to collect such increased differential excise duty as between two licence periods in respect of all stocks of Indian made foreign liquor held by the licensees at the close of the former period is legal and valid.¹³⁷ The moment the liquor is produced, excise duty becomes payable.¹³⁸ Impost

135. P. Ramachandran v. State of Kerala, 1971 KLT 408 / AIR 1971 Kerala 146.

136. State of Kerala v. Koya, ILR 1971 Kerala 340.

137. State of Kerala & Ors v. Sabu George and others, ILR 1999 (3) Kerala 669 / 1999 KLJ 255 / 1999 (2) KLJ 618.

138. M/s. Mc Dowel & Co. Ltd. v. Additional Secretary, Excise, ILR 1979 Kerala 345.

is attracted from the moment of production of Liquor and can be levied at any time. Rule

34 of the Kerala Distillery and Ware House Rules does not impose any inelastic obligation on the authorities to impose the duty, but is merely a machinery provision to work out and quantify the impost.¹³⁹

No luxury tax is contemplated by S.18 (2) to be imposed on manufacture or issuance of liquor referred to in Cls. (d), (e) and (f) of S.17. Similarly, S.18 (2) does not contemplate levy of luxury tax with reference to Cls. (a), (b) and (c) of S.17.

Luxury Tax ⇒ What is relevant with regard to these Clauses is the levy of excise duty. The method in which excise duty is levied is provided under S.18 (1). This leaves out Cl. (g) of S.17. Luxury tax referred to in S.17 is with reference to the sale of intoxicating drugs or liquor in any part of the State. Cl. (g) of S.17 is relatable to the levy of luxury tax. The proviso to S.18 (3) would not enable the State to realise the increase in excise duty from the licensee who was not under an obligation to pay the original excise duty, which was increased. The luxury tax on the sale of intoxicating liquor can be imposed only on the persons holding licence for sale simpli-citor but not excise duty. [**State of Kerala vs. Baby**, 1999 (3) KLT 32 reversed].¹⁴⁰

¹⁴¹[**18A. Grant of exclusive or other privilege of manufacture, etc., on payment of rentals:-** (1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they may deem fit, the exclusive or other privilege-

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the government, from time to time, and may be collected to the exclusion of, or in addition to the duty or tax leviable under Sections 17 and 18.

(2) No grantee of any privilege under sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) in such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply].

139. *M/s. Mc Dowell and Co. Ltd. v. Additional Secretary*, ILR 1979 (2) Kerala 345.

140. *T.J.Baby and others v. State of Kerala and others*, 2000 (2) KLJ 344 / 2000 (3) KLT 382 (SC).

141. Inserted by Section 7 of President's Act 1 of 1964

SYNOPSIS

Grant of exclusive or other privilege of manufacture: State exclusive privilege ⇒ State has privilege in the manufacture, storage, and sale of liquor and intoxicating drugs, and hence Section 18 A providing for grant of privilege on payment of rent is legal and valid.¹⁴² Rules made there under are not bad because of excessive delegation.¹⁴³

Persons who had applied and obtained licences issued pursuant to these provisions cannot be heard to contend that Sections 18 A & 24 of the Abkari Act 1 of 1077 violate either Article 19 and or 14 of the Constitution. If there is a fundamental right to carry on the business of dealing in liquor and intoxicating drugs the fact that the exercise of such right has affected the petitioners is not a ground, which would enable the court to say that the grant of licences to the persons that enable them to exercise that fundamental right is wrong.¹⁴⁴

Re-Auction ⇒ The condition in the notification of auction for the privilege to vend toddy is statutory rules issued under the rule making power in the Act. The loss sustained in the re-auction can be recovered from the highest bidder who backs out at the auction. Re-auction is not illegal even if a different person conducts it.¹⁴⁵ The contract between the Government and the Licensee is governed by statutory provisions i.e. provisions of the Act, Rules, the conditions of Licence and the counter part agreement.¹⁴⁶

Granting exclusive licence to public sector Corporation for possession and supply of liquor in the entire State of Kerala is not ultra vires Act.¹⁴⁷ The rules restricting location of shops within the specified distance from educational institutions, Temples, Churches etc. is not bad for excessive delegation of legislated power to the rule making authority.¹⁴⁸ State has absolute privilege concerning sale of liquor and intoxicating drug.¹⁴⁹

Notification issued by the Government, making abkari contractors booked for offence under Abkari Act except U/s 61, ineligible for extension of privilege of vending toddy, is valid.¹⁵⁰ Even drastic restrictions are permissible in respect of trade in Liquor. Farming out right to vend liquor is a reasonable restriction and section is valid.¹⁵¹

142. *G.Anandarajan v. The State Kerala and others*, ILR 1994 (1) Kerala 339.

143. *G.Anandarajan v. The State of Kerala and others*, ILR 1994 (1) Kerala 339.

144. *P.Ramachandran and others v. State of Kerala and others*, ILR 1968 (1) Kerala 742.

145. *Varkey v. State of Kerala*, ILR 1972 (2) Kerala 395 / 1972 KLJ 621 / 1972 KLT 815

146. *Isaac Peter and others v. State of Kerala and others*, 1999 (1) KLJ 356

147. *Monisenan v. State of Kerala*, 1984 KLT 1060 / 1984 KLN 416 / 1984 KLJ 555 (DB).

148. *Anandarajan v. State of Kerala*, 1993 (1) KLT 523 / 1993 (2) KLJ 165.

149. *Ibid* 143

150. *Sukumaran Nair v. State of Kerala*, 2005 (1) KLT 562.

151. *Madhavan v. Assistant Excise Commissioner Palaghat & others*, ILR 1969 (2) Kerala 71 / 1969 KLJ 289

A person who bid at the auction based on the section and conducted the trade for some time cannot question the constitutional validity of the section. Having taken the benefit

of the contract the monopoly of the trade, he cannot repudiate the liability under the contract. There is no question of taking only the benefit and discarding the liability under the contracts.¹⁵² Persons who had applied and obtained licences issued pursuant to these provisions cannot be heard to contend that Sections 18 A & 24 of the Abkari Act 1 of 1077 violate either Article 19 and or 14 of the Constitution. If there is a fundamental right to carry on the business of dealing in liquor and intoxicating drugs the fact that the exercise of such right has affected the petitioners is not a ground, which would enable the court to say that the grant of licences to the persons that enable them to exercise that fundamental right is wrong.¹⁵³

19. Tax for tapping unlicensed trees from whom leviable:- ¹⁵⁴[When duty of excise is levied] by way of tax on toddy trees under section 18, the Government may, by notification, direct that the licence required under Section 12 shall be granted only on the production by the person applying for it of the written consent of the owner, or person in possession, of such trees to the licence being granted to such person so applying for it; and when such notification has been issued, such tax shall, in default of payment by the licensee, be recoverable from the owner or other person in possession who has so consented.

When, in like case, trees are tapped without license, the tax due shall be recoverable primarily from the tapper or in default by him from the occupier, if any of the land, or if the trees do not belong to the occupier, of the land, or if the land is not occupied, from the person, if any, who owns or is in possession of the trees unless he proves that the trees were tapped without his consent.

SYNOPSIS

Levy of tree tax does not offend Art. 14 of the Constitution.¹⁵⁵ Levy of duty on manufacture of toddy in the form of a tax on each tree from which duty is drawn is an excise duty

Tax on toddy trees: ➡ coming within Entry 51 of List 11 of seventh schedule to the constitution. The levy satisfies all the characteristics of an Excise Duty.¹⁵⁶

152. *Damodaran v. State of Kerala*, ILR 1969 (2) Kerala 95 / 1969 KLJ 686 / 1969 KLT 587.

153. *P.Ramachandran and others v. State of Kerala and others*, ILR 1968 (1) Kerala 742.

154. Substituted for the words "when duty is levied" by Section 8 of President's Act 1 of 1964.

155. *Jose v. State of Kerala*, 1973 KLT 463 / 1973 KLJ 517 / ILR 1973 (2) Kerala 112.

156. *Jose E.J. and others v. State of Kerala*, ILR 1973 (2) Kerala 112 / 1973 KLT 463.

20. Duties may be farmed:- ¹⁵⁷[All or any of the duties, tax and rentals] leviable under this Act in any Taluk or other local area may, with the sanction

of the Government, be farmed, subject to such payment and on such other conditions as the Government shall prescribe, ¹⁵⁸[Such farmers] shall take out licenses as such from the ¹⁵⁹[Commissioner].

21. Toddy farmer may grant license:- When the exclusive privilege of manufacturing toddy has been granted under ¹⁶⁰[Section 18A] the Government may declare that the written permission of the grantee to draw toddy shall have, within the area to which the privilege extends, the same force and effect as a licence from the ¹⁵⁹[Commissioner] for that purpose under Section 12.

22. Farmer may let or assign:- In the absence of any contract or condition to the contrary any grantee of any exclusive or other privilege, may let or assign the whole or any portion of his privilege or farm. But no such lessee or assignee shall excise any rights as such unless and until the grantee or farmer, as the case may be shall have applied to the ¹⁵⁹[Commissioner] for a licence to be given to such lessee or assignee, and such lessee or assignee shall have received the same.

23. Recovery by farmer of rents due to him:- When any amount is due to a grantee, farmer, lessee or assignee of an exclusive privilege, under this Act, such grantee, farmer, lessee or assignee may make an application to the ¹⁶¹[Collector] for recovery of such amount on his behalf and on receiving such application, the ¹⁶¹[Collector] may, at his discretion, recover such amount as if it were an arrear of Land Revenue, and shall pay any amount so recovered to the applicant:

Provided that execution of any process issued by the ¹⁶¹[Collector] for the recovery of such amount shall be stayed if the person against whom the process is issued institute a suit in the Civil Court to contest the demand of such grantee, farmer, lessee or assignee and furnishes security to the satisfaction of the ¹⁶¹[Collector] for the payment of the amount which such court may adjust to be due from him;

157. Substituted for the words "all or any of the duties" by section 9(i) of Presidents Act 1 of 1964.

158. Substituted for the words "farmers of duties under this Section" by Section 9(ii) of Presidents Act 1 of 1964.

159. Substituted for "Superintendent" by Section 2 off Act III of 1106.

160. Substituted for the words and figures "Section 16" by Section 10 of President's Act 1 of 1964.

161. Substituted for the word "peishkar" by Section 19 of Act 10 of 1967.

Provided also that nothing contained in this section or done thereunder shall affect the right of any grantee, farmer, lessee or assignee to recover by

suit in the Civil Court or otherwise any amount due to him from such person.

VI.- LICENSES, ETC.

24. Forms and conditions of licenses, etc.- Every license or permit granted under this Act shall be granted-

- (a) on payment of such fees, if any;
- (b) for such period;
- (c) subject to such restrictions and on such conditions; and
- (d) shall be in such form and contain particulars - as the Government may direct either generally, or in any particular instance in this behalf.

SYNOPSIS

Agreements that are calculated to defeat the object of the act would be void. A party allowing another to do business without licence should not be allowed to recover money due for doing such business. Transferor's suit for return of consideration was held not maintainable in a case in which the transferor and the transferee made an agreement to transfer licence for foreign liquor tavern and the transferee started running it without obtaining sanction of abkari authorities. (Sec. 23 of the Contract Act).¹⁶² The transfer of a privilege to deal with liquor covered by the licence in favour of the partners is hit by the provision under R.6 (22) of the Abkari Shops (Disposal in Auction) Rules. Such a contract of partnership is void under S.23 of the Contract Act. Such a void contract of partnership cannot be recognised as a genuine partnership under the Income Tax Act, 1961. There cannot be, in law, a partnership with respect to the privilege/business granted under the licence without a permission to transfer in writing. The object of such an agreement have been held to be of such a nature that if permitted it would defeat the provisions of the excise law within the meaning of S.23 of the Contract Act. Agreements calculated to defeat the object of the act would be void.¹⁶³

162. *Krishna Menon v. Narayana Ayyar* (FB) 1961 KLT 620 / FB 1961 KLJ 365 / AIR 1962 Kerala 21.

163. *CIT v. Grand Enterprises*, 1998 (1) KLT SN 26 / ILR 1998 (2) Ker. 239

25. Counterpart agreement to be executed by licensee:- Every person taking out a license under this Act may be required to execute a counterpart agreement in conformity with the tenor of his license, and to give such security for the per-

formance of his agreement as the ¹⁶⁴[Commissioner] may require.

26. Power to recall licenses, etc.- The ¹⁶⁴[Commissioner] may cancel or suspend any license or permit granted under this Act:-

(a) if ¹⁶⁵[any fee, duty, tax or rental] payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such license 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 such license or permit; or

¹⁶⁶[(bb) if the holder thereof or his servant, or any one acting with his express or implied permission on his behalf, sells or stores for sale liquor in any place other than the licensed premises; or,]

¹⁶⁷[(c) if the holder thereof is convicted of any offence against this Act or of any cognizable and non-bailable offence or of any offence under the Dangerous Drugs Act, 1930, or under the Trade and Merchandise Marks Act, 1958, or under Sections 478 to 489 of the Indian Penal Code; or]

(d) where a license or permit has been granted on the application of the holder of an exclusive or other privilege or of a ¹⁶⁸[farmer under Section 20] on the requisition in writing of such person; or

(e) if the conditions of the license or permit provide for such cancellation or suspension at will.

164. Substituted for "Superintendent" by Section 2 of Act III of 1106.

165. Substituted for the words "any fee or duty" by Section 11(i) of Presidents Act 1 of 1964.

166. Inserted by section 2 of Act 12 of 1995.

167. Substituted for "(C) If the holder thereof is convicted of any offence against this Act, or any other law for the time being in force relating to Abkari Revenue or of any cognizable and non bailable offence or of any offence under the Cochin Dangerous Drugs Act, or under the Cochin Merchandise Marks Act or under Section 458 to 459 of the Cochin Penal Code, or is punished for any offence Referred to in the eighth item of the schedule in Section 166 of the Cochin Sea Customs Act XII of 1109" by Section 20 of Act, 10 of 1967.

168. Substituted for the words "farmer of duties under this Act" by Section 11(ii) of President's Act 1 of 1964.

SYNOPSIS

The power to cancel licence is conferred only on the commissioner by the Act. The conferment of power under Rule 34 is beyond the rule making power under Section 29.

The rule to the extent of conferring the power of cancellation on an Assistant Commissioner of Excise is therefore, ultra vires and unenforceable.¹⁶⁹ The renewal of licence is not automatic. Several factors would influence the mind of the officers while renewing licence, for instance, the manner in which the licensee conducted the shop during the previous years, the question as to whether there was any attempt to sell or transfer privilege, to lease out or sublet the privilege etc. Excise Commissioner has not only a right but also an obligation U/s 26B to examine the conduct of licensee.¹⁷⁰ If there is a fundamental right to carry on the business of dealing in liquor and intoxicating drugs the fact that the exercise of such right has affected the petitioners is not a ground, which would enable the court to say that the grant of licences to the persons, which enable them to exercise that fundamental right, is wrong.¹⁷¹ Rate of licence fee payable is the rate prevailing at the time of granting the licence and not the rate prevailing at the time of the application.¹⁷² Trade in liquor, not a fundamental right is a permissive privilege and not a right at all. Levy charged neither a tax nor a fee only for granting permission does not violate Articles 301, 302 and 304 of Constitution.¹⁷³ The Excise Commissioner has no authority to permit shifting of a foreign liquor shop from one range to a very different range.¹⁷⁴

S. 18A, S. 24 (e), S. 24(d), S. 29(1). Rules framed for rehabilitation of arrack workers held ultra vires the provisions of the Act.¹⁷⁵

If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range. It would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi Kerala Abkari Shops (Disposal in Auction) Rules (1974), R.6. R. 6(1) and (2).¹⁷⁶

Locus Standi: → **169. Jose Kuruvinnakunnel v. Assistant Excise Commissioner and others, ILR 1992 (1) Kerala 411 / 1992 (2) KLJ 87.**

170. **Commissioner of Excise v. Gopidas, 2005 (2) KLT 84, Case No. 101.**

171. **P.Ramachandran and others v. State of Kerala and others, ILR 1968 (1) Kerala 742.**

172. **State of Kerala and others v. V.M. Kaya, ILR 1979 (1) Kerala 344.**

173. **State of Punjab v. Devan's Modern Breweries Ltd., 2004 (1) KLT SN 72 (SC).**

174. **M.S. Jayaraj v. Commissioner of Excise, Kerala, AIR 2000 SUPREME COURT 3266 / 2001 (1) KLJ NOC 45 (SC).**

175. **Kerala Samsthana Chethu Thozhilali Union v. State of Kerala – 2006 KHC 536 / 2006 (2) KLT 270 / 2006 (4) SCC 327 / ILR 2006 (3) Ker. 65 / JT 2006 (5) SC 41**

176. **M.S. Jayaraj v. Commissioner of Excise, Kerala AIR 2000 SUPREME COURT 3266 / 2001 (1) KLJ NOC 45 (SC).**

VII.- GENERAL PROVISIONS

¹⁷⁷[27. **Certain licensees required to keep instruments for testing, etc.-** Every person who manufactures or sells any liquor or intoxicating drugs under a license granted under this Act shall be bound:-

(a) to supply himself with such measures, weights and instruments as the ¹⁷⁸[Government] may prescribe and to keep the same in good condition; and

(b) on the requisition of any Abkari officer duly empowered in that behalf, at any time to measure or weigh any liquor or intoxicating drug or to test any liquor in his possession in such manner as the said Abkari Officer may require.]

28. Recovery of duties:- All duties, taxes, fines and fees payable to the ¹⁷⁸[Government] direct under any of the foregoing provisions of this Act or of any license or permit issued under it, and all amounts due to the ¹⁷⁸[Government] by any grantee of a privilege or by any farmer under this Act or by any person on account of any contract relating to the Abkari Revenue may be recovered from the person primarily liable to pay the same or from his surety (if any) as if they were arrears of Land Revenue, and, in case of default made by a grantee of a privilege or by a farmer, the ¹⁷⁹[Commissioner] may take grant or farm under management at the risk of the defaulter or may declare the grant or farm forfeited, and re sell it at the risk and loss of the defaulter. When a grant or farm is under management under the section, the ¹⁷⁹[Commissioner] may recover any moneys due to the defaulter by any lessee or assignee as if they were arrears of Land Revenue.

SYNOPSIS

Amounts due under the Abkari Act are recoverable as if they are arrears of land revenue. Such arrears become public revenue due on land and are recoverable due on land and are recoverable by invoking S. 44 of the Kerala Revenue Recovery Act.¹⁸⁰ The discretion left to the Collector or the officer authorized by him to choose anyone of the two methods for collecting abkari arrears does not violate Art. 14 of the Constitution of India.¹⁸¹

Recovery of duties: Revenue Recovery ⇒ The amounts due under the Abkari Act are recoverable as if they are arrears of land revenue. The liability to satisfy the dues arising out a bid is enforceable under S. 28 quite apart from any contractual liability.^{181A}

177. Substituted by Section 9 of Act L of 1112

178. Substituted for the word "Sirkar" by Act 10 of 1967.

179. Substituted for "Superintendent" by Section 2 of Act III of 1106.

180. **Gourikuttamma v. District Collector, 1975 KLT 29.**

181. **Govindankutty Menon v. Tahsildar, 1972 KLT 1010.**

181A. **Kaduthuruthy Urban Co-op. Bank Ltd. v. State of Kerala, 2007 (3) KLT 957**

Under the Abkari Shops (Disposal in Auction) Rules, 1974 (Kerala), R.5 (11) any encumbrance created of the assets covered by the solvency certificate will be deemed to be void to the extent of the sum due under such contract^{181B}. Licence issued under the Abkari Act is not a right but only a privilege. A contract entered into by the parties and their conduct can only be on the lines laid down by the statute. Non obstante clause in S. 29 (r) put the Abkari Shops (Disposal in Auction) Rules which has been framed in exercise of

such powers beyond the reach or restriction of Section 73 of the contract Act.¹⁸² Contractors are liable to pay duty in respect of unlifted portion of designated quantum of rectified spirit. Excise duty payable for the designated quantity distributed for the period of lease has undertaken. S. 18A, S. 24 (e) S. 24(d), S. 29(1). Rules framed for rehabilitation of arrack workers held ultra vires the provisions of the Act.¹⁸³

¹⁸⁴[¹⁸⁵[**29. Power to make rules.**- (1) The Government may, by notification in the Gazette either prospectively or retrospectively, make rules for the purposes of this Act]

(2) In particular and without prejudice to the generality of the foregoing provision, the Government may make rules:-

(a) regulating the mode in which toddy may be supplied to licensed vendors of the same, or to persons who distil spirits from it or who use it in the manufacture of bread;

(b) for determining the number of licenses of each description to be granted in any local area;

(c) for regulating the number, size and description of stills, utensils, implements and apparatus to be used in any ¹⁸⁶[distillery, brewery, winery or other manufactory in which liquor is manufactured];

(d) prescribing the instruments to be used in the testing of liquor and the tables of corrections according to temperature to be used therewith;

(e) prescribing the weights to be used for the sale of intoxicating drugs and measures to be used for the sale of liquor;

181B. Kadathuruthy Urban Co-op. Bank Ltd. v. State of Kerala, 2007 (3) KLT 957

182. Paulose v. State of Kerala, 2005 (3) KLT 850.

183. Kerala Samsthana Chethu Thozhilali Union v. State of Kerala – 2006 (2) KLT 270 / 2006 (4) SCC 327 / ILR 2006 (3) Ker. 65 / JT 2006 (5) SC 41.

184. Substituted by Section 11 of Act V of 1091.

185. Marginal heading and sub-section (1) substituted by Finance Act 2003 (Act 12 of 2003) with effect from 1-4-2003. Earlier it ran as follows : “29. *Power to frame rules*:— (1) The Government may make rules for the purpose of carrying out the provisions of this Act.”

186. Substituted for the words “distillery” by Section 22(a) of Act 10 of 1967.

(f) fixing for any local area the maximum and minimum prices above and below which any liquor or intoxicating drug shall not be sold;

(g) for the warehousing of liquor and intoxicating drugs and for the removal of the same from any warehouse in which they are deposited for deposit in any other warehouse or for local consumption or for export;

(h) for the inspection and supervision of stills, distilleries, ¹⁸⁷[breweries,

wineries, or other manufactories in which liquor is manufactured and warehouses];

(i) for the management of any public ¹⁸⁸[distillery, brewery or winery] or public warehouse established under Section 14;

(j) for placing the storage, import, export, ¹⁸⁹[possession, transit or transport] of liquor or intoxicating drugs under such supervision; and control as may be deemed necessary for the purposes of this Act;

(k) prohibiting the use of any article which the Government shall deem to be noxious or otherwise objectionable in the manufacture of liquor or of any intoxicating drug;

(l) (1) declaring the process by which spirit manufactured in or imported into ¹⁹⁰[the State] shall be denatured;

(2) for causing such spirit to be denatured through the agency or under the supervision of Excise Officers;

(3) for ascertaining whether such spirit has been denatured;

(m) regulating the bottling of liquor for purposes of sale;

(n) declaring in what cases or classes of cases and to what authorities appeals shall lie from orders, whether original or appellate, passed under this Act or under any rule made thereunder, or by what authorities such orders may be revised and prescribing the time and manner of presenting appeals and the procedure for dealing therewith;

¹⁹¹[(o) x x x]

187. Substituted for the words "private warehouses and breweries" by Section 22(b) of Act 10 of 1967.

188. Substituted for the word "distillery" by Section 22(c) of Act 10 of 1967.

189. Substituted by Act 10 of 1975.

190. Substituted for the words "Cochin State" by Section 22(d) of Act 10 of 1967.

191. Clause "(o) for the grant of batta to witnesses and of compensation for loss of time to persons released by any Abkari Officer under Section 40(3) of this Act on the ground that they have been improperly arrested, and to persons charged before a Magistrate with offences under this Act and acquitted"; Omitted by Act 16 of 1997 with effect from 3-6-1997.

(p) regulating the power of Abkari Officers to summon witnesses from a distance under Section 44;

(q) for the disposal of articles confiscated and of the proceeds thereof.]

¹⁹²[(r) for the forfeiture notwithstanding provisions to the contrary contained in the ¹⁹³[Indian Contract Act, 1872] or in any other law, of the whole or any portion of the kists deposited by persons who purchase the right to sell toddy, arrack, foreign liquors or ganja, in addition to damages recoverable by Government on account of the breach of conditions of sale laid down by the Government from time to time]

SYNOPSIS

Power to make rules ⇒ Section 29(1) stipulates that Government may, by notification in the Gazette, either prospectively or retrospectively, make rules for the purpose of Abkari Act. Section 29(2) stipulates that, in particular and without prejudice to the generality of section 29(1), Government may make rules on the following:

No.	Subject/Aspect	(Sec.29(2))
a	Regulating the mode in which toddy may be supplied to licensed toddy vendors or persons who distil spirits from it or who use it in the manufacture of bread;	
b	For determining the number of licences of each description to be granted in any local area;	
c	For regulating the number; size and description of stills, utensils, implements and apparatus to be used in any distillery, brewery, winery or other manufactory in which liquor is manufactured;	
d	Prescribing the instruments to be used in the testing of liquor and the tables of corrections according to temperature to be used therewith;	
e	Prescribing the weights to be used for the sale of intoxicating drugs and measures to be used for the sale of liquor;	
f	Fixing for any local area, the maximum and minimum prices above and below which any liquor or for local consumption, or for export;	
g	For the warehousing of liquor and intoxicating drugs, and for the removal of the same from any warehouse in which they are deposited for deposit in any other warehouse, or for local consumption, or for export;	
h	For the inspection and supervision of stills, distilleries, breweries, wineries or other manufactories in which liquor is manufactured and ware housed;	

192. Inserted by Act XIII of 1119.

193. Substituted for the words and figures "Cochin Contract Act, XXIII of 1112" by Section 22(e) of Act 10 of 1967.

No.	<i>Subject/Aspect</i> (Sec.29(2))
i	For the management of any public distillery, brewery or winery or public warehouse established under section 14;
j	For placing the storage, import, export, possession, transit or transport of liquor or intoxicating drugs, under such supervision and control as may be deemed necessary for the purpose of this Act;
j	For placing the storage, import, export, possession, transit or transport of liquor or intoxicating drugs, under such supervision and control as may be deemed necessary for the purpose of this Act;
k	Prohibiting the use of any article which the Government shall deem to be noxious or otherwise objectionable in the manufacture of liquor or any intoxicating drug;
l	(1)For declaring the process by which spirit manufactured in or imported into the State shall be denatures; (2)For causing such spirit to be denatured through the agency or under the supervision of Excise Officers; (3)For ascertaining whether such spirit has been denatured;
m	Regulating the bottling of liquor for purposes of sale;
n	Declaring in what cases or classes of cases, and to what authorities, appeals shall lie from orders, whether original or appellate, passed under this Act or under any rule made there under, or by what authorities such orders may be revised, and prescribing the time and manner of presenting appeals, and the procedure for dealing therewith;
o	(This proviso has been omitted with effect from 3-6-1997)
p	Regulating the power of Abkari officers to summon witnesses from a distance, under section 44;
q	For the disposal of articles confiscated, and of the proceeds thereof;
r	For the forfeiture, notwithstanding the provisions to be contrary contained in the Indian Contract Act, 1872 or in any other law, of the whole or any portion of the kists deposited by persons who purchase the right to sell toddy, arrack, foreign liquor or ganja, in addition to damages recoverable by government on account of the breach of conditions of sale laid down by the Government from time to time.

Sec.29(1) enables government to frame Abkari rules, and Sec.29(2) to frame the same on such particular subjects or aspects as listed under Section 29(2)(a) to (r). Thus, the *Kerala Abkari Disposal of Confiscated Articles) Rules, 1996* is limited to the aspect mentioned in Sec.29 (2) (q), while *The Kerala Distillery And Warehouse Rules* cover the aspects mentioned in Sec.29(2)(c),(g),(h),(i),(j),(k) & (n) together.

VIII.— POWERS AND DUTIES OF OFFICERS, ETC.

30. Magistrate may issue a search warrant on application:— If ¹⁹⁴[the Commissioner of Excise or] any Magistrate, upon information ¹⁹⁵[obtained] and after such enquiry as he thinks necessary, has reason to believe that an offence under ¹⁹⁶[*x x x x*] this Act has been committed, he may issue a warrant for the search for any liquor, intoxicating drug, materials, stills, utensil, implement or apparatus in respect of which the alleged offence has been committed.

Before issuing such warrant, the ¹⁹⁷[Commissioner of Excise, or] Magistrate shall examine the informant on oath or affirmation, and the examination shall be reduced into writing in a summary manner and be signed by the informant and also by ¹⁹⁷[the Commissioner of Excise or] Magistrate.

SYNOPSIS

Magistrates' power to issue a search warrant: Must be a speaking order ➡

Before issuing a search warrant, Commissioner or Magistrate must examine the informant on oath or affirmation and it should be reduced into writing in a summary manner. The Commissioner or the Magistrate as the case may be and the informant; should sign it. Issuance of a search warrant is a serious matter and it would be advisable not to dispose of an application for search warrant in a mechanical way by a laconic order. Issue of search warrant being in the discretion of the Magistrate it would be reasonable to expect of the Magistrate to give reasons, which swayed his discretion in favour of granting the request. A clear application of mind by the learned Magistrate must be discernible in the order granting the search warrant.¹⁹⁸

194. Inserted by Section 10(1) of Act L of 1112.

195. Substituted for the words “given by an Abkari or Police Officer or any other person” by Section 12 of Act V of 1091.

196. The words and figures “Section 55 or Section 57 or Section 58 of” omitted by Act 16 of 1997, w.e.f. 3-6-97.

197. Inserted by Section 10(2) of Act L of 1112.

198. **V.S. Kuttan Pillai v. Ramakrishna and another, 1980 CrLJ 196 / 1980 AIR (SC) 185 / 1979 CAR 360 / 1980 Cr LR (SC) 657 / 1980 SCC (Cr) 226 / 1980 Mad LJ (Cr) 402.**

**TABLE SHOWING ABKARI OFFICERS
EMPOWERED FOR SEARCH**

Department	Abkari Officers
Excise Department(See SRO.NO. 234/67 under GO(MS)NO.356/67/Rev. Dated 10-8-1967.	<ol style="list-style-type: none"> 1. Excise Commissioner 2. Additional Excise Commissioner 3. Deputy Excise Commissioner 4. Assistant Excise Commissioner 5. Excise Circle Inspector 6. Excise Inspector 7. Assistant Excise Inspector 8. Excise Preventive Officer (Assistant Excise Inspectors are empowered by virtue of their rank above Preventive Officers.).
Police Department(See SRO.NO.321/96 underGO(P)NO.69/96/TD.Dated 29-3-1996	All Police Officers of and above the rank of Sub Inspectors of Police; in charge of Law and Order and working in the General Executive Branch of Police Department within the local limits of their jurisdiction.
Revenue Department(See SRO.NO. 321/96 under GO(P)NO.69/96/TD. Dated 29-3-1996.	All Revenue Officers of and above the rank of Deputy Collectors.

31. Power to certain Abkari and Police Officers to search houses, etc., without warrant:- Whenever the ¹⁹⁹[Commissioner of Excise] or any ²⁰⁰[Abkari Officer not below such rank as may be specified by the Government in this behalf or any Police Officer] not below the rank of ²⁰¹[Sub Inspector] or a Police Station Officer, has reason to believe that an offence under ²⁰²[x x x x] this Act has been committed and that the delay occasioned by obtaining a search warrant under the preceding section will prevent the execution thereof, he may, after recording his reasons and the grounds of his belief at any time by day or night, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act, and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act:

199. Inserted by Section 10(2) of Act L of 1112.

200. Substituted for the words "Abkari or Police officer" by Section 23(a) of Act 10 of 1967.

201. Substituted for "Inspector" by Section 3 of Act III of 1106.

202. The words and figures "Section 8 or Section 15C or Section 55 or Section 55B or Section 56A or Section 57 or Section 58 or Section 58A or Section 58B of" Omitted by Act 16 of 1997 with effect from 3-6-1997.

²⁰³[x x x x]

SYNOPSIS

Power of Abkari and Police Officers to search houses, etc., without warrant:



In urgent cases where it may not be possible for the officer concerned to get the warrant from the authority mentioned U/s 30 of the Act, he may after recording reasons and grounds for belief, seize the materials. In such a case, warrant is not necessary.²⁰⁴ When detection of the offence and seizure of the contraband articles does not involve search of the premises, the question of satisfying requirements under Sec. 31 does not arise.²⁰⁵ Before proceeding to search a place an excise officer-conducting search has to make a record of ground based on which he had reasonable belief that an offence under the act was being committed. Interpreting Section 54 of the Mysore Excise Act, which corresponds to section 31 of the Kerala Abkari Act, Hon'ble Supreme Court, held that the violation of the provision rendered the search completely without jurisdiction and, as a logical corollary, vitiated the conviction.²⁰⁶

32. Power to enter and Inspect place of manufacture and sale:- The ²⁰⁷[Commissioner of Excise] or any Abkari Officer not below the rank of ²⁰⁸[Preventive officer] or any Police Officer duly empowered in that behalf, may enter and inspect, at any time by day or by night, any place in which any licensed manufacturer carries on the manufacture of any liquor or intoxicating drug, or draws toddy, or stores any liquor or intoxicating drug or toddy, and may enter and inspect, at any time during which the same may be open, and place in which any liquor or intoxicating drug is kept for sale by any licensed person; and may examine, test, measure or weigh any materials, stills, utensils, implements, apparatus, liquor or intoxicating drugs found in such place.

SYNOPSIS

Power of entry and Inspection of place of manufacture and sale: Distinction between Sec. 31 & 32



Unlike S.31, where Abkari Officers have right of entry and search of any place, under S. 32, the Abkari Officers can enter and inspect only the premises where liquor and intoxicating drug is kept for sale by any licensed person and only places where any licensed manufacturer carries on any manufacture

203. The proviso "Provided that every person arrested under this section shall be admitted to bail by such Officer as aforesaid if sufficient bail be tendered for his appearance either before a Magistrate or before on Abkari Inspector as the case may be" Omitted by Act 16 of 1997 with effect from 3-6-1997.

204. **Ouseph v. State of Kerala, 1980 KLT 827.**

205. **Sivaraman v. State of Kerala, 1981 KLT S.N. page 9.**

206. **K. L. Subbayya v. State of Karnataka, AIR 1979 Supreme Court 711.**

207. Substituted for "Superintendent of Abkari Revenue" by Section 2 of Act III of 1106.

208. Substituted for the word "(a) Sub-Inspector" by Act 10 of 1967.

of liquor or intoxicating drug etc. at any time whether day or night during which the same may be opened and may test, measure or weigh any materials, utensils etc. Under S.32 of the Act, power of entry and inspection is not limited to specified offences during the relevant time when inspection was conducted. The power under S.32 is kept in tact, entry and inspection of the licensed premises under S.32 can be done when the premises are open, and after test and examination, if any offences, were suspected to have been committed, he can file a report under S.50. When the definite contention is that abkari inspectors have conducted check up of only licensed premises under S.32 then there is no condition precedent that before such inspection, the officer must have reason to believe that a particular offence has been committed. Under S.27 of the Act, person in possession of the liquor as per licence is bound to test the liquor as required by the Abkari Officer. Therefore, if sample is taken during inspection as authorised under S.32 and if the Abkari Officer finds out any offence, it is for the authorised Abkari Officer to file report under S.50 of the Act before the competent Magistrate and, thereafter, it is for the Magistrate to deal with the same as prescribed in the Code of Criminal Procedure²⁰⁹. If sample is taken in the routine inspection of licensed premises under S.32, matter can be reported under S. 50. When sample is taken under S.32 without a search under S. 30 or 31, procedure under s. 36 is not mandatory and report can be filed under S. 50²¹⁰.

209. **Prabhakaran v. Excise Inspector 2002 (1) KLT 896**

TABLE SHOWING OFFICERS EMPOWERED UNDER Sec.32

Department	Abkari Officers
Excise Department(See SRO.NO.234/67 under GO(MS)NO.356/67/Rev. Dated 10-8-1967.	<ol style="list-style-type: none"> 1. Excise Commissioner 2. Additional Excise Commissioner 3. Deputy Excise Commissioner 4. Assistant Excise Commissioner 5. Excise Circle Inspector 6. Excise Inspector 7. Assistant Excise Inspector 8. Excise Preventive Officer (Assistant Excise Inspectors are empowered by virtue of their rank above Preventive Officers. Notification under section 4 is lacking in their case).
Police Department(See SRO.NO.321/96 underGO(P)NO.69/96/TD.Dated 29-3-1996	All Police Officers of and above the rank of Sub Inspectors of Police in charge of Law and Order and working in the General Executive Branch of Police Department.
Revenue Department(See SRO.NO. 321/96 under GO(P)NO.69/96/TD. Dated 29-3-1996.	All Revenue Officers of and above the rank of Deputy Collectors.

210. **Chami v. Excise Inspector – 2006 KHC 174 / 2006 (1) KLT 511/ ILR 2006 (1) Ker. 273 / 2006 (1) KLJ 237 / 2006 (1) KLD 530**

33. In case of resistance entry may be made by force, etc.- ²¹¹[(1)] If any officer empowered to make an entry under the provisions of the last two preceding sections, cannot otherwise make such entry, it shall be lawful for him to break open any outer or inner door, window and to remove any other obstacle to his entry into any such place.

²¹¹[(2)] An Abkari Officer may without an order or without a warrant from a Magistrate, arrest and detain any person who obstructs him while in the execution or discharge of his duty or who has escaped from his lawful custody:

Provided that every person who is arrested and detained in custody shall be produced before the Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate:]

SYNOPSIS

Resistance to entry: ⇒ Where a power is conferred or a duty is imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means are reasonably necessary for such execution. If in the exercise of the power or the performance of the official duty, officers executing search warrant encounter improper or unlawful obstruction or resistance the search party have the right to use reasonable means to remove the obstruction or overcome the resistance. The aforementioned observations were made by the Hon'ble Supreme Court while considering the scope and ambit of the powers of officers executing search warrant under S.6 (9) of the Taxation on Income (Investigation Commission) Act (30 of 1947 read with S.96 of the Criminal P.C. (5 of 1898)).²¹² The provisions under S. 33(2) of the Abkari act is only an enabling provision and a procedural safeguard to the Excise Officer to effect arrest of the person who obstructs him in the discharge of the duty and to detain him for a period not exceeding twenty four hours and if need be to obtain appropriate orders from the Magistrate to detain him for any period in excess of twenty four hours so as to have the Abkari Officer enabled to discharge his duty without any such obstruction. Obstruction caused under S. 33 (2) is not by itself an offence punishable under the provisions of the Abkari Act²¹³.

211. By Act 4 of 1996 Section 33 of the Act remembered as sub-section (1) of that section and sub Section (2) along with proviso inserted.

212. **Matajog Dobey v. H.C. Bhari** 1955 (2) SCR 925 / AIR 1956 SC 44 / 1956 SCJ 110.

213. **Unni @. Jayakumar v. State of Kerala** – 2006 KHC 716 / ILR 2006 (3) Ker. 109 / 2006 (2) KLJ 683

²¹⁴[34. Offenders may be arrested and contraband liquor, vehicles, etc. seized without warrant:- (1) Any ²¹⁵[Abkari Officer] Department may arrest without warrant in any public thorough fare or open place other than a dwelling house, any person found committing an offence punishable under ²¹⁶[this Act], and in any such thorough fare or public place may—

(a) Seize and detain-

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

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

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

SYNOPSIS

Officers empowered to search: ➔ The term Abkari Officer is defined under Section 3(2) of the Abkari Act. Under Section 3(2) of the Abkari Act, an “Abkari Officer” means the Commissioner of Excise, any officer, or other person lawfully appointed or invested with powers under Sections 4 or five. Under Section 4(d) of the Abkari Act, the Government has the power to appoint officers to perform the acts and duties mentioned in Sections 40 to 53 of the Abkari Act. Under Section 4(e), the Government has the power to appoint subordinate officers of such classes and with such designations and confer power. Under Section 4(f) the Government

214. Substituted by Section 2 of Act 24 of 1975.

215. Substituted for the words “officer of the Excise Department or the Police Department” by Act 16 of 1997 with effect from 3-6-1997.

216. Substituted for the words and figures “section 8 or section 15C or Section 55 or Section 55B or Section 56A or Section 57 or Section 58 or Section 58A or Section 58B” by Act 16 of 1997 with effect from 3-6-97.

217. Substituted for Sub-Sections 2 and 3 by Act 16 of 1997 with effect from 3-6-1997 Sub-sections 2 and 3 before substitution ran as follows: “(2) If the Officer making an arrest under Sub Section 1 is not empowered under Section 5A to admit to bail, the person arrested shall forthwith be produced before an Officer so empowered. (3) It shall be the duty of the Officer empowered under Section 5A to admit such person to bail if sufficient bail is tendered for his appearance before an Abkari Officer having jurisdiction to enquire into the case”.

has the power to order that all or any of the powers and duties assigned to any officer under clauses (d) and (e) of this section shall be exercised and performed by any (Officer of Government) or any person. Under Section 4(g) of the Abkari Act, Government has the power to delegate to any Abkari Officer all or any of their powers under this Act.

Police Station Officer & Officer-in-charge of Police Station Under section 31 Abkari Officer or an Officer in charge of the Police station are empowered to conduct search of search houses, etc. The word Police Station Officer is the same as Officer in charge of the Police station appearing in Section 2-(O) of the Code of Criminal Procedure. Officer in charge of the Police Station includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present.

Clerk Attached to the Police Station A clerk attached to a police station and in charge of it, when the Sub-Inspector and other senior officers are away on other duty is an “officer in charge of the police station²¹⁸. The officer next in rank at a police station, but above the rank of a constable, will be officer-in-charge of the police station, during the absence or illness of the officer-in-charge of the police station²¹⁹. Even in the absence of the officer-in-charge of a police station, the police officer next in rank at the police station may be regarded as the ‘officer-in-charge of the police station’.

Absence of the Officer in charge of Police Station The officer-in-charge when he goes out on tour does not cease to be ‘officer-in-charge of the police station’. He will still be ‘officer-in-charge of the police station’. It is clear that a place or post declared by the Government as police station must have a police officer-in-charge of it and if he, for any reason, is absent in the station house, the officer who is in next junior rank present in the police station, shall perform the function as officer-in-charge of that police station²²⁰.

When ASI has power to Search Assistant sub Inspector of Police is not an authorised officer to detect and investigate an offence under the Act²²¹. As per S. 4 of the Abkari Act, the Government of Kerala is empowered to authorise an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act. The Government of Kerala had notified that all police officers of and above the rank of Sub Inspector of Police is empowered to discharge all the duties conferred on an Abkari Officer. In the light of S.R.O. No. 321/96 an Assistant Sub Inspector of

218. *Pyli Yacob v. State* ILR 1952 TC 937

219. *Naginalal Nandlal v. State of Gujarat*, (1962) 1 Cr.L.J. 142]

220. *Jaipur v. State of Rajasthan*, AIR 2001 SUPREME COURT 668 / 2001 AIR SCW 305

221. *Sabu v. State of Kerala* 2007 (4) KLT 169)

Police is not empowered to detect or investigate the offence. Even if he was empowered as per the provisions of S.2 (o) Cr.P.C., he cannot exercise the power conferred on an Abkari Officer^{221A}. In *Subhash v. State of Kerala*^{221B} the division bench of the High Court of Kerala affirmed the view taken in *Sabu's case*^{221C}.

However, the police officer conducting search and seizing materials must be working in the general executive branch of the police department. Search and seizure must be confined to the local limits of the police station to which he or she is posted. A police officer cannot search a place, which is not within the local limits of his jurisdiction²²². Search and seizure by an officer who has not been conferred power cannot form the basis of a valid charge.²²³

Whether the detecting officer can investigate: In *Naushad v. State of Kerala*,²²⁴ a single bench of the Hon'ble High Court held that when the complainant and the investigating officer are the same person the investigation conducted could not be said to be a fair and proper. The Division Bench in the decision in *Khader v. State of Kerala*²²⁵ overruled the decision in Naushad's case. The Division Bench said that the investigation by the complainant police officer in a case under the N.D.P.S. Act is not improper or illegal for the reason that main part of the investigation would be over at the time the offence is detected and what would remain would only be the sending of the samples for chemical analysis report and the lodging of a final report in Court. The Division Bench observed that in such circumstances there would be no likelihood of any prejudice being caused to the accused²²⁶.

Search and seizure: Search memo should contain date, time, place, and exact location at which the search memo was prepared. It should contain name, designation, and official address of the officer preparing the search memo, situation, and circumstances in which the officer got information about the offence. It should contain nature and particulars of the offence got informed of, approximate distance to the spot of offence got informed of, reasoning and ground of belief of the officer upon obtaining information and justification for conducting search without warrant.²²⁷ In urgent cases where it may not be possible for the officer

221A. *Thankamony v. State of Kerala*, 2007 (3) KLT SN 19 (C.No.20)

221B. 2008 (2) KLT 1047

221C. 2007 (4) KLT 169)

222. SRO No. 321 /96

223. *Roy V.D. v. State of Kerala*, 2001 (1) KLT 86 / AIR 2001 SUPREME COURT 137 / 2000 AIR SCW 4005

224. 2000 (1) KLT 785

225. 2001 (2) KLT 407

226. 2002 (2) KLJ 409

227. *Balan v. State of Kerala*, 1999 (1) KLT 13.

concerned to get the warrant from the authority mentioned U/s 30 of the Act, he may after recording reasons and grounds for belief, seize the materials. In such a case, warrant is not necessary.²²⁸

Need to file prompt reports

Prompt reports, proper preservation of samples with proof of its authenticity and proper analysis are essential. The improprieties noticed in the manner of sending sample for analysis do not vitiate the conviction by themselves. Irregularity in search and seizure by themselves will not make the evidence inadmissible.²²⁹ Section 36 only provides safeguard to accused during search and even if there is any infraction that will not vitiate the trial if materials brought on record justify the conviction.²³⁰ It is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.²³¹ Evidence collected during a search, vitiated by procedural illegality does not become inadmissible.²³² However, if the search and seizure was incomplete, in defiance of law and evidence collected likely to have been tampered with, or interpolated, then evidence becomes inadmissible.²³³

Official Witnesses, reliability of their testimony

Even if the independent witnesses who signed a seizure mahazar resile from their former version, it would not mean that the prosecution case regarding occurrence is not correct. Evidence of official witnesses can be relied in such a case²³⁴. The officer who makes the search has a duty to explain the reason for not adhering to the minimum requirement of two witnesses in a seizure mahazar. If the explanation offered by him is acceptable, search and seizure may not be vitiated. Court has to see why the conditions were not complied with.²³⁵

Failure to record reasons in the search memo whether vitiates conviction

The search memo should contain the reason for not obtaining warrant as contemplated under Sec. 30. In *K. L. Subbaya v. State of Karnataka*²³⁶, the excise officer, had not made any record of any ground on the basis of which he had reasonable belief that an offence under section 34 of the Mysore Excise Act was being committed, before proceeding to search a motor car. Interpreting section 54 of the Mysore excise act, which corresponds to section 31 of the Kerala Abkari Act, Hon'ble Supreme Court, held that the violation of the provision rendered the search completely without jurisdiction and, as a logical corollary, vitiated the conviction.

228. *Ouseph v. State of Kerala*, 1980 KLT 827.

229. *Dominic v. State of Kerala*, ILR 1989 (2) Kerala 419 / 1989 (1) KLT 601.

230. *Madhavan and another v. The Excise Inspector*, ILR 2000 (1) Ker. 823 / 2000 (1) KLT 311.

231. *Khel Singh v. Union of India*, AIR 2002 SC 1450 / AIR 2002 SAR 1308 / 2002 (4) SCC 380.

232. *Ibid* 231.

233. *Ibid* 231.

234. *Sivaraman v. State*, 1981 KLT SN 17 Page9

235. *Ramachandran Nair v. State of Kerala*, 1991 KLT 44 / 1989 (2) KLT 719.

236. (AIR 1979 SC 711)

Comparison with Sec. 42 & 50 of the NDPS Act

In many cases²³⁷ and, it was laid down that failure to observe the safeguards, while conducting search and seizure, as provided by Sec. 50 of the N.D.P.S Act would render the conviction and sentence of an accused illegal. In some cases it was opined by the Supreme court that the judgment in *Pooran Mal's* case²³⁸ could not be interpreted to have laid down that the contraband seized as a result of illegal search or seizure could by itself be treated as evidence of possession of the contraband to fasten liability, arising out of unlawful possession of the contraband, on the person from whom the alleged contraband had been seized during an illegal search conducted in violation of the provisions of Section 50 of NDPS Act. However in *State of Himachal Pradesh v. Pirthi Chand*²³⁹ and *State of Punjab v. Labh Singh*²⁴⁰ relying upon a judgment of the Hon'ble Supreme Court in *Pooran Mal* a discordant note was struck and it was held that evidence collected in a search conducted in violation of S. 50 of NDPS Act did not become inadmissible in evidence under the Evidence Act. On a reference, a bench of five judges resolved the conflict in *State of Punjab v. Baldev Singh*²⁴¹.

Hon'ble Supreme Court observed thus:²⁴² *“Thus, considered we are of the opinion that the judgment in Ali Mustafa's case correctly interprets and distinguishes the judgment in Pooran Mal's case (AIR 1974 SC 348) and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law, as laid down in Pooran Mal's case.*

On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he

237. *State of Punjab v. Balbir Singh*; (1994) 3 SCC 299/ (1994) AIR SCW 1802 / AIR 1994 SC 1872 / 1994 Cri LJ 3702, *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* (1994) 6 SCC 569 / (1994) AIR SCW 4393 / AIR 1995 SC 244); *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* (1995) 3 SCC 610 / (1995 AIR SCW 1852 / 1995 Cri LJ 2662)

238. AIR 1974 SC 348

239. (1996) 2 SCC 37 / (1996 AIR SCW 422 / AIR 1996 SC 977 / 1996 Cri LJ 1354)

240. 1996 (5) SCC 520 / (1996 AIR SCW 3444 / 1996 Cri LJ 3996)

241. 1999 AIR 1999 SUPREME COURT 2378 AIR SCW 2494

242. 1999 AIR 1999 SUPREME COURT 2378 AIR SCW 2494

so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether the safeguards provided in Section 50 have been duly observed would have to be determined by the Court based on evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of

the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustafa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

Under Section 42(1) of the N.D.P.S Act when the empowered officer gets prior information that offences under Chapter IV have been committed, he should necessarily make a record of the information in writing. However, if he has reason to believe from personal knowledge or materials, which may furnish evidence of commission of such offences, are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. Under the proviso to Section 42(1) of the N.D.P.S Act, if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent, it was held in **State of Punjab v. Balbir Singh**²⁴³ that these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. The Hon'ble Supreme Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and to the accused while defending his prosecution. The Hon'ble Supreme Court also held that failure to comply with S. 42(1), proviso to S. 42(1) and S. 42(2) would render the entire prosecution case suspect and cause prejudice to the accused. In the following cases²⁴⁴ Hon'ble Supreme Court held that the non-compliance of the provisions of the proviso to S. 42 of the Act was mandatory

243. (1994) 3 SCC 299 / AIR 1994 SC 1872 / 1994 AIR SCW 1802 / 1994 Cri LJ 3702

244. Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513; Koluttumottil Razak v. State of Kerala (2000) 4 SCC 465; Beckodan Abdul Rahman v. State of Kerala (2002) 4 SCC 229; Chhunna alias Mehtab v. State of M.P., (2002) 9 SCC 363

and the conviction of the accused was set aside. In the case of **Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat**²⁴⁵ Hon'ble Supreme Court held that the prosecution is obliged to give evidence of the search and all that transpired in its connection. It is very relevant that the prosecution witnesses speak about the compliance about the mandatory procedure and if under the evidence to this effect is not given; the Court must assume that the person to be searched was not informed of the protection. The Court must find that the possession of illicit articles under the Act was not established. It has been held that when the officer has not deposed that he had followed the procedure mandated the Court is duty-bound to conclude that the accused had not had the benefit of the protection that the Act affords; that therefore, his possession of articles under Act is not established and that the pre-condition for his having satisfactorily accounted for such possession had not been met; and to acquit the accused. The above statement of law has been affirmed in the Constitution Bench judgment of Supreme Court in the case of **State of Punjab v. Baldev Singh** (supra). Though these observations were made in a case to which S. 50 of the N.D.P.S Act applies, in view of the pronouncement of the judgment of three-Judges of this Court in **Abdul Rashid Ibrahim Mansuri v. State of Gujarat** (supra), the approach by the Court in interpreting the law for the non-compliance of Section 42 and Section 50 of the N.D.P.S Act must remain the same²⁴⁶.

The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure²⁴⁷. Challenge to a search and seizure made under the Criminal Procedure Code on the ground of violation of fundamental rights under Article 20(3) of the Constitution was examined in **M.P. Sharma v. Satish Chandra**²⁴⁸ by a Bench of eight Judges of The Hon'ble Supreme Court. The challenge was repelled and it was held as under:

Admissibility of a piece of Evidence obtained in an illegal search ⇒

“A power of search and seizure is in any system of jurisprudence an over-riding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into

245. (1995) 3 SCC 610 / 1995 AIR SCW 1852 / 1995 Cri LJ 2662

246. **State of West Bengal v. Babu Chakraborty**, AIR 2004 SUPREME COURT 4324

247. **State v. N.M.T. Joy Immaculate**, 2004 (5) SCC 729 / AIR 2004 SC 2282 / 2004 AIR SCW 2828 / 2004 Cri LJ 2515

248. AIR 1954 SC 300 / 1954 Cri LJ 865

a totally different fundamental right, by some process of strained

construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.”

In **Kuruma v. The Queen**²⁴⁹ an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under:

“The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained”.

A Constitution Bench in **Pooran Mal v. Director of Inspection**²⁵⁰ examined this question and the principle enunciated therein is as under:

“If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.”

The Constitution Bench decision in **Pooran Mal** was considered in **State of Punjab v. Baldev Singh** and the observations therein were made having regard to the scheme of the N.D.P.S Act and especially the provisions of Section 50 thereof. In that context, it was held that it was not possible to hold that the judgment in **Pooran Mal** can be said to have laid down that the “recovered illicit article” can be used as “proof of unlawful possession” of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language

249. 1955 AC 197

250. 1974(1) SCC 345 / AIR 1974 SC 348 / 1974 Tax LR 340

used, a very strict view of Section 50 of the Act was taken and it was held that failure to

inform the person concerned of his right as emanating from sub-Section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision to include even some bag, article or container or some other baggage being carried by him.²⁵¹ It is pertinent to note that there is no provision in the Abkari Act corresponding to section 50 of the N.D.P.S Act.

35. Arrest of persons refusing to give name or giving false name:- Any person who may be accused or reasonably suspected of committing an offence under this Act, and who, on demand of any officer of the Abkari, Salt, Police, Land Revenue or Customs Departments or of any other person duly empowered, refuses to give his name and residence which such officer or person to believe to be false, may be arrested by such officer or person in order that his name and residence may be ascertained.

36. Searches how to be made:- All searches under the provisions of this Act shall be made in accordance with the provisions of the ²⁵²[Code of Criminal Procedure, 1973 (Central Act 2 of 1974);]

²⁵³[Provided that the persons called upon to attend and witness such searches shall include at least two persons neither of whom is an Abkari, Police or Village Officer].

SYNOPSIS

Deposition of the police personnel are not liable to be discarded, particularly when it is the *Witnesses during search reliability of the testimony of police personal* specific case of the prosecution that they tried to procure independent witnesses from the public but they failed in their attempt to get such independent witness from the public.²⁵⁴

When contraband/smuggled goods are recovered from the bushes in an Island, insistence of participation of independent witnesses from the locality is not proper.²⁵⁵ When witness residing 38 miles away *Local Witness not necessary*

251. **State of West Bengal v. Babu Chakraborty**" AIR 2004 Supreme Court 4324
252. Substituted firstly by Act 10 of 1967 and again substituted by Act 16 of

1997.

253. Added by Section 11 of Act L of 1112.

254. **Brij Pal v. State (Delhi Administration)** 1996 CrLJ 1677/ 1996 AIR (SC) 2915 / 1996 SCC (Cr) 392 / 1996(1) Crimes 93(SC) / 1996(1) CCR 176

255. **The State of Maharashtra v. P.K. Pathak**, 1980 CrLJ 923 / 1980 AIR (SC) 1224 / 1980 CAR 321/ 1980 SCC (Cr) 428 / 1980 UP CrC 16

from the scene of occurrences are found unreliable, placing reliance on evidence of police

officer is not proper.²⁵⁶ Independent witnesses not available near the place of incident. For want of corroboration by independent witnesses, evidence of police officer, which was otherwise reliable, could not be discarded.²⁵⁷ There was no suggestion given to the witnesses examined by the prosecution that at the relevant time, the members of the public were present at the spot. Since it was a case of sudden apprehension without any pre plan, independent public witness was not essential in the facts of the case.²⁵⁸ Section 100(4), of the Cr.P.C. requires that before making a search, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. The Courts generally look for compliance of the previously mentioned provisions.²⁵⁹ Search witnessed by person's who are not respectable inhabitants of locality. It does not invalidate the search but merely affects the weight of evidence.²⁶⁰

The Panch witness residing near police station and his uncle lost an election to the accused persons. Evidence of such witness must be scrutinised carefully as contradictions in evidence of Panch witnesses vitally affect authenticity of search.²⁶¹ If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version.²⁶²

Search list is prepared under Sec. 100 (5) of the Cr.P.C. It shall be made in the presence of witnesses. It shall specify all things seized and the place from where it was found.

Witnesses should sign it. Where a Circle Inspector made a significant error in a material part in describing the article

Preparation of Search List: ⇒

256. **The Delhi Administration v. Balakrishnan**, 1972 CrLJ 1 / 1972 AIR (SC) 3 / 1972(4) SCC 659 / 1972 MLJ (Cr) 205

257. **Ram Kumar v. State (NCT) of Delhi**, 1999 CrLJ 3522 / 1999 AIR (SC) 2259 / 1999 SCC (Cr) 574 / 1999(2) Rec CrR 782 / 1999 CrLR (SC) 373

258. **Kaka Singh v. State of Haryana**, 1995 CrLJ 3234 / 1995 AIR (SC) 1948

259. **Pradeep Narayan Madgaonkar etc. etc. v. State of Maharashtra**, 1995 CrLJ 3213 / 1995 AIR (SC) 1930 / 1995 SCC (Cr) 708 / 1995(3) CCR 2

260. **Sunder Singh v. State of Uttar Pradesh**, 1956 AIR (SC) 411 / 1956 CrLJ 801

261. **Kaur Sain v. The State of Punjab**, 1974 CrLJ 358 / 1974 AIR (SC) 329 / 1974(3) SCC 649 / 1974 CAR 26

262. **Modan Singh v. State of Rajasthan**, 1978 CrLJ 1531/ 1978 AIR (SC) 1511 / 1978 CrLR (SC) 631 / 1979 SCC (Cr) 56 / 1980 CAR 175

seized, viz. he wrote brass bangles for bronze churis and further when articles were not kept under seal, his evidence was not acted upon.²⁶³ Practice of obtaining signature of accused in the search list is objectionable.²⁶⁴

Section 100 of the Cr. P.C. applies only in the case of search of a place. It does not apply the search of a person. It is not obligatory to keep two witnesses during such search.²⁶⁵

Whenever liquor or intoxicating drug is seized, samples should be taken in the presence of witnesses and accused, from the spot. Sample should be taken in clean and dry bottles. If there is more than one container, though samples can be taken at random, it must be insured that the total contraband substance contained in the containers so elected, exceeds the limit of possession notified under Sec. 13 and other provisions of the Abkari Act. Accused has no right to get the sample of contraband articles.²⁶⁶ When S.36 of the **Abkari Act** and Para.17, 26, 34, 49 & 77 in the Manual are read together, it is clear that a seizure should be reported to the Court 'forthwith' and request made for sending the sample for analysis. As per Para.17 of the Excise Manual, it is imperative that the provisions of the Criminal Procedure Code are strictly and carefully observed concerning searches. As per S.102 (3) of the Cr. PC, the Officer acting under sub-s (1) of S.102 shall forthwith report the seizure to the Magistrate having jurisdiction and shall produce the seized property before the Court unless the property seized is such that it cannot be conveniently transported to the Court. It is specifically stated in Para.49 of the Manual that a report of all searches or arrest should be sent to the Assistant Excise Commissioner and to the Magistrate concerned within 24 hours. It is also gatherable from Para.77 that whenever contraband liquor is produced in a Court, the Court may be requested to send samples thereof to the Chemical Examiner. As per a notification issued by the Government of Kerala, an Excise Circle Inspector or an Excise Range Officer can keep in safe custody the seized articles. However, it cannot be said that in view of the provisions contained in S.53 of the Act, the seized articles need not be produced before the Court. If the sample is not produced before the Court and it is not sent for analysis through the Court, there is no guarantee about the authenticity of the sample. When there is doubt with regard to the authenticity of the sample that reached the laboratory, the accused is entitled to the benefit of doubt.²⁶⁷

263. *Naba Kumar Das v. State of W.B.*, AIR 1977 SC 777.

264. *Narayan Rao v. State of A.P.*, AIR 1957 SC 737 / 1958 SCR 283 / 1957 CrI, L.J.1320.

265. *Job vs. State of Kerala*, 1991 (1) KLJ 398.

266. *State of Kerala v. Choyunni*, 1980 KLT 107.

267. *Alex v. State*, 2003 (1) KLT SN 9.

The accused in **Sathi s/o Peethambaran v. State of Kerala**²⁶⁸ was found carrying a black jerry can containing a liquid believed to be illicit arrack. Even though a black jerry can of 10-litre capacity containing a liquid alleged to be illicit arrack was produced before the committal magistrate, the description of the property in property list did not show that the can was sealed. There was no direction by the magistrate to take a sample or indicating

Presumption relating to regularity of official act of Sampling

the quantity of sample to be taken. Prosecution in such a case can succeed only if it is proved that the sample, which was analysed in the chemical examiner's laboratory, was the very same sample that was drawn from the bulk quantity of the alleged contraband substance said to have been possessed by the accused. Regularity of sampling and despatch (official acts) can be presumed within the meaning of sec. 114(e) of the Evidence Act only if there is some acceptable evidence to show that sampling was, in fact, done in the court and the sample so drawn was despatched from the court. When there is no endorsement on any of the court records to the effect that sampling was done on a particular day and that the sample so drawn was forwarded to the chemical examiner's laboratory, there is no question of the court presuming that official acts were regularly performed. It is only when official acts are shown to have been performed, can the court presume that such official acts were regularly and properly performed. When this link evidence, is seen missing in a case no presumption arises.²⁶⁹

As per Clause 34 of the Excise Manual, it is mandatory on the part of the Excise Officials or the Police Officials to take two separate samples from the contraband article and to seal and label it in the presence of the witnesses and the accused. Section 53 of the Abkari Act insists that any seizure is made of any contraband article, it is imperative on the part of such officer that he shall take sample from them on affixing the seal and also the same shall be labelled for the purpose of chemical analysis. as per Rule 3 of the Kerala Chemico - Legal Examination Rules, 1959 in every case in which analysis is required for judicial purpose by the Police, Magistracy or Excise Officers, the Chemical Examiner shall as far as practicable furnish a quantitative analysis stating the results of the analysis which led to the conclusion in his report under Section 293 of the Code of Criminal Procedure. This rule also contemplates that the officers, who seized the contraband article for the purpose of chemical analysis, shall take samples²⁷⁰.

Seizing officer has no authority to destroy the articles seized. Only the authorized officer authorized under Sec. 67B can destroy when it is produced before him. However, destruction of seized articles is only an irregularity.²⁷¹

268. 2007(1) KLT SN Page 57

269. 2007(1) KLT SN Page 57

Destruction of seized articles 270. Selvaaraj s/o Chellappan Nadar v. State of Kerala, CRL.A.NO.1411/2005 www.judis.nic.in Narayani v. Excise Inspector (2002(3) KLT 725) relied

271. Kittunni v. State of Kerala, 1981 KLT SN 124.

In **Vijendrajit Ayodhya Prasad Goel v. State of Bombay**, a bench of three judges of the Hon'ble Supreme Court held that it is not necessary to send all the bottles recovered in the presence of Panchas, which contained same stuff, for analysis.²⁷² In **Viswanath vs. State of Maharashtra**²⁷³ appellant was found to be in possession of thirteen bottles of illicit liquor and one tin containing liquid by a flying squad of excise department. Samples were taken from the thirteen bottles in a single bottle and sent for chemical analysis. The

Whether samples should be taken from all the seized bottles

report showed that the substance contained 43 % ethyl alcohol. Appellant was prosecuted and ultimately the High Court upheld the conviction and sentence of the appellant. The Hon'ble Supreme Court reversed the finding of the Courts below and acquitted the accused in **Viswanath case**.

In **Gaunter Edwin Kircher v. State of Goa**²⁷⁴ two pieces of charas weighing seven grams and five grams respectively, were found in the possession of the accused. Only one of the pieces, weighing less than five grams sent for chemical analysis was chemically examined. The contraband seized and proved through chemical examination came under small quantity described in Section 27 of the N.D.P.S. Act. Hon'ble Supreme Court held that possession of five grams of charas alone was proved which was for his personal use and punishable only under Section 27 of the N.D.P.S. Act. In **Mahajan v. State of Himachal Pradesh**,²⁷⁵ the accused was caught with eight bottles of XXX Rum. Samples were taken only from three bottles. As per the notification issued by the Himachal Pradesh Government, a family living in separate and distinct premises could possess six bottles of Indian made foreign liquor of 750 ML. each at one time. As only three bottles were subjected to chemical analysis, the court held that there is no evidence to show that the remaining five bottles, allegedly recovered from the accused, also contained Indian made foreign liquor. The court concluded that the prosecution had failed to prove that the accused was in conscious possession of Indian made foreign liquor in excess of the prescribed limit of six bottles of 750 ml. each²⁷⁶. Accused was found carrying 5.25 litres of Indian made foreign liquor, six bottles of 750 ml. each and two bottles of 375 ml. each, only one bottle of 750 ml. sent for chemical analysis. Accused was therefore found to be in possession of 750 ml. of foreign liquor, which is within the permissible limit of 1.5 litres and therefore, possession of that much quantity of liquor is not an offence. There must be proof that remaining bottles contained liquor in excess of the permissible quantity. The conviction and sentence imposed by the trial court set aside.²⁷⁷

272. 1953 AIR (SC) 247 / 1953 CrLJ 1097

273. 2005 Supreme Court Cases (CrI) 1258.

274. AIR 1993 SC 1456

275. 2003 CrI.L.J.1346

276. 2003 CrI.L.J.1346

277. **Krishnankutty v. State of Kerala**, 2005 (3) KLT 568.

In **Balan v. State of Kerala** eight bottles of IMFL was seized and sample was taken only from two bottles. A single bench of the Hon'ble High Court placing reliance on **Krishnankutty v. State of Kerala** held that in the absence of taking sample from each bottle, the entire quantity cannot be said to be IMFL²⁷⁸. Recovery of eight bottles of IMFL, having brand name Victoria XXX Rum. Held that the offence under S. 58 will not lie since it is not spurious liquor and. The permissible quantity that can

be legally carried is 1.5 litres. Sample was taken only from two bottles from each group, which would work out only 1100, which is below 1.5 litres. Hence, conviction and sentence imposed by the court below was set aside²⁷⁹.

In **Chandran v. State of Kerala**,^{279A} large numbers of similarly labelled and sealed bottles purporting to contain same type of article were seized. Relying on the dictum in **Krishnankutty's** case it was urged that the investigating officer must take samples from each of the bottles. The division bench of the Hon'ble High Court was of the opinion that **Krishnankutty's** case does not lay down a universal principle that if several similar bottles containing similar liquids are seized, samples of contents of all bottles have to be examined. Relying on the dictum in **Vijendrajit Ayodhya Prasad Goel v. State of Bombay** the Division Bench of the High court held that if large number of similarly labelled bottles purported to contain same type of article are seized, chemical examination can be done by taking one bottle or certain number of bottles selected at random.

In **Chandran v. State of Kerala**^{279B} the division bench of the High Court held that if large number of similarly labelled and sealed bottles said to contain same type of article are seized, chemical examination can be done by taking one bottle or certain number of bottles selected at random.

In **C.H. Kunhikannan v. State**²⁸⁰, the bottles produced before the court were of the same capacity as mentioned in the FIR and PW1 testified that the bottles had the capacity of 375 ml. each. Hon'ble High Court held that it could be said that the samples are taken from the articles seized from the accused.

In the absence of any evidence to prove that residue and sample were kept in the proper custody till the date of producing the same before Court on 13.9.98 (no evidence is forthcoming as to who was in possession of contraband till it was produced in court and it is evident from the testimony of PW4 that he was not in custody of the contraband) the chance of tampering with the sample taken and the residue seized cannot be ruled out. R. 3 of Chemic Legal Examination Rules, 1959 does not say

278. 2006 KHC 1377 / 2006 (2) KLD 35

279. **Balan v. State of Kerala**, 2006 KHC 1377 / 2006 (2) KLD 35

279A. 2008 (2) KLT 513

279B. 2008 (2) KLT 513, 2005 (3) KLT 568 Explained

280. 2006 (3) KLJ 31 / 2006 (4) KLT 469, Dt. 02.06.2006

that if the result of the analysis is only stated the Public Analyst's report become useless and cannot be relied on by the Court to arrive at a conclusion regarding the article analysed.²⁸¹ Where the samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of

the samples being changed or tampered with during the period in question a fact which had to be proved affirmatively by the prosecution. Consequently, the accused could not be convicted under S. 9A of the Opium Act 1878. In such a case, the prosecution could not be allowed to fill up the gaps in the prosecution story at the appellate or revisional stage²⁸² Committing Magistrates have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the Chemical Examiner in a tamper-proof condition are recorded in the proceedings before court. Sessions Judges trying such cases also should ensure that the concerned member of the staff, who had drawn the sample and dispatched the same to the Chemical examiner duly packed and sealed under the covering letter of the Magistrate, is examined before court during trial. The Public Prosecutor in charge of the case also has a duty to file an additional witness list for examining the thondy section clerk (property clerk) concerned to establish the nexus between the contraband substance and the accused.²⁸³

TABLE SHOWING THE MINIMUM QUANTITY OF SAMPLES TO BE TAKEN

<i>No.</i>	<i>Item</i>	<i>Quantity</i>	<i>Remarks</i>
1	Toddy	500 ml	Benzoic Acid preservative (1% w/v may be added @ of 5 gms to 500 ml of toddy. The sample bottle should not be filled to top. Sufficient space should be left at the top to capture Carbondioxide liberated on fermentation.
2	Wash	300 ml	No preservative needed. The sample bottle should not be filled to the top. Sufficient space should be left at the top to capture Carbondioxide liberated on fermentation. Presently, it has been insisted to send samples not less than 500 ml.
3	Spirituos preparations like Arishtas	200 ml	No preservative needed. The sample bottle should not be filled to the top. Sufficient space should be left at the top to capture Carbondioxide liberated on fermentation.

281. Narayani v. Excise Inspector, 2002 (3) KLT 725

282. The State of Rajasthan v. Daulat Ram, 1980 CrLJ 929 / 1980 AIR (SC) 1314 / 1980 SCC (Cr) 683 / 1980 CrLR (SC) 84 / 1980 Sim LC 119 / 1980 UP CrC 98; Valsala V. State of Kerala, 1993 (2) KLT 550 SC).

283. Sasidharan v. State of Kerala, 2007 (1) KLT 720.

4	Arrack	180 ml	No preservative required. Presently, it has been insisted to send samples of not less than 200 ml.
5	Spirit	300 ml	No preservative required.
6	Foreign Liquor	180 ml	As per Rule 8 (1) (a) of F.L. Rules, 180 ml is required. Chemical Examiner's intimation mentions that 300ml. is to be forwarded, and in crime cases a minimum quantity of 180 ml. May be forwarded. No preservative

necessary.

Samples have to be forwarded through the Magistrate within whose jurisdiction the offence has been committed. (GO (Rt) No. 901/70/Home dated 22.05.1970 and Kerala Chemico-Legal Examination Rules published as GO (MS) No. 624/Home dated 18.8.1959).

On construction of Section 293 (4), Cr.P.C. Hon'ble Supreme Court held that the expression 'Director' comprehends Joint Director as well. The amendment made in clause (e) of Section 293 (4) indicates that clearly. A Joint Director is a higher officer than a Deputy Director or an Assistant Director and, therefore, it would be unreasonable to hold that a report signed by Joint Director is not admissible in evidence though a report signed by Deputy Director or Assistant Director is admissible²⁸⁴. The term chemical examiner takes in a joint chemical examiner as well. Asst. Chemical Examiner has been included and considered competent. Joint Chemical Examiner is also Chemical Examiner as contemplated U/s 293 (4) of the Code of Criminal Procedure, 1973²⁸⁵.
Chemical Analysis: as contemplated U/s 293 (4) of the Code of Criminal Procedure, 1973²⁸⁵.
Who are competent analysts : There is no provision in the Abkari Act enabling the accused to have a second analysis of the sample of contraband.²⁸⁶ Unlike in the case of illicit liquor where the content of ethyl alcohol will be material, in the case of ganja identification by sight and smell by persons familiar with it, such as excise officials can be accepted.²⁸⁷ 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.²⁸⁸
Joint Chemical Examiner See **Dominic v. State of Kerala**²⁸⁹

284. *Ammini v. State of Kerala*, AIR 1998 SUPREME COURT 260 / 1997 AIR SCW 4231

285. *Joseph v. State of Kerala*, 1988 (2) KLT 848.

286. *Devaki v. State of Kerala*, 1986 KLT 1.

287. *Joseph v. State of Kerala*, 1988 (2) KLT 848.

288. *Mary v. State of Kerala*, 2005(4) KLT 39

289. 1989 (1) KLT 601

In **State of Kerala vs. Narayanan**²⁹⁰ Hon'ble High Court observed that excise officers could be considered as experts on the question whether a certain liquid is liquor or not there being no provision in the act or rules that the liquor should be sent for chemical analysis. However, before accepting the opinion of the officer, court is required to ascertain the grounds on which the opinion is based to test it. Similar view was taken in **State of Kerala vs. Bhavani**²⁹¹ where an excise guard who had put in 20 years of service was regarded as an expert and his testimony regarding wash was accepted. In **State of Kerala vs. Sreedharan**²⁹² a division bench held that in the absence of a report from a public analyst it

Chemical analysis whether mandatory would not be safe to rely on smell alone. In **Ankamuthu v, State of Kerala**²⁹³ a single bench held that without the Chemical Examiner's report, the Prosecution evidence would be insufficient to implicate a person in an offence under S. 55(a) of the Abkari Act.

In **State of A.P. v. Madiga Boosenna**²⁹⁴ except for a general statement, contained in the evidence of the witnesses that there was a strong smell of alcohol, emanating from the tins, which were pierced open, there was no other satisfactory evidence to establish that the article was one coming within the definition of the expression liquor. Hon'ble Supreme court held that by merely trusting to the smelling sense of the Prohibition Officers, and basing a conviction, on an opinion expressed by those officers under the circumstances did not justify the conviction of the accused in that case. In the opinion of the Hon'ble Supreme Court better proof, by a technical person from a scientific point of view was necessary, to establish that the article seized was one coming within the definition of liquor. Supreme court held that the fact that accused failed to challenge the answers given by the prosecution witnesses effectively during cross-examination that the commodity was arrack would not absolve the prosecution from establishing the ingredients of the offence, for justifying the conviction when the accused categorically state in general terms, that no arrack was seized from them. Hon'ble Supreme court referred to a decision of the Court in **Baidyanath Mishra v. State of Orissa**, Cri App. No. 270 of 1964, D/-17-4-1964 (SC). In that case, the question was as to whether the appellants, therein, were in possession of opium, to make them liable for an offence. The Opium Act of 1878 defines the expression 'opium'. The appellants contended that the article seized from them was not opium, as defined in that Act, and pointed out that the only evidence, relied on by the prosecution, to establish that the article recovered from them was opium, was the evidence of the Prohibition staff, and that the article has not been subjected to any chemical analysis. The Court rejected that contention in the particular circumstances of the case, and stated:²⁹⁵

290. 1962 KLT 31

291. 1963 KLT 549

292. 1965 KLT 1002

293. 1970 KLT 427 / 1970 KLJ 490 / 1971 KLR 197

294. AIR 1967 Supreme Court 1550

295. AIR 1967 SUPREME COURT 1550

“It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary.....Two other witnesses who were cultivators and who knew what they were

talking about said that it was opium. If the appellants, who themselves were licensed vendors of opium, had the slightest doubt about the correctness of these statements they could have challenged them either by cross-examination or by suggesting to the court that the substance be analysed to determine whether it was opium or not.”

These observations according to their lordships in **Madiga Boosenna**²⁹⁶ clearly indicated as to why the Court in past case expressed the view that there is no infirmity in the prosecution case, simply because there had been no chemical analysis made of the commodity, which according to the prosecution, was opium. Hon’ble Supreme Court held that the facts in **Madiga Boosenna** were entirely different and the observations in **Baidyanath Mishra v. State of Orissa**, extracted above did not apply.

In **Chand Batra v. State of U.P.**,²⁹⁷ the observations in **Madiga Boosenna**²⁹⁸ came up for consideration before the Hon’ble Supreme Court. In **Chand Batra** the Sessions Judge distinguished **Madiga Boosenna’s** case, (supra) on the ground that the Excise Inspector in **Chand Batra v. State of U.P** who had technical knowledge and training behind him, had tested the contents of the drums with the aid of litmus paper, hydrometer and thermometer and did not confine himself to smelling the contents of the drums. The High Court had also distinguished **Madiga Boosenna’s** case supra) on the ground that there were sufficient number of surrounding circumstances to buttress the opinion evidence of the Excise Inspector. The High Court also held that the excise Inspector in **Chand Batra** was a senior man in charge of raids and detection of important cases so that his opinion evidence was admissible, presumably as “expert” evidence, and could be relied upon. The dictum in **State v. Madhukar Gopinath**²⁹⁹ was placed before the Hon’ble Supreme Court **Chand Batra v. State of U.P.** In **State v. Madhukar Gopinath** it was held that, although, the circumstances in which an accused was discovered carrying liquid in rubber tubes might raise grave suspicion against him, yet the Court would not be content with anything less than a chemical or idoform test to determine the composition of the

296. AIR 1967 SUPREME COURT 1550

297. AIR 1974 SUPREME COURT 639

298. *ibid*

299. ILR (1965) Bom 257 / AIR 1967 Bom 61 / 1967 Cri LJ 167)

liquid. According to this decision, the Hydrometer test would be enough if the liquid were known to contain alcohol because it would help to determine the strength of alcoholic contents. Another case cited before the Hon’ble Supreme Court **Chand Batra** was **Ram Jus v. State**³⁰⁰, where a Division Bench of the Allahabad High Court had held that evidence based on chemical analysis was essential in order to establish that a substance alleged to be Ganja, recovered from an accused person, was really Ganja. In that case, reliance was placed on the judgment of Court the Hon’ble Supreme Court in **Boosenna’s** case (supra).

Hon'ble Supreme Court in **Chand Batra v. State of U.P.**³⁰¹ stated thus:

“We think that it is not desirable to lay down an inflexible rule on questions of fact even though their determination requires the adoption of scientific methods and tests. It is really for the Court of fact to decide whether, upon a consideration of the totality of the facts in a case, it has been satisfactorily established that the objects recovered from the possession of the accused included liquor of prohibited strength... We may, however, observe that we agree with the High Court that the proposition contained in Boosenna's case (supra) must be confined to its own facts. 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... 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”.

In **Shanmugham, in re**^{301A}, the evidence of the doctor showed that even if old sugar juice was taken it might smell like I.D. arrack. The madras High Court in that case held that smell of liquor is not considered sufficient to raise a presumption against a person that he had consumed alcohol and that the prosecution when they had seized arrack should have got it examined by a Chemical Examiner. A reliable process to find out whether a liquid is ethyl alcohol or contains ethyl alcohol is by subjecting it to a chemical test and this test is known as idoform test^{301B}.

The primary question in **State v. Madhukar Gopinath Lolge**^{301C} was whether the liquid in question did contain alcohol or not. The High Court of Bombay held that the Hydrometer test does not appear to be the proper test to come to any such determination that the liquid does not contain alcohol.

300. 1970 All LJ 1343

301. AIR 1974 SUPREME COURT 639

301A. AIR 1954 Mad. 376

301B. -do-

301C. A.I.R. 1967 Bom. 61 at page 64).

The report of the Chemical Examiner containing his opinion must, disclose the factual data on which the opinion is based and the reason in support of the opinion. Opinion is no evidence unless reasons in support of the opinion are given, for it is then only that the Court can scrutinize the reasons and decide for itself as to what weight should be attached to the opinion^{301D}.

The Hon'ble Supreme Court in the case of **Raja Ram v. State of Bihar**³⁰², considered the relevant provisions of the Bihar and Orissa Excise Act and the powers conferred upon an Excise Officer under the said Act and ultimately came to the conclusion that the said

power is not analogous to that of a Customs Officer under the provisions of the Sea Customs Act. The Court also further came to the conclusion that in view of the positive provisions contained in sub-section (3) of Section 78 and the powers which an Excise Officer exercises under the provisions of the Bihar and Orissa Excise Act, the conclusion is irresistible that the said officer is a Police Officer for the purpose of Section 25 of the

Confession to abkari officers: Excise officers under Bihar Excise Act are police officers

Evidence Act, and therefore, a confessional statement of an accused made to such Excise Officer would be inadmissible in evidence. This decision was considered in a later decision of The Supreme Court in **Badaku Joti Savant v. State of Mysore**³⁰³. In that case, the statement made before a Deputy Superintendent of Customs and Excise under the Central Excises and Salt Act was for consideration and the Court held that the said Deputy Superintendent of Customs and Excise is not a Police Officer within the

meaning of Section 25 of the Evidence Act. The Court then drew up a distinction between a Central Excise Officer exercising power under the provisions of Central Excises and Salt Act and an Excise Officer under the Bihar and Orissa Excise Act and ultimately came to the conclusion that the Deputy Superintendent of Customs and Excise would not be a Police Officer for the purpose of Section 25 of the Evidence Act, and therefore statement made before the said officer of the Central Excise and Customs Department would be

Officers under Customs and Central Excise not police officer

admissible in evidence. It may be noted that the judgment of the Court in **Raja Ram** was a Bench of 3-learned Judges whereas the Judgment in **Badaku Joti** was a Judgment of 5-learned Judges. The later Judgment of the 5-Judge Bench never disapproved the law laid down in **Raja Ram** and on the other hand was of the opinion that in view of the provisions contained in the Bihar and Orissa Excise Act, 1915 more particularly sub-section (3) of Section 78 and the provisions contained in Section 21(2) of the Central Excises and Salt Act which confers power on the Officer of the

301D. *Suleman Usman Memon v. State of Gujarat*, A.I.R. 1961Guj. 120 at p. 125

302. AIR 1964 SC 828 / (1964 (1) Cri LJ 705 LJ 705)

303. AIR 1966 SC 1746 / (1966 Cri LJ 1353)

Central Excise Department, even though the Central Excise Officer may while making the enquiries for the purpose of Act exercises powers of an Officer-in-Charge of a Police Station he does not thereby become a Police Officer even if the broader meaning to those words in Section 25 of the Evidence Act is given. The Court noted further that the Scheme of the Bihar and Orissa Excise Act is distinct and different from the scheme of the Central Excises and Salt Act and as such, the decision in **Raja Ram** will have no application where a statement of the accused is made to an officer under the Central Excises and Salt Act. The dictum in **Raja Ram v. State of Bihar**³⁰⁴ was followed in **Abdul Rashid v. State of Bihar**.³⁰⁵ In **Balkishan A. Devidayal v. State of Maharashtra**³⁰⁶, the Supreme Court was to consider whether an officer of the Railway Protection Force making an

enquiry under the Railway Property (Unlawful Possession) Act, 1966, is a police officer within the meaning of S. 25 of the Evidence Act. After elaborate consideration of the provisions of the Code of Criminal Procedure, the Railway Property (Unlawful Possession) Act, and Art 20(3) of the Constitution, the Court concluded that an R.P.F. Officer is not a police officer within the meaning of S. 25 of the Act and, therefore, a confession made to that officer is admissible in evidence. In **Romesh Chandra Mehta v. State of West Bengal**³⁰⁷, the confession made to a Customs Officer under the Sea Customs Act was held to be not hit by S. 25 of the Evidence Act and it was held that they are not police officers within the meaning of S. 25. Bench of three Judges in **K.I. Pavunni v. Assistant Collector (HQ), Central Excise Collectorate Cochin**³⁰⁸, held that are not police officers within the meaning of S. 25 of the Evidence Act and the confession made to them was held to be admissible.

Railway Protection Force Officer not a Police Officer

In **Raj Kumar Karwal v. Union of India**³⁰⁹ the Hon'ble Supreme Court held that the officers of the Revenue Department, who have been invested with the powers given to the in-charge of the police station were not police officers within the meaning of S. 25 of the Evidence Act and, therefore, the confessional statement recorded by such officers in the course of investigation of the persons accused of an offence under the Act, were admissible in evidence. A senior reserve police officer appointed under the SRPF Act, though is a police officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order

304. AIR 1964 SC 828 / (1964 (1) Cri LJ 705 LJ 705)

305. Abdul Rashid v. State of Bihar, 2001 AIR SCW 2439 / AIR 2001 SUPREME COURT 2422

306. 1980 (4) SCC 600 / AIR 1981 SC 379

Senior Reserve Police Officer 307. (1969) 2 SCR 461 / (AIR 1970 SC 940)

under Bombay SRPF Act not a police Officer 308. (1997) 3 SCC 721

309. (1990) 2 SCC 409 / (AIR 1991 SC 45)

and tranquillity in the society and the powers of investigation envisaged in Chapter XII of the Cr. P.C. have not been invested with him. Such an officer is not a police officer and confession made by accused is admissible³¹⁰. In **Gulam Hussein Shaikh Chougule vs. S. Reynolds, Supdt. of Customs, Marmgoa**³¹¹, the Supreme Court held that the inculpatory statement made by any person under Section 108, is to a non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinized by the court in the same manner as confession made by an accused person to any non police personnel. In **Paravan v. State of Kerala**³¹² when the excise officer who seized the contraband liquor questioned the accused, he confessed that he kept it for the purpose of manufacturing arrack. It was held that since excise officer is not a police officer confession made to him is acceptable.

Unless an officer is invested with “all the powers” under Chapter XII of the Cr. P.C. including the power to submit a charge sheet under S. 173 of the Cr. P.C, a confession statement recorded by such officer who has not been conferred all such powers, may not be hit by section 25 of the Evidence Act. The object of S. 25 is to ensure that the person accused of the offence would not be induced by threat, coercion or force to make a confessional statement and the officers also would make every effort to collect the evidence of the commission of the crime de hors the confession to be extracted from the accused while they are in the custody of the police.

Officers of the Excise Department in Kerala are not police officers

37. Officers of certain Departments bound to assist.- All officers of the Departments of Police, Customs, Salt and Land Revenue shall be legally bound to assist any Abkari Officer in carrying out the provisions of this Act.

Effect of amendment to Sec. 50A **38. Offences to be reported, etc.**- Every ³¹³[Officer of Government] other than an Abkari Officer, shall be bound to give immediate information to an Abkari Officer, and every Abkari Officers shall be bound to give immediate information either to his immediate official superior or to an Abkari Inspector, of all breaches of any of the provisions of this Act, which may come to his knowledge; and all such officers shall be bound to take all reasonable measures in their power to prevent the commission of any such breaches which they may know or have reason to believe are about or likely to be committed.

310. State of Gujarat v. Anirudhsing, 1997 AIR SCW 2758 / AIR 1997 SUPREME COURT 2780

311. 2002 Supreme Court Cases (Cri) 116

312. 2007 (1) KLT 396

313. Substituted for the words “Sirkar Officer” by Section 27 of Act 10 of 1967.

39. Land holders and others to give information.- All jenmies, proprietors, tenants, under tenants and cultivators who own or hold land on which there shall be ³¹⁴[any cultivation of the hemp or coca-plant or] any manufacture on liquor or intoxicating drugs not licensed under this Act shall in the absence of reasonable excuse, be bound to give notice of the same to a Magistrate or to an officer of the Abkari, Salt, Police, Customs or Land Revenue Departments immediately the same shall have come to their knowledge.

³¹⁵**[40. Procedure on arrest and seizure.**- (1) (a) Any Officer arresting a person under Section 31, Section 34 or Section 35 shall him of the grounds for such arrest.

(b) Where an Abkari Officer arrests without warrant any person other than a person suspected of, or accused of, any non-bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be

released on bail and that he may arrange for sureties on his behalf.

(2) Every person arrested under Section 30 shall be produced before, and the article seized under that section shall be forwarded to, without unnecessary delay, the Magistrate or the Commissioner, as the case may be, by whom the warrant was issued.

314. Inserted by Section 5 of Act XIX of 1111.

315. Substituted by Act 16 of 1997 with effect from 3-6-1997, Prior to the amendment it ran as follows:
“40. Persons arrested how to be dealt with:- (1) When any person is arrested under the provisions of section 31 or section 34 or section 35 of this Act, the person arresting him shall, unless bail shall have been accepted under the provisions of section 31 [or of section 34], forthwith forward him to an Abkari Inspector, or if there be no such officer within a distance of ten miles from the place at which such arrest took place, to the nearest Police Station, with a report of the circumstances under which such arrest was made.

[2] Procedure by Police Station Officer:- On any such person being brought to a Police Station as aforesaid, the officer in charge thereof shall either admit him to appear when summoned before the Abkari Officer as aforesaid, within the limits of whose jurisdiction the offence with which he is charged is suspected to have been committed, or, in default of bail, shall forward him in custody to such officer.

[3] Procedure by Abkari Officer Impowered to inquire:- On any such person being brought in custody before such Abkari Officer, as aforesaid or appearing before him on bail [or when such Abkari Officer as aforesaid has himself made the arrest] such officer shall hold such inquiry as he may think necessary and shall either release such person, or forward him in custody to or admit him to bail to appear before the Magistrate having jurisdiction to try the case.

[4] Power of Abkari Officer to admit persons to bail to appear before himself or other officer having jurisdiction:- [Provided that if such enquiry is not commenced and completed on the day on which such person is arrested by or is brought or appears before such Abkari Officer, the said officer shall, if sufficient bail be tendered for the appearance of the person arrested, admit the said person to bail to appear on any subsequent day before himself or any other Abkari Officer having jurisdiction to enquire into the case.]

Provided also that no person shall be released before the records of enquiry have been forwarded to the [Commissioner] and his orders first obtained, and that the Inspector may accept bail pending the receipt of the order of the [Commissioner]

The [Commissioner] may, for reasons to be recorded in writing also stay proceedings in any case pending enquiry before the Inspector in which, he may consider it necessary to do so, and may thereafter dispose of the case in such manner as he may think fit.”

(3) Every person arrested under Section 31 or Section 34 or Section 35 shall be produced before, and article seized under section 34 shall be forwarded to, without unnecessary delay,-

(a) to the Officer in charge of the nearest Police Station; or

(b) to the Officer empowered under section 5A, or to the Abkari Inspector.

(4) The authority or Officer before whom any person is produced under sub section (2) or sub section (3) shall, take expeditious steps as provided in section 41.

(5) The authority of Officer to whom any article is forward under sub-

section (2) or sub section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article.]

³¹⁶[**41. Disposal of persons arrested.**- (1) Where any person accused of or suspected of, the commission of an offence punishable with imprisonment which may not extend to three years under this Act is arrested or brought in accordance with the provisions of Section 40, he may be released on bail, if sufficient bail be tendered for his appearance before the concerned Abkari Inspector or the Magistrate, as the case may be.

(2) Where a person accused of, or suspected of the commission of an offence punishable with imprisonment which may extend to three years or more under this Act is arrested or brought in accordance with the provisions of Section 40, he shall without any delay be produced before the Magistrate, who shall take such measures as may be necessary to proceed against such person in accordance with the provisions of the Code of Criminal Procedure, 1973, (Central Act 2 of 1974)

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

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

316. Substituted by Act 16 of 1997, with effect from 3-6-1997 as Section 41 and Section 41A. Section 41 prior to the amendment ran as follows : “**41. Persons arrested to be admitted to bail:**— It shall be the duty of any Officer arresting any person under the powers given by section 31 of this Act and of any Police Station Officer or Abkari Officer, before whom a person arrested is brought or appears under the provisions of section 40, to release such person on bail if sufficient bail be tendered for his appearance before an Abkari Inspector or before a Magistrate, as the case may be.”

(b) no person accused of an offence punishable for a term of imprisonment of three years or more under this Act shall be released on bail or on his own bond unless-

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

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

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

SYNOPSIS

S.41A of the Abkari Act is in parimateria with S.37 of the Narcotic Drugs and Psychotropic Substance Act³¹⁷. The mandate in the said Section is that if the Public Prosecutor opposes bail application, the court must satisfy that there are reasonable grounds for believing that the accused is not guilty of such offence, and then only bail can be granted³¹⁸.

S.41A is in parimateria with S.37 of the Narcotic Drugs and Psychotropic Substances Act. No person who is involved in an offence under that Act can be released on bail in contravention of the conditions laid down in the said Section³¹⁹. If the position is thus in regard to an accused even after arrest, it is incomprehensible how the position would be less when he approaches the court for pre-arrest bail knowing that he would also be implicated as an accused. Custodial interrogation of such accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies

Bail: ⇒ committed by the persons, which ultimately led to the capital tragedy. Hon'ble Supreme Court expressed its reprobation at the supercilious manner in which the Sessions Judge decided to think, "No material could be collected by the investigating agency to connect the petitioner with the crime except the confessional statement of

317. *Muraleedharan*, 2001 (2) KLT 355/ 2001 (2) KLJ NOC 6 / ILR 2001 (2) Ker. 329 / 2001 (4) SCC 638; *Circle Inspector v. Prasad* 2000 (3) KLT 682

Sec. 41A and similar 318. *Circle Inspector v. Prasad*, 2000 (3) KLT 682

provisions in the NDPS Act 319. *Union of India v. Ram Samujh & Anr.* (JT 1999 (6) SC 397 / 1999 (9) SCC 429

the co-accused".³²⁰ Section 437 of the Criminal P.C does not create an absolute bar on the Magistrate to the grant of the bail to persons accused of non-bailable offence or in respect of offences exclusively triable by a court of Sessions³²¹. If the Public prosecutor opposes bail application, the Court must satisfy that there are reasonable grounds for believing that the accused is not guilty of such offence, and only then can bail be granted.³²²

A person who has committed an offence within the sweep of Section 41A is not entitled to be released on bail even if the investigation has completed and final report is filed.³²³ The limitations in granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression 'reasonable

grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence³²⁴.

In *Union of India v. Thamisharasi*³²⁵ the Hon'ble Supreme Court considered the question of applicability of proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure in respect of an accused under N.D.P.S. Act in the case and it has been held that Section 37 does not exclude the application of the proviso to sub-section (2) of Section 167 of the Code, even in respect of persons who are accused for offences under N.D.P.S. Act. In *Bipin Shantilal Panchal, Dr. v. State of Gujarat*³²⁶ a petition for bail on merit was rejected by the City Sessions Judge relying on the judgment of the Supreme Court in the case of *Narcotics Control Bureau v. Kishan Lal*³²⁷ taking into consideration Section 37 of the N.D.P.S. Act. The High Court also rejected the prayer for bail, made on behalf of the appellant, in view of Section 37 of the Act the N.D.P.S. Act. Hon'ble Supreme Court held that if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet

320. *Muraleedharan v. State of Kerala*, 2001 (2) KLT 355/ 2001 (2) KLJ NOC 6/ ILR 2001 (2) Ker. 329 / 2001 (4) SCC 638

	321.	<i>Sukumar v. State of Kerala</i> , 2001(1) KLJ 841 / 2001(1) KLT 22
<i>Bail under</i>	322.	<i>Circle Inspector v. Prasad</i> , 2000 (2) KLJ (NOC) 332 / 2000 (3) KLT 682
<i>Sec. 167(2) of</i>	323.	<i>Manichan v. State of Kerala</i> , 2001 (1) KLJ 380 / 2001 (1) KLT 644.
<i>Cr.PC</i>	324.	AIR 2004 SUPREME COURT 2950 "Narcotics Control Bureau v. Dilip Pralhad Namade ; AIR 2004 SUPREME COURT 3022 "Customs, New Delhi v. Ahmadalieva Nodira"
<i>whether</i>		
<i>controlled by</i>	325.	1995) 4 J.T. (SC) 253 / (1995 AIR SCW 2543)
<i>Sec. 41A</i>		

326. 1996 AIR SCW 734 /AIR 1996 Supreme Court 2897

327. AIR 1991 SC 558 / (1991) 1 SCC 705

within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. On the other hand, if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge sheet.³²⁸

42. Bond of accused and Sureties:- Before any person is released on bail on bond, in such sufficient but not excessive, sum of money as the officer admitting him to bail things proper, shall be executed by such person and by one or more sureties conditioned that such person shall attend in accordance with the terms of the bonds and shall continue to attend until otherwise directed by the Abkari Inspector before whom he was bailed to attend or by the Magistrate, as the case may be:

Provided that the officer admitting any such person to bail may at his discretion dispense with the requirement of a surety or sureties to the bond

executed by such person.

The Government shall, from time to time, determine the form of the bond to be used in any Taluk or other local area.

43. Procedure in case of default of persons admitted to bail to appear before Abkari Inspector:- When by reason of default of appearance of a person bailed to appear before an Abkari Inspector such officer is of opinion that proceedings should be had to compel payment of the penalty or penalties mentioned in the bond of the person bailed or of the surety or sureties, he shall forward the bond to the Magistrate having jurisdiction to try the offence of which the person bailed was accused and the Magistrate shall proceed to compel payment of the penalty or penalties in the manner provided by the ³²⁹[Code of Criminal Procedure, 1973 (Central Act 2 of 1974)] for the recovery of penalties in the like case of default of appearance by a person bailed to appear before his own Court.

44. Abkari Officers may Summon witnesses:- Any Abkari Officer holding an inquiry ³³⁰[under the Act] may summon any person to appear before himself to give evidence on such enquiry or to produce any document relevant thereto which may be in his possession or under his control;

328. Aslam Babalal Desai v. State of Maharashtra, AIR 1993 SC 1/(1992) 4 SCC 272/ (1992 AIR SCW 2621)
329. Substituted firstly by Act 10 of 1967, again substituted by Act 16 of 1997.

330. The words and figures "in the manner provided in section 40" substituted by Act 16 of 1997 with effect from 3-6-1997.

Provided that no such Abkari Officer shall summon any person to appear at a greater distance from the usual place of residence of such person than the Government may, from time to time, by rule, direct.

45. Terms of summons:- Every summons issued under the last preceding section shall state whether the person summoned is required to give evidence or to produce a document, or both, and shall require him to appear before the said officer at a stated time and place.

46. Examination of witnesses by Abkari Inspectors:- Person so summoned shall attend as required and shall answer all questions relating to such inquiry put to them by such Officer. Such answers shall be reduced into writing and shall be signed by such Officer.

47. When attendance of witnesses to be dispensed with, and procedure in such

cases.- It shall be lawful for an Abkari Inspector, instead of summoning to appear before him any person who, from sickness or other infirmity may be unable to do so, or whom by reason of rank or sex it may not be proper to summon, to proceed to the residence of such person and thereto require him to answer such questions as he may consider necessary with respect to such inquiry; and such person shall be bound so to answer accordingly, and the provisions of section 46 shall apply to such answers.

48. Abkari Inspector may summon persons suspected of offenses against Abkari laws.- Any Abkari Inspector may after recording his reasons in writing, summon any person to appear before him whom he has good reason to suspect of having committed an offence under this Act. On such person appearing before such Officer, the procedure prescribed by sections 40 to 47 inclusive of this Act shall become applicable. ³³¹[The Officer may also, if he considers it necessary for the investigation of the case, exercise the powers conferred by Sections 44 to 47 before summoning the person suspected].

49. Law relating to criminal Courts as to Summoning of witnesses to apply:- The law for the time being in force as to summonses and compelling the attendance of person summoned In Criminal Courts shall, so far as the same may be applicable apply to any summons issued by an Abkari Inspector and to any person summoned by him to appear under the provisions of this Act.

³³¹. Added by Section 16 Act V of 1091.

³³²[**50. Report of Abkari Officer gives jurisdiction to a competent Magistrate:-** (1) Every investigation into the offence under this Act shall be completed without necessary delay.

(2) As soon as investigation into the offences under this Act is completed, the Abkari Officer shall forward a Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub section (2) of section 173 of Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

50A. Procedure to be adopted on receipt of report.- Upon receipt of a final report from the Abkari Officer; the Magistrate shall inquire into such offence and commit to Court of Session if the offence is exclusively triable by Court of Session or try the person accused thereof in like manner as if a case is instituted upon a police report as provided in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).]

SYNOPSIS

Before the amendment of Section 50 and the introduction of Section 50A by Act 16 of 1997, the filing of the reports by the Excise Inspectors could be treated as complaints and the Court is competent to take cognizance of the same by virtue of the provisions contained in the Code of Criminal Procedure.³³³ Under unamended Section 31, on the basis of the samples collected, the Excise Inspector would file complaint for the offence under Section 57A.³³⁴ Section 50(2) specifically provides that the Abkari Officer shall forward to a Magistrate empowered to take cognizance of an offence on a police report, a report in accordance with sub-section (2) of Section 173 of the Code of Criminal Procedure. The Magistrate upon receipt of the final report under Section 50A of the Act shall inquire into such offence and commit it to the Court of Session if the offence is exclusively triable by the Court of Session, or try the accused by himself in like manner as if a case is instituted upon a police report as provided in the Code of Criminal Procedure, 1973. The procedure to be followed in a case instituted upon a police report is the one contemplated by Section 207 of the Code read with Section 209 of the Code, if

332. Section 50 Substituted by Act 16 of 1997 as section 50 and 50A with effect from 3-6-1997. Section 50 prior to the Amendment ran as follows “**50. Report of Abkari Inspector gives jurisdiction to a competent Magistrate.**- When an Abkari Inspector forwards in custody any person

Report of abkari officers: ⇒

accused of an offence under this Act to the Magistrate having jurisdiction to try the case or admits any such person to bail to appear before such magistrate such officer shall also forward to such Magistrate a report setting forth the name of the accused person and the nature of the offence with which he is charged and the names of the persons who appear to be acquainted with the circumstances of the case, and shall send to such Magistrate any article which it may be necessary to produce before him. Upon receipt of such report the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if complaint had been made before him as prescribed in the [Code of Criminal Procedure, 1898].”

Report under Sec. 50A deemed to be reports under Sec. 173(2) of the Cr.P.C. ⇒

333. **Balan v. State of Kerala, 1999 (1) KLT 13.**

334. **Suraj v. Excise Inspector, 2001 (1) KLT 169 (SC).**

the offence were one triable exclusively by the Court of Session. The earlier decisions insisting that there should be an enquiry under Section 202 of the Code, could not be applied, subsequent to the amendment brought about to the Abkari Act, by Act 16 of 1997 and amendment of Section 50 and the introduction of Section 50A³³⁵. Section 50 of the **Abkari Act** was amended and Act 16 of 1997 with effect introduced Section 50A of the Act from 3.6.1997. An amendment to the law of procedure is generally held to be retrospective and affects pending actions. As stated by the Supreme Court in **Eapen Chacko v. Provident Investment Company (P) Ltd.** ((1997) 1 SCC 593), if a statute deals merely with procedure in an action; but does not affect the rights of parties, it will be held to apply to all actions, pending and future. Substantive rights of the accused are not affected. When the statute says that the report of the Abkari Officer is to be treated as a police report in accordance with Section 173(2) of the Code, it has only altered the form of procedure to be followed by the Magistrate under the Code of Criminal Procedure **State of Kerala v. Gangadharan Nadar**³³⁶ explained in **In re State of Kerala**.³³⁷ The Abkari Act does not contemplate sanction from higher authorities. A Circle Inspector of Police who detects offence is competent to initiate prosecution. Excise Manual cannot override the provisions of the Act.³³⁸ The report under Sec.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 to enable the magistrate to take cognizance of the offence and proceed further, it cannot be said that there is failure of compliance of section 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 incomplete³³⁹. Even in a case where the investigating officer has chosen to term the police report as “incomplete”, the power of the Magistrate to take cognizance of the offence is not lost. If the police report and the materials produced along with it are sufficient to satisfy the Magistrate that he should take cognizance of the offence, then his power is not fettered by the label, which the investigating agency chooses to give to the report submitted under sec.173 (2) Cr.P.C.³⁴⁰ No magistrate at the stage of *Sanction from Higher authority not necessary to file final report* taking the case on file on a report filed under sec.50 of the Abkari Act, can insist on a certificate from the chemical examiner, or treat such report as incomplete merely because a certificate of chemical analysis does not accompany it. The question as to whether the prosecution has adduced sufficient evidence to establish its case will be a matter

335. *In re State of Kerala*, 2002 (1) KLT 10

336. 2000(2) KLT 150 / 2000(1) KLJ 774 / ILR 2000(3) Ker. 379

337. *In re State of Kerala*, 2002 (1) KLT 10

338. *Thankachan v. Circle Inspector*, 1989 (2) KLT 368.

339. *Swami Premananda @ Premkumar @ Ravi v. Inspector of Police - XXXIX MLJ (CrI) 702*

340. *State of Maharashtra v. S.V.Dongre - AIR 1995 SC 231*

to be decided at the close of the trial and not when cognizance is taken of, the offence alleged³⁴¹. S.50 of the Abkari Act says that as soon as the investigation into the offences under this Act is completed, the Abkari Officer shall forward to the Magistrate, empowered *Scientific analysis report need not accompany final report* to take cognizance of the offence on a police report, a report in accordance with offence based on a report by an officer not authorised under law. A Magistrate has no power to take cognizance of a case on the report of an officer other than an Abkari Officer and it go to the root of the matter. Report by a specifically empowered officer is a condition precedent for taking cognizance of an offence and trial on a report by Assistant Sub Inspector of Police is void. In cases where assistant Sub Inspector of Police filed report and trial has not yet commenced Magistrate can return the defective report and after curing defects Abkari Officer as defined in the Act can file report according to law^{341A}.

Since there is no special procedure made mention of in the Abkari Act for trial of offences, as provided in S. 4 Cr. P.C., the offences under the Act have to be tried as per the provisions of the Code. Classification of offences as mentioned in Schedule II Cr. P.C. is applicable to offences under the Act subject to the rider that no Court inferior to that of a Presidency Magistrate or Magistrate of a first class shall try any offence against that Act.^{341B}

Under S. 218 of the Code of Criminal Procedure, for every distinct offence of which any person is, accused there shall be a separate charge and every such charge shall be tried separately. In *Mohanani v. State of Kerala*^{341C} two officers seized two sets of

contraband on two different dates, from two different persons, on different occasions.

Final report to be filed by a competent officer This second seizure not being a recovery made under S. 27 of the Evidence Act the trial court could not have framed a single charge. The Hon'ble High Court held that trial courts order framing a single final charge is an irregularity. A joint trial is contemplated under S. 223 of the Criminal Procedure Code only if more than one person is accused of the same offence committed in the course of the same transaction^{341D}.

In *Retnakaran v. State of Kerala*,^{341E} the trial Court suspended sentence of imprisonment alone but not sentence of fine of Rs. 1 lakh. Accused expressed his inability to deposit huge amount of fine in view of his meagre income. The Hon'ble High Court held that in such cases the Court might allow him to furnish security instead of insisting for payment/ deposit of fine in pending appeal.

Trial of offences Error in charge shall not result in acquittal, when it is a curable irregularity in the light of S. 464 Cr.P.C.^{341F}

341. **Kamalaksha v. The SI of Police, 2007 (1) KLT 299. Circular No. 13/1966 dt. 8.7.1966 of the High Court of Kerala adverted to**
- 341A. **Subhash v. State of Kerala, 2008 (2) KLT 1047**
- 341B. **Suresh kumar v Sub Inspector of Police 2007(3) KLT 363=2007(2) KHC 763. V. Sugandha Lal, Applicant v. Bobby Varghese, 2000 CRI. L. J. 4121**
- 341C. **2007 (4) KLT 408**
- 341D. **-do-**
- 341E. **2007 CRI. L. J. 1488**
- 341F. **Jose v. State of Kerala, 2007 (2) KLT 202.**

Error in Driving Charge

51. Powers of Abkari Inspector to cause attendance of witnesses before Magistrate:- When an Abkari Inspector forwards in custody any person accused of an offence under this Act to the Magistrate having jurisdiction to try the case or admits him to bail to appear before such magistrate, such officer shall exercise all the powers conferred by the ³⁴³[Code of Criminal Procedure, 1973 (Central Act 2 of 1974)] on an Officer in charge of a police Station in respect to causing the appearance before such Magistrate of such persons acquainted with the facts and circumstances of the case as he considers it necessary that such Magistrate shall examine as witnesses for the prosecution of such case.

52. Accused not to be detained in custody for a longer period than twenty four hours without special authority:- No person accused or suspected of having committed an offence under this Act shall be detained for a longer period than under all the circumstances of the case is reasonable; and such period shall not, in the absence of a special order of a Magistrate, whether having jurisdiction to try the case or not exceed twenty-four hours, exclusive of the time necessary for the journey of such person to the place where an Abkari Inspector may be and from thence to the court having jurisdiction to try the case.

53. Police to take charge of articles seized:- All Officers in charge of Police Stations shall take charge of and keep in safe custody pending the orders of a Magistrate or an Abkari Inspector, all articles seized under this Act which may be delivered to them and shall allow any Abkari Officer who may accompany such articles to the Police Station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the Police Station.

³⁴⁴[**53A. Disposal of seized liquor, intoxicating drugs or articles.-** (1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug, or article, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor, intoxicating drug or article which shall, as soon as may be after

343. Substituted for the words "Code of Criminal Procedure, 1898" by Finance Act, 2002 (Act 7 of 2002) w.e.f. 1-4-2002.

344. Section 53A inserted by Act 1 of 2003, with effect from 3-9-2002.

their seizure, be disposed of by the authorised officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2) Where any such notified liquor, intoxicating drug or, article has been seized under this Act, the authorised officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as the authorised officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate for the purpose of,-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

(c) Allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn

(3) Where an application is made under sub-section (2) the Magistrate shall, as soon as may be, allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Ordinance, 2002 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorised officer shall obtain prior permission of the court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence.

Explanation.- ‘Article’ for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time.]

54. Closing of shop for the sake of public peace:- It shall be lawful for the ³⁴⁵[District Magistrate] by notice in writing to the licensee, to require that any shop in which liquor or any intoxicating drug is closed at such times or for such period as he may think necessary for the preservation of the public peace.

If a riot or unlawful assembly is apprehended or occurs in the vicinity of any such shop, it shall be lawful for any Magistrate, or for any Police Officer who is present, to require such shop to be kept closed for such period as may be necessary.

SYNOPSIS

Power of the District Magistrate, including the power to order closure when there is an apprehension of breach of public tranquillity and peace or unlawful assembly, riot etc, under S.54 has to be exercised based on police reports as to the apprehension of ground realities^{345A}.

³⁴⁶[**54A. Bar of Certain Proceedings:-** (1) No suit, prosecution or other proceeding shall lie against any Abkari Officer or servant of the Government for any Act done or purporting to be done under this Act, without the previous sanction of the Government.

(2) No Officer or servant of the Government shall be liable in respect of any such Act in any civil or criminal proceeding, if the Act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.]

IX.— PENALTIES

55. For illegal import, etc.— Whoever in contravention of this Act or of any rule or order made under this Act ³⁴⁷[x x x]

(a) imports, exports, ³⁴⁸[transports, transits or possesses] liquor or any intoxicating drug; or

(b) Manufactures liquor or any intoxicating drug;

345. Substituted for “Magistrate of the District” by Section 4 of Act III of 1106.

345A. Sulekha v. State of Kerala, 2008 (2) KLT 23

346. Inserted by Section 12 of Act 4 of 1996.

347. The words “or of any licence or permit obtained under this Act” Omitted by Act 16 of 1997, with effect from 3-6-1997.

348. Substituted for the words “transport or possesses” by Section 4 of Act 10 of 1975.

³⁴⁹[(c) x x x]

(d) ³⁵⁰[taps or causes to be tapped] any toddy-producing tree, or

(e) ³⁵¹[draws or causes to be drawn] toddy from any tree; or

(f) constructs or works any ³⁵²[distillery, brewery, winery or other manufactory in which liquor is manufactured]; or

(g) uses, keeps, or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug; or

³⁵³[(h) bottles any liquor for purposes of sale; or]

³⁵⁴[(i) ³⁵⁵[Sells or stores for sales liquor] or any intoxicating drug;]

³⁵⁶[shall be punished.—]

³⁵⁷[(1) for any offence other than an offence falling clause (d) or clause (e), with imprisonment for a term which may extend to ³⁵⁸[ten years and with fine which shall not be less than rupees one lakh and]

349. Clause C omitted by Section 3 of Act 12 of 1995. Clause C ran as follows “(C) Cultivates the hemp plant (Cannabis Sativa) or collects any portion of such plant from which an intoxicating drug can be manufactured; or”

350. Substituted for the word “taps” by Section 28(a) of Act 10 of 1967.

351. Substituted for the word “draws” by Section 28(b) of Act 10 of 1967.

352. Substituted for the words “distillery or brewery” by Section 28(c) of Act 10 of 1967.

353. Inserted by Section 17 (ii) of Act V of 1091.

354. Clause (h) re-lettered as (i) by Act V of 1091.

355. Substituted for the words “Sells liquor” by Section 3 of Act 12 of 1995.

356. Substituted for the words “shall on conviction before a magistrate be punished” by Act 16 of 1997 with effect from 3-6-1997.

357. Clause 1 and 2 substituted by Section 3 of Act 12 of 1995. Before the substitution clauses 1 and 2 ran as follows. “(1) for any such offence, other than an offence falling Clause (d) or Clause (e), with imprisonment for a term which may extend to two years and fine which may extend to five thousand rupees:

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court:-

(i) Such imprisonment shall not be less than six months and fine shall not be less than one thousand rupees for a first offence; and

(ii) Such imprisonment shall be rigorous and shall not be less than one year and fine shall not be less than two thousand rupees for a subsequent offence.

(2) for an offence falling under Clause (d) or Clause (e), with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both”.

358. Substituted by Act 16 of 1997 with effect from 3-6-1997, for the words “two years and with fine which shall not be less than twenty five thousand rupees; and”

(2) for an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both.

Explanation:- For the purpose of this section and section 64A, “intoxicating drug” means an intoxicating substance, other than a narcotic drug or psychotropic substance regulated by the Narcotic Drugs and Psychotropic Substance Act, 1985 (Central Act 61 of 1985), which the Government may by notification declare to be an intoxicating drug.]

SYNOPSIS

Scope: ⇒ Sub-clause (a) of section 55 deals with illegal imports and exports of liquor or intoxicating drugs or transportation or possession of such liquor covered under import or export. Sub-clause (b) deals with manufacture of the same. Sub-clauses (d) and (e) deal with illegal toddy tapping or drawing of toddy from trees. Section 55 (f) deals with engagement in construction or works relating to illegal distillery, brewery etc and clause (g) deals with possession of utensils or implements or apparatus for manufacturing illegal liquor. Section 55 (h) deals with bottling of liquor for the purposes of sale without licence and clause (i) deals with illegally storing of liquor for selling the same. If a licensee illegally manufactures liquor or intoxicating drugs, apart from section 56, he may be guilty under section 55 (b). Further, if he makes or sells denatured spirit fit for human consumption or adulterates liquor, he will be punishable under the other sections also like sections 57, 57A etc.

Burden of proof ⇒ Identification of the accused for the first time in court shall not form the basis for conviction unless corroborated by his previous identification in the Test Identification Parade or in other evidence.

³⁵⁹Possession of medicinal preparation fit for use as intoxicant banned. The burden of proving that preparation seized is unfit for consumption, is on the prosecution³⁶⁰. In *Paravan v. State of Kerala*³⁶¹, PWs.3 and 4, the independent witnesses to the search and seizure, turned hostile to the prosecution. Both of them admitted their signatures in Ext.P2 mahazar and Ext.P4 arrest memo. However, they did not support the prosecution case regarding the search as well as the seizure of the contraband liquor from out of the possession of the appellant. Held that much strain was not necessary to conclude that PWs.3 and 4 were turning out to be cunning performers in the witness box evidently with a view to jettison the appellant from his criminal liability. (*Sivaraman v. State of Kerala* (1981 KLT SN P.9) and *Suresh v. State* (1995 (1) KLT 636 referred to). There is no legal bar in proving the prosecution case based on the evidence of the official witnesses or the investigating officers, if their evidence is otherwise free from doubt or infirmity^{361A}.

³⁵⁹. *Murali v. State of Kerala*, 2003 (3) KLT SN 61 page 44.

³⁶⁰. AIR 1962 SUPREME COURT 579 “*State of Bombay v. Nararandas Mangilal Agarwal*”

³⁶¹. 2007 (1) KLT 396

^{361A}. *Sabu v. State of Kerala* 2007 (4) KLT 169)

Possession ⇒ In order to make the possession illicit, there must be a conscious possession.
Meaning: The expression 'possession' is a polymorphous term, which assumes
conscious different colours in different contexts. It may carry different meanings in
possession contextually different backgrounds. It is impossible, to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes. Possession in a given case need not be physical possession but can be constructive. The word 'conscious' means awareness about a particular fact. It is a state of mind that is deliberate or intended. Indisputably, where possession of a forbidden article constitutes an offence, prosecution is duty bound to prove ingredients therefore. Existence of *mens rea*, however, would be a question which has to be determined having regard to the provisions of the statute. In other words, the prosecution must prove that the accused was knowingly in control of something in circumstances, which showed that he was assenting to being in control of it^{361B}. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. S. 35 Narcotic Drugs and Psychotropic Substances Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of S. 54 of the N. D. P.S Act where also presumption is available to be drawn from possession of illicit articles.³⁶² It is pertinent to note that section 64 of the Abkari Act corresponds to Section 54 of the N.D.P.S. Act. In **Nellikunnel Jose v. State of Kerala** High Court recorded a finding that the accused was seen near the lorry. However, the Hon'ble Supreme Court held that based on this finding, it is difficult to sustain the conclusion that the offence under Section 55(a) of the Act has been committed³⁶³. Articles were kept in a bag that was closed and they were put into the dickey of the rickshaw. The accused was merely a rickshaw driver. However, the Hon'ble Supreme Court held that based on this finding, it is difficult to sustain the conclusion that the offence under S. 66 (1) (b) read with S. 181 of the Bombay Prohibition Act has been committed. Driver cannot be imputed with the knowledge of the possession of the articles merely because the passenger put those articles in the dickey of that rickshaw.³⁶⁴ S.55(a) – If accused is found in possession of contraband liquor and is unable to account for the same, it can be presumed that he was in possession of contraband liquor even if premises belongs to somebody else. Even if the shed from where the intoxicant is recovered belonged to somebody else, if the accused was found in possession of the contraband liquor and he was not able to account for his possession of the same or offer any satisfactory explanation for his possession, it can legitimately be presumed that the appellant

362. *Megh Singh v. State of Punjab*, AIR 2003 SUPREME COURT 3184 / 2003AIR SCW 4536

363. AIR 2000 SUPREME COURT 3577(2) / 2000 AIR SCW 3738 / 2000 (2) KLJ NOC 23 (SC).

364. *Jawar Arjan v. State of Gujarat*, 1980 CrLJ 828 / 1979 AIR (SC) 1500 / 1979 CrLR (SC) 424 / 1979 SCC (Cr) 633 / 1980 CAR 183 / 1979(3) Mah LR 255

was in possession of the contraband liquor³⁶⁵. In **Bindu v. Assistant Police Commissioner**³⁶⁶ it was held that a person who imports, exports, transports, transits or

Possession of liquor in violation of rules ⇒ possesses liquor or any intoxicating drug in contravention of the Act or of any rule or order made under the Act is guilty of the offence under S.55 (a). It was also held that even if possession of rectified spirit were not prohibited under the provisions of the Act, it would be sufficient for the purpose of S.55 (a), if such prohibition were found in the rules. Possession of rectified spirit without licence attracts S.55 (a) of the Act.³⁶⁷ What is relevant to be proved is as to whether the accused was found in possession of the contra-band liquor. Even if the shed belonged to somebody else, if the accused was found in possession of the contraband liquor and he was not able to account for his possession of the same or offer any satisfactory explanation for his possession, it can legitimately be presumed that the accused was in possession of the contraband liquor.³⁶⁸

The word 'possesses' appearing in S.55 (a) comes in the context of the preceding words 'imports, exports, and transports'. What is contemplated there is possession in the course of the said activities. The heading given to the section itself reads as 'for illegal import, etc. The higher punishment contemplated in S.55 (a) obviously is taking into account the fact that possession of liquor intended there is in the course of the activities mentioned earlier viz., imports, exports and transports. To attract an offence under S. 55(a) of the Abkari Act, the prosecution should specifically allege and prove that the contraband articles found in the possession of the accused were in connection with export, import, transport, or transit. Offence of transportation or possession of foreign liquor exceeding the quantity as notified by the Government of Kerala under Ss. 10 and 13 of the Abkari Act only under S.63 of the Abkari Act^{368A}. Offence under S. 55(a) can be made out only when possession of contraband liquor was incidental or in connection with export, import, transport, or transit of liquor^{368B}.

On the other hand, in S.58, the possession contemplated is at the stage after import, export, transport etc. that had already taken place some time back at the hands of somebody else. Such possession is made liable to a lesser punishment under S.58.³⁶⁹ Innocent possession cannot be a more serious offence than possession with the knowledge of illegal import etc. A case shall fall within the ambit of S.55 (a) only

365. *Paravan v. State of Kerala* 2007 (1) KLT 396

366. 2003 (3) KLT 583/ 2003 (2) KLJ 1010.

367. *Bindu v. Assistant Police Commissioner*, 2003 (3) KLT 583/ 2003 (2) KLJ 1010

368. *Paravan v. State of Kerala*, 2007 (1) KLT 396.

368A. *Sabu v. State of Kerala* 2007 (4) KLT 169)

368B. *Raman v. State of Kerala*, 2007 (4) KLT 223.

369. *Purushan v. State of Kerala*, 2002(2) KLT 661

when a person is found to be in possession of liquor in the course of import, export, transport, or transit of the goods. In case the possession is merely with the knowledge of

the goods having been illegally imported or manufactured, the case would fall within the mischief of S.58. Keeping in view the slight similarity in language, it is permissible to refer to the heading of the provision. S.55 is labelled as - "for illegal imports etc". Legislature provided for penalty in a case where a person illegally imports alcohol. S.58 makes the "possession of illicit liquor" culpable. When a person is in possession of liquor while illegally importing it the case would be covered under S.55 (a). In a case where the possession is of illicit liquor, the case would fall within S.58. *Rajeevan v. Excise Inspector and Purushan v. State of Kerala* approved. *Meenakshi v. Excise Inspector* overruled (see **Surendran v. Excise Inspector**³⁷⁰).

If the violation of a Rule is in relation to the legal liquor permitted to be transacted within the State, offence under Section 55 will not lie.³⁷¹ Conducting of sale of Liquor on a prohibited day - Even if he is a licence holder will not be an offence under the Act. It is a violation of Rule 29 and is an offence, but not punishable under Section 55(a).³⁷²

Rectified Spirit Rules 1972 (Kerala) Rule 15 possession of rectified spirit without licence attracts Section 55 (a) of the Act.³⁷³ Order of acquittal passed by the trial court for the offence under S.55 (a) of the **Abkari Act** (acquittal-attained finality) cannot be reversed by the Sessions in an appeal preferred against the order of conviction. Alteration of the finding of acquittal recorded by the trial court under S.55 (a) to one under S.58 in an appeal filed by the accused is against clear mandate of S.386 (b) (ii) of the Criminal. P.C.³⁷⁴

According to the officer, who gave crime and occurrence report two accused were transporting beer. The total quantity of beer both of them could possess is 9 litres. If the allegation were that one of the petitioners committed the offence under S.55 (a) of the for the reason that he was possessing and transporting the entire quantity of beer seized by the excise officers, then there would have been no allegation against the other person that he committed the offence. Since the allegation is that both of them committed the offences, the total quantity of beer both of them can possess and transport can be up to 9 litres. When the allegation is that, there was only 7.8 litres of beer, the statements in the crime and occurrence report will not prima facie show that the petitioners committed the offence under section S.55 (a).³⁷⁵ When the liquor was

Possession and transportation of excess quantity of beer, does not attract 55(a) ➡

370. 2004 (1) KLT 404

371. *Sabu v. State of Kerala*. 2003(2) KLT 173 / 2003(1) KLJ 462.

372. *George Issac v. State of Kerala*, 2004 (1) KLT 752 / ILR 2004 (2) Ker 218. overruled in *Mohan v. State of Kerala*, 2007 (1) KLT 845

373. *Bindu v. Assistant Police Commissioner and others*, 2003 (2) KLJ 1010 / 2003(3) KLT 583.

374. *Sely v. State of Kerala*, 2002(1) KLT 416 / 2002(1) KLJ 126

375. *Prasanth v. State of Kerala*, 2002(1) KLT 628 / 2002(1) KLJ 312

purchased from the Kerala State Beverages Corporation for own consumption and there is no question of any illegal import or transporting or possessing illicit liquor. The only

offence is that they were in possession of excess quantity of liquor, permissible under law though purchased legally from the Kerala State Beverages Corporation. Offence under Section 55 will not lie.³⁷⁶

Even if the N.D.P.S. Act has impliedly repealed the provisions of S. 55(a) of the Abkari Act so far as they relate to ganja, the sweep of such repeal does not affect that portion of *Possession of ganja leaves* ⇒ ganja falling under the definition intoxicating drug” and which survives the restricted definition of ganja under the NDPS Act. Since no provision has been made in the N.D.P.S. Act for the punishment of possession of ganja comprising of every part other than the fruiting or flowering tops of the cannabis plant, an offence under S. 55(a) of the Abkari Act would still lie with respect to such part. There is no implied repeal of the Abkari act as far as it relates to ganja not covered by the definition of “ganja” under the NDPS Act. To put it differently, where the ganja seized consists of leaves and seeds not accompanied by the fruiting or flowering tops, it would still continue to be an “intoxicating drug” as defined under the Abkari Act even after the coming into force of the NDPS Act on 14.11.1985 and even after the notification under S.8 specifying 13.12.1989 as the date from which the prohibition under the NDPS Act would operate. 1995 (2) KLT 873 & 1998 (2) KLJ 613 overruled.³⁷⁷ Wash is not liquor but is only a material fit for the purpose of distillation of arrack.³⁷⁸ Wash, which is a liquid containing small percentage of alcohol, is a “matter” or “material”. Viewed in this light, keeping or being in possession of wash for distillation will come under S.55 (g).³⁷⁹ “Wash” is the raw material for preparation of arrack, which is a potable liquor containing alcohol. The prosecution able to prove that the accused was found in possession of 20 litres of wash. The conviction recorded by the trial court under S. 55(g) of the Abkari Act confirmed.³⁸⁰ In **Santhosh v. State of Kerala**^{380A} there was no specific allegation indicating that the possession of the articles in question was for the purpose of manufacturing liquor. Possession of articles, which can be used for purpose of manufacturing liquor, cannot in absence of cogent and probative indications be assumed to be possession for the purpose of manufacturing illicit liquor as to justify indictment under Sec. 55(g) of the Abkari Act^{380B}. Transportation of jaggery and kareenja patta by itself will not

376. **Sabu v. State of Kerala**, 2003 (2) KLT 173 / 2003 (1) KLJ 462 / 2004 (1) KLJ 108 / ILR 2003 (3) Ker. 130

377. **Mary v. State of Kerala**, 2005(4) KLT 39.

378. **State v. Choyunni**, 1980 KLT 107

379. **Kittuni v. State** 1981 KLT SN page 169 case124

380. **Paravan v. State of Kerala**, 2007 (1) KLT 396

380A. 2007 (2) KLT 27

380B. -do-

amount to an offence under S. 55(g) in the absence of allegations or materials to show that such possession was for purpose of manufacturing liquor^{380C}. Recovery of eight bottles of IMFL, having brand name Victoria XXX Rum. Held that the offence under S. 58 will not

lie since it is not spurious liquor. The permissible quantity that can be legally carried is 1.5 litres. Sample was taken only from two bottles from each group, which would work out only 1100 ml, which is below 1.5 litres. Conviction and sentence imposed by the lower court set aside³⁸¹.

The allegation **Karthikeyan v. State of Kerala** was that in disobedience of the order issued by the District Collector banning the sale of intoxicating liquors in connection with the election and counting of votes in the election to the Parliament and Assembly held on 8.5.96, 1st accused the licensee and the 2nd accused, the Bar Man sold liquors in the Bar. The sale of liquor by the licensees is prohibited under R.28A of F.L. Rules and condition 20-A (v) of the conditions of F.L.3 Licence on the days mentioned therein. Condition 28 of the Licence lays down that the licensee will be liable for the specific offence under the provisions of the Abkari Act and the Rules framed thereunder over and above the payment of penalty and of the cancellation of the licence issued to the licensee. The dictum laid down in the aforementioned case that the offence would be punishable under S.55 (1) of the Abkari Act has been held to be not correct³⁸². S.55 (i) of the Act says that when in contravention of the provisions of the Act or any rule or order made under the Act sale or storing for sale of liquor or any intoxicating drug is done, that will be an offence punishable under the Act. Conducting sale even if it is in licensed premises on the first day of English calendar month is in violation of R.28A of the Foreign Liquor Rules and that will be an act done in contravention of the provisions of the Rules. The view taken in **George Issac v. State of Kerala**, that when a licensee conducts sale of liquor in contravention of any rule that will be an offence under S.55 (I) of the Act is no longer good law.³⁸³ The accused in **Mohanani s/o Kochunarayanan** was caught while transporting toddy in bicycle. When a permanent tapper licenced to tap and transport was laid up, accused was entrusted with the duty of tapping and transporting toddy to the licensed shop. Licensed tapper deposed that he was not able to tap toddy on that day due to illness, that he authorised the accused to tap toddy and take it to licensed shop on his behalf. He was not charge-sheeted for offence under section 55 (d) or (e). The Hon'ble High Court held that instead of section 55 (a) read with section 55 (1) for which he was charged, maximum

380C. **Santhosh v. State of Kerala**, 2007 (2) KLT 636

381. **Balan v. State of Kerala** – 2006 KHC 1377 / 2006 (2) KLD 35

382. **Karthikeyan v. State of Kerala**, 2000 (3) KLT 639 overruled in **Mohanani s/o Kochunarayanan**, 2007 (1) KLT 845.

383. **George Issac v. State of Kerala**, 2004 (1) KLT 752 overruled in **Mohanani s/o Kochunarayanan**, 2007 (1) KLT 845.

punishment that could be imposed was only under section 63³⁸⁴. Section 55 (a) of the Act deals only illegal import, export or transport, transit etc. on such import or export and is applicable only when persons illegally imports or transport liquor or are in possession of liquor while illegally importing it. The observations made in **Karthikeyan v. State of Kerala** (2000 (3) KLT 639), **Balan v. State of Kerala** (2002 (3) KLT 161) and **George Issac v. State of Kerala** (2004 (1) KLT 752) contrary to the decision made in **Surendran's** case (supra) held not good law³⁸⁵. Section 55 (a) will not be attracted merely because licensee sells the liquor on a prohibited day, but punishment can be imposed under section 56³⁸⁶.

³⁸⁷[55A. x x x]

³⁸⁸[55B. **Penalty for rendering or attempting to render denatured Spirit fit for human consumption:-** Whoever, renders or attempts to render fit for human consumption any Spirit, whether manufactured in ³⁸⁹[the State] or not, which has been denatured, or has in his possession any spirit in respect of which he knows or has reason to believe that any such attempt has been made, shall, ³⁹⁰[on conviction before a competent court, be liable to imprisonment for term which may extend to five years, and fine which shall not be less than twenty five thousand rupees] or with both. For the purpose of this section it shall be presumed, unless and until the contrary is proved, that any spirit which is proved on chemical analysis to contain any quantity of any of the prescribed denaturants is or contains or has been derived from denatured spirit.]

384. **Mohanani s/o Kochunarayanan v. State of Kerala, 2007 (1) KLT 845**

385. **Mohanani s/o Kochunarayanan v. State of Kerala, 2007 (1) KLT 845**

386. **Mohanani s/o Kochunarayanan v. State of Kerala, 2007 (1) KLT 845**

387. Section 55A inserted by Act 14 of 1973 and omitted by 12 of 1995. Again inserted by Act 4/1996 and omitted by Act 16 of 1997 with effect from 3-6-1997. Section 55A as inserted by Act 4 of 1996 ran as follows. "55A. **Magistrates of second class to have power to impose minimum penalties for certain first offences:-** Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898), it shall be lawful for a Magistrate of the Second class to pass the minimum sentence mentioned in paragraph (i) of the proviso to clause (1) of Section 55, for a first offence referred to in that paragraph, in excess of his powers under Section 32 of the said Code."

388. Inserted by Act V of 1091 as Section 55A and renumbered as 55B by Act 14 of 1973.

389. Substituted for the words "British India" By Section 29 (a) of Act 10 of 1967.

390. Substituted for the words "on conviction before a magistrate be liable to imprisonment for a term which may extend to [six months or with fine which may extended to three thousand rupees] by Act 16 of 1997 with effect from 3-6-1997.

SYNOPSIS

Conversion of Denatured spirit: ⇒ Denaturing involves mixing ethanol with small amounts of poisonous or unpleasant substances to make the ethanol undrinkable. Industrial ethanol is denatured for the most part to prevent its use as a beverage. The removal of all these unpleasant or noxious substances would involve a series of treatments beverages and such acts invite punishment under S.55B.

56. For misconduct by licensee, etc.- Whoever, being the holder of a licence or permit granted under this Act ³⁹¹[or being in the employ of such holder and acting on his behalf-]

(a) fails to produce such licence or permit on the demand of any Abkari Officer or of any other officer duly empowered to make such demand; or

(b) ³⁹²[Willfully does or omits to do anything] in breach of any of the conditions of his licence or permit not otherwise provided for in this Act; or

³⁹³[(c) x x x]

(d) permits drunkenness, riot or gaming in any place in which any liquor intoxicating drug is sold or manufactured; or

(e) permits persons of notoriously bad character to meet or remain in any such place;

shall, on conviction before a Magistrate, be punished for each such offence, ³⁹⁴[with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both].

³⁹⁵[**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—

391. Inserted by Section 19 of Act V of 1091.

392. Substituted for the words “does any Act” by Section 19 of Act V of 1091.

393. Omitted by Act 16 of 1997 with effect from 3-6-1997 which ran as follows : “(C) willfully contravenes any rule made under Section 29 of this Act; or”.

394. Substituted for the words “with fine which may extend to two hundred rupees, or with imprisonment which may extend to three months or with both” by Section 30 of Act 10 of 1967.

395. Inserted by Section 31 of Act 10 of 1967.

(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, ³⁹⁶[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 ³⁹⁷[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].

57. For adulteration, etc., by licensed vendor or manufacturer.- Whoever being the holder of a licence for the sale or manufacture of liquor or of any intoxicating drug under this Act,

(a) mixes or permits to be mixed with the liquor or intoxicating drug, sold or manufactured by him, ³⁹⁸[any drug, other than a noxious drug] or any foreign ingredient likely to add to its actual or apparent intoxicating quality or strength, or any article prohibited ³⁹⁹[other than an article which the Government

396. Substituted for the words “On conviction before a Magistrate, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to three thousand rupees or with both”, by Act 16 of 1997 with effect from 3-6-1997.

397. Substituted for the words “five hundred rupees” by Act 16 of 1997 with effect from 3-6-1997.

398. Substituted by Act 21 of 1984.

399. Inserted by Act 21 of 1984.

shall deem to be noxious] by any rule made under section 29, clause (k), when such admixture shall not amount to the offence of adulteration under ⁴⁰⁰[section 272 of the Indian Penal Code]; or

(b) sells or Keeps or exposes for sale as foreign liquor, liquor which he knows or has reason to believe to be country liquor; or

(c) marks the cork of any bottle, case, package or other receptacle containing country liquor, or uses any bottle, case, package or other receptacle containing country liquor with any mark thereon on the cork thereof with the intention of causing it to be believed that such bottle, case, package or other receptacle contains foreign liquor when such act shall not amount to the offence of ⁴⁰¹[applying a false trade mark under Section 78 of the Trade and Merchandise Marks Act, 1958]; or

(d) sells or keeps or exposes for sale any country liquor in a bottle, case, package or other receptacle with any mark thereon or on the cork thereof with the intention of causing it to be believed that such bottle, case, package or other receptacle contains foreign liquor, when such act shall not amount to the offence of selling goods ⁴⁰²[to which a false trade mark or false trade description is applied under, Section 79 of the Trade and Merchandise Marks Act, 1958];

Shall, ⁴⁰³[on conviction before a competent court, be punished for each such offence with imprisonment for a term which may extend to five years, or with fine which may to extend to fifty thousand rupees, or with both.]

400. Substituted for the words and figures “ Section 248 of the Cochin Penal code” by Section 32(a) of Act 10 of 1967.

401. Substituted for the words and figures “using a false trade mark with intent to deceive or injure any person under Section 462 of the cochin Penal Code”, by Section 32(b) of Act 10 of 1967.

402. Substituted for the words and figures “marked with a counterfeit trade mark under Section 466 of the Cochin Penal Code” by Section 32(c) of Act 10 of 1967.

403. Substituted for the words “on conviction before a Magistrate, be punished for each such offence, [with imprisonment for a term which may extend to six months, or with fine which may extend to three thousand rupees, or with both.” by Act 16 of 1997 with effect from 3-6-1997.

SYNOPSIS

Distinction between offences under section S.56 (b), S.55 S.57 S.57(A) & S.58:

⇒ Where reduction of strength in the IMFL was noticed without any other allegation, offences could be charged only under S.56 (b) of the Act. When there is no adulteration or possession of illicit liquor in order to attract S.57 or S.58, a mere violation of the licence conditions and rules would attract only an offence under S.56. (b). Criminal case has to be dealt with based on law in force at the time of occurrence of offence unless otherwise provided for validity in the statutes. When S.67 was deleted by Ordinance, deletion was not made retrospectively. Therefore, as offences detected were compoundable under S.67 at the time of the alleged commission of the offence. Hence accused are well within their rights to make use of the same. It was a right vested in the licensees during that time. Circulars' directing the Excise Officers to charge in a different section than that is permissible under law is illegal. Before the amendment of the Abkari Act by Ordinance No. 7/97 the offences charged for dilution were compoundable as per R.67(a) of the then existing Act. In a case where alleged commission of the offence was prior to deletion of S.67 by Ordinance, accused are well within their rights to make use of the same⁴⁰⁴

As per condition in the licence, the vendor is permitted to sell foreign liquor within a room specifically approved for that purpose to the residents in the hotel or Boarding House and their guests etc. Therefore, vending liquor in any other place in the hotel other than the room specifically approved and scheduled as per the licence, is contrary to the conditions stipulated in the licence.⁴⁰⁵ In a case where licensee violates the conditions of licence or commits misconduct by selling the liquor in a holiday, it will come only under S.56 as specific provision for misconduct of licence is mentioned under S.56 and the above offence will not come under S.55 of the Act. Possession of liquor knowing that it was not duty paid or illegally transported or manufactured, the offence will come under S.58, but knowledge that it was illegally imported or transported, manufactured, or tax was not paid on that liquor is a condition under S.58. Therefore, mere possession even with knowledge that possession was illegal will not attract a higher penalty. S. 55(a) of the Act deals with only illegal import, export or transport, transit etc. on such import or export. It was made clear that S.55 (a) is applicable only when persons illegally imports or transport liquor or in possession of liquor while illegally importing. It is true that if a licensee illegally manufactures liquor or intoxicating drugs, apart from S.56, he may be guilty under S.55 (b). Further, if he makes or sells denatured spirit fit for human consumption or adulterated liquor, he will be punishable under the other sections also like sections 57, 57A etc. However, S. 55(a) will not be attracted merely because he sells the

⁴⁰⁴. *Mariamamma & Another v. State of Kerala & Ors.*, 1998 (1) KLT 286 / 1998 (1) KLT 286

⁴⁰⁵. *Rajan v. Circle Inspector of Police*, 1999 (2) KLT 704

liquor on a prohibited day, but punishment can be imposed under S.56. (*Karthikeyan v. State of Kerala*, 2000 (3) KLT 639/*Balan v. State of Kerala* (2002 (3) KLT 161) &

George Issac v. State of Kerala (2004 (1) KLT 752) – Overruled. *Surendran v. Excise Inspector* (2004 (1) KLT 404) – Followed. *Mariamm and another v. State of Kerala & Ors.* (1998 (1) KLT 286, *Rajeevan v. Excise Inspector* (1995 (1) KLT 38) and *Purushan v. State of Kerala* (2002 (2) KLT 661) – Referred to)⁴⁰⁶.

Owner of the vehicle is not liable for offence under Sections 56 and 57 when there is no allegation that he is involved directly or indirectly in the transport of the contraband liquor.⁴⁰⁷ Ss. 56 and 57 operate in different fields and provide for different punishments. They lead to different consequences. Whereas S.56 contemplates penal action in the event, terms, and conditions of a licence are found to have been violated, S.57 of the Act speaks of adulteration. A person may violate rule, but while doing it may not adulterate liquor, which may be intentional or unintentional attracting penal provisions of S.56 of the Act. Violation of the provisions of S.57 rests on existence of *mens rea* or *actus reus* on the part of the offender. In a case where extract of juice is subject to automatic fermentation, one does not have to mix anything for increase of contents of ethyl alcohol. If one act attracts two offences, the one providing for higher punishment cannot be presumed to apply unless ingredients thereof are satisfied⁴⁰⁸. S.57, which provides for graver offence is attracted only when the licensee deliberately mixes additional ethyl alcohol in the liquor to increase the potency thereof. In *Balu v. State of Kerala*⁴⁰⁹, the only allegation was that the toddy did contain foreign ingredient of starch. There was no whisper of an allegation that starch is an ingredient likely to add to the actual or apparent intoxicating quality or strength of toddy. The Hon'ble high court held that in the total absence of such allegation, the ingredients of clause (b) of S.57 are absent. Adding starch to toddy cannot attract action under S.57 (a). Court held that the allegation does not attract a sustainable charge under Ss.57 (a) and 56(b) of the Kerala Abkari Act.

As per rule 9 (2) of the Kerala Abkari Shops (Disposal) Rules, 2002, Ethyl Alcohol content of toddy kept or offered for sale should not exceed 8.1% v/v in the case of coconut toddy, 5.2% v/v in the case of Palmyrah-toddy and 5.9% v/v in the case of 'choondapana'

Alcohol content in toddy: ⇒ toddy . In *Unni v. State of Kerala*, samples taken from the premises of the licensees indicated that it contained 9.5% of ethyl alcohol. If a prosecution is initiated under S.57 (a) licensee cannot

406. *Mohanam v. State of Kerala*, 2007 (1) KLT 845.

407. *Sooraj v. Excise Inspector*, 2002 (2) KLT SN 104 / 2002 (1) KLJ 739.

408. *State of Kerala v. Unni*, 2007 (1) KLT 151 (SC) / 2003(3) KLT 306 Affirmed 2005(1) KLT 714 Reversed

409. 2007 (1) KLT 401

obtain renewal of licence, whereas when a licensee is prosecuted under S56 he can get his licence renewed. Writ petitions were filed by licensees challenging the validity of or otherwise of Rule 9(2) of Abkari Shops (Disposal in Auction) Rules, 2002 (Kerala) and the

applicability of S57 (a) of the Act. A learned Single bench of the Hon'ble High Court held that the Rules were ultra vires the provisions of the Act⁴¹⁰. In the appeal challenging the judgement of the single bench (**State of Kerala v. Unni**,⁴¹¹) Division Bench of the Hon'ble High Court held that the prescription of the percentage is reasonable, rational and that Rule 9(2) is valid, sustainable in law, and capable of being implemented. It was further observed that if the rule making authority has taken the average percentage of alcohol as the guiding principle to fix the standard and has provided that toddy which contains more than that average percentage of ethyl alcohol shall not be sold through licensed toddy shop, it cannot be said that the prescription of the percentage is unreasonable or irrational.⁴¹² In the SLP's filed challenging the judgement of the Division Bench, the Hon'ble Supreme Court reversed the judgement of the Division Bench upholding the judgement of the single bench. The Hon'ble Supreme Court observed thus⁴¹³:

“R.9(2) of the said Rules, in our opinion, should be given a plain meaning. It should be read in its entirety. It is in two parts. The intention of the legislature must be gathered having regard to the expressions used therein. R.9 (2) read in its entirety, states the context that thereby what is essentially sought to be prevented is adulteration of toddy. It is aimed at prevention of adulteration. The penal provision contained in first part not only directs that all toddy kept or offered for sale should be of good quality and unadulterated but also provides that nothing shall be added to it to increase its intoxicating power or for any other purpose. If the second part prescribing the contents of the ethyl alcohol in toddy is read in the context of the first part vis-à-vis S.57(a) of the Act, it would be evident that prohibition is aimed at adulteration by addition of any foreign substance to increase its intoxicating power for any other purpose. Validity of R.9 (2), therefore, can be saved if the said provision is read in its entirety and rule of harmonious construction is resorted to. If, however, R.9(2) is sought to be invoked even for the purpose of initiating a prosecution as against a license even he does not add any foreign substance to it, the same in our opinion, would render the same ultra vires, as would appear from the discussions made hereinafter. It is not in dispute that there does not exist any mechanical devise to measure the contents of ethyl alcohol present in

410. 2003(3) KLT 306

411. **State of Kerala & Others v. Unni**, 2005(1) KLT (DB) 714

412. *ibid*

413. **State of Kerala v. Unni**, 2007 (1) KLT 151 (SC) / 2003(3) KLT 306 Affirmed 2005(1) KLT(DB) 714 Reversed

toddy. It also stands admitted that contents of ethyl alcohol in toddy would be depend upon various factors including weather, season or pot in which it is kept etc. We have noticed the definition of `toddy`. It does not limit the extent of fermentation. Fermented toddy would, therefore, come within the

purview of definition of toddy. Manufacture and sale of toddy, which is fermented, is not prohibited. Excise Manual clearly points out that the contents of ethyl alcohol by reason of fermentation in toddy can go up to 12%, whereafter only it ceases to be a toddy. While laying down the norms in Excise Manual, the State had used the words `average yield`. The percentage specified therein, thus, is only average. If by reason of the rule making power, the State intended to impose a condition, the same was required to be reasonable one. It was required to conform to the provisions of the statute as its violation would attract penal liability. It was expected to be definite and not vague. Indisputably, the State having regard to the provisions of Article 47 of the Constitution of India, must strive hard to maintain public health. While, however, imposing conditions in regard to the prescription of norms, it was expected of the State to undertake a deeper study in the matter. It should have undertaken actual experiments. It should have specified mode and manner in which the percentage of ethyl alcohol can be found out by the licensee. A subordinate legislation can be questioned on various grounds. It is also well known that a subordinate legislation would not enjoy the same degree of immunity as a legislative act would. A person may be held to be guilty even if the contents of ethyl alcohol exceed 8.1% marginally. He must, therefore, be in a position to know as to what extent he can go and to what extent he cannot. The matter cannot, thus, be left to an act of nature. A penal provision must be definite. Unless the statutory intention otherwise provides, existence of mens rea must be read into a penal statute. It must be a deliberate act and not an unintentional one, unless the statute says so explicitly or by necessary implication. The Act or the Rules do not say either. It is in that sense vague or unreasonable.”

If a noxious substance or any substance that is likely to endanger human life or causing grievous hurt to human beings is added with any liquor, S.57A is applicable. To be a noxious substance, it is not necessary that the name of that substance should be notified under S.29 (2) (k) even though Government has power to declare any substance as noxious under the above provisions⁴¹⁴. Chloral Hydrate and Diazepam are noxious substances. It is injurious to health. Mixing it with toddy and drugs is an offence U/s 57(a). (*Roshy vs. State 2005 (3) KLT 796 overruled*).⁴¹⁵

414. *Chami v. Excise Inspector 2006 KHC 174/ 2006 (1) KLT 511 / ILR 2006 (1) Ker. 273 / 2006 (1) KLJ 237 / 2006 (1) KLD 530. Dt. 14.12.2005; Roshy v. State of Kerala, 2005 KHC 889/ ILR 2005 (3) Ker. 127/ 2005 (3) KLT 796/ 2005 (2) KLJ 372/ 2005 (2) KLD 301; Overruled.*

415. *Chami v. Excise Inspector, 2006 (1) KLT 511.*

⁴¹⁶[57A. For adulteration of liquor or intoxicating drug with noxious substances, etc:- (1) Whoever mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable—

(i) if, as a result of such act, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(ii) If, as a result of such act, death is caused to any person, with death or imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year, but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

Explanation :- For the purposes of this section and section 57B, the expression “grievous hurt” shall have the same meaning as in section 320 of the Indian Penal Code, 1860 (Central Act 45 of 1860).

(2) Whoever omits to take reasonable precautions to prevent the mixing of any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable,-

(i) if as a result of such omission, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(ii) if as a result of such omission, death is caused to any person, with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

416. Sections 57A and 57B inserted by Act 21 of 1984.

(iii) in any other case, with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(3) Whoever possesses any liquor of intoxicating drug in which any substance referred to in sub-section (1) is mixed, knowing that such substance is mixed with such liquor or intoxicating drug shall, on conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), no person accused or convicted of an offence under sub-section (1) or sub-section (3) shall, if in custody, be released on bail or on his own bond, unless-

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872),-

(a) where a person is prosecuted for an offence under sub-section (1) or sub-section (2), the burden of proving that he has not mixed or permitted to be mixed or, as the case may be, omitted to take reasonable precautions to prevent the mixing of, any substance referred to in that sub-section with any liquor or intoxicating drug shall be on him;

(b) where a person is prosecuted for an offence under sub-section (3) for being in possession of any liquor or intoxicating drug in which any substance referred to in sub-section (1) is mixed, the burden of proving that he did not know that such substance was mixed with such liquor or intoxicating drug shall be on him.

SYNOPSIS

Burden of proof conviction on the base of solitary testimony ⇒ In prosecution, the burden of proving that the accused has not committed the offence is on the accused, in respect of the following offences: Sec. 57A (1), Sec. 57A (2), Sec. 57A (3). Conviction can be based on the Evidence of a solitary witness only if it is found reliable⁴¹⁷

Sec. 57A & 57B, constitutional validity upheld Provisions for payment of compensation to the injured person and condition for filing appeal are legal and valid.⁴¹⁸ Section 57 A and its sequential provision in Section 57 B are in pith and substance part of the legislation relating to intoxicating liquors falling under Entry 8 list II within the competence of state legislature.⁴¹⁹ The apprehension that a person will be punished under both Sections 8 (2) and 55 (1) of the Act for the same offence is un-warranted.⁴²⁰ The Act as amended by Ordinance 13/97 only fixed the maximum punishment. Fixing of higher punishment is not arbitrary and violative of the constitution of India.⁴²¹

Sentences under 57A not disproportionate and does not violate Art. 21 The sentences prescribed by Sub Section (1) and (2) are not as severe or disproportionate as to violate Article 21 of the Constitution of India.⁴²² Sub Section (4) (b) of Section 57 A does not absolutely bar the grant of bail. Bail is not granted as a matter of course but only subject to conditions. The conditions imposed are not unreasonable or violative of Article 14 or 21 of the Constitution.⁴²³

Casting Burden of proof on accused constitutional validity upheld Casting burden of proof on the accused to prove what is within his knowledge is not illegal. It does not impose any undue or unreasonable burden on the accused. It does not offend Articles 14, 19 (1) (g) or 21 of the Constitution.⁴²⁴

⁴²⁵[**57B. Order to pay compensation.**- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the court when passing judgment in a case falling under Section 57A may, if it is satisfied

417. *Chacko v. State of Kerala*, 2002 Vol. 3 KLT SN 149 Page 111 DB.

418. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

419. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

420. *Asokan and another v. State of Kerala and others*, ILR 1998 (2) Kerala 329 / 1998 (1) KLT 330

421. *Asokan and others v. State of Kerala and others*, ILR 1998 (2) Kerala 329 / 1998 (1) KLT 330.

422. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

423. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

424. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

425. Sections 57A and 57B inserted by Act 21 of 1984.

that death or grievous hurt has been caused to any person or persons by consumption of liquor or intoxicating drug sold in any place licenced under this Act, order the licensee of that place, whether or not he is convicted of an offence under the said section, to pay, by way of compensation, such amount as it appears to be just, to the legal representatives of the deceased or to the person or persons to whom grievous hurt has been caused.

(2) Any person aggrieved by an order under sub-section (1) may, within ninety days from the date of the order, prefer an appeal to the High Court;

Provided that no such appeal shall lie unless the amount ordered to be paid under sub-section (1) is deposited in the court which passed such order:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time].

SYNOPSIS

Constitutional validity of 57B upheld ⇒ Section 57 A and its sequential provision in Section 57 B are in pith and substance part of the legislation relating to intoxicating liquors falling under Entry 8 list II within the competence of state legislature.⁴²⁶ Though the seizing officer is not an officer authorised under Sec. 67B to destroy materials any irregular destruction by him does not affect the legality of the proceedings U/s 57B.⁴²⁷

Criminal proceedings initiated as per ordinance 13/97 can be continued ⇒ Criminal Proceedings initiated as per ordinance 7/97 can be legally continued under ordinance 13/97. Ordinance 13/97 is not illegal as colourable exercise of power.⁴²⁸

58. For Possession of illicit liquor.- Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing⁴²⁹[the duty, tax or rental payable under this Act] not to have been paid therefor,⁴³⁰[shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh.]

426. *Mariamamma Sunny v. State of Kerala and others*, ILR 1994 (1) Kerala 477 / ILR 1994 (1) Kerala SN 22 / 1994 (1) KLJ 18.

427. *Kittunni v. State of Kerala*, 1981 KLT S.N. 124 page 69.

428. *Asokan and others v. State of Kerala and others*, ILR 1998 (2) Kerala 329 / 1998 (1) KLT 330.

429. Substituted for the words "the prescribed duty" by Section 12 of Presidents Act 1 of 1964.

430. Substituted for the words "shall on conviction before a magistrate, be punishable [with a fine which shall not be less than Rs. fifteen thousand and with imprisonment for a term which may extend to the year] by Act 16 of 1997 with effect from 3/6/1997.

⁴³¹[**58A. For sale of certain preparations:-** Whoever sells any preparation which he knows or has reason to believe is intended to serve as a substitute for alcohol or intoxicating drug shall, ⁴³²[on conviction before a competent court be punished with imprisonment which may extend to five years, or with fine which may extend to fifty thousand rupees, or with both;]

Provided that nothing contained in this section shall apply to the sale of any medicinal preparation for *bona fide* treatment, mitigation or prevention of disease in human beings or animals.

58B. For manufacture, import, export, etc., of certain preparations:- (1) Whoever, in contravention of the provisions of this Act:-

(a) manufactures any preparations which in the opinion of the Commissioner can be used as a substitute for alcohol; or

(b) adds any substance, which when swallowed or inhaled by, or injected into, a human being produces intoxication, drowsiness, sleep, stupification or insensibility, to any alcoholic preparation; or

(c) imports, exports, transports, possesses or sells any alcoholic preparation containing ingredients not approved by the Commissioner; shall, ⁴³³[on conviction before a competent court, be punished with imprisonment for a term which may extend to three years and with fine which may extend to twentyfive thousand rupees.]

(2) Nothing contained in this section shall apply in the case of any medicinal preparation which is generally used for or in the treatment, mitigation or prevention of disease in human beings or animals].

59. For vexatious search or arrest:- Any Abkari Officer or other person who, without reasonable ground of suspicion, enters or searches or causes to be searched any closed place; or vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for anything liable

431. Inserted by Section 34 of Act 10 of 1967.

432. Substituted for the words "on conviction before a magistrate, be punished with imprisonment for a term which may extend to six months or with fine which may extend to three thousand rupees, or with both", by Act 16 of 1997 with effect from 3-6-1997.

433. Substituted for the words "on conviction before a magistrate, be punished with imprisonment for a term which may extend to one year or with fine which may extend to three thousand rupees or with both", by Act 16 of 1997 with effect from 3-6-1997.

to confiscation under this Act; or vexatiously and unnecessarily detains, searches or arrests any person; or in any other way vexatiously exceeds his lawful powers; shall, ⁴³⁴[on conviction before a competent court be punished for each such offence, with imprisonment for a term which may extend to three years or with fine which may extend to twenty five thousand rupees or with both;]

60. For vexatious delay:- Any officer or person, exercising powers under this Act, who vexatiously and unnecessarily delays forwarding to an Abkari Inspector or to the officer in charge of the nearest Police Station, as required by section 40 of this Act, any person arrested, or any articles seized under this Act, shall, ⁴³⁵[on conviction before a competent court, be punished with fine which may extend to ten thousand rupees or with imprisonment for a term which may extend to one year or with both;]

61. For abetment of escape of persons arrested, etc.- Any officer or persons who unlawfully releases or abets the escape of any person arrested under this Act, or abets the commission of any offence against this Act, or acts in any manner inconsistent with his duty for the purpose of enabling any person to do anything whereby any of the provisions of this Act may be evaded or broken or the Abkari Revenue may be defrauded; and any officer of any other Department referred to in section 37 who abets the commission of any offence against this Act in any place; shall, ⁴³⁶[on conviction before a competent court, for every such offence, be punished with fine which may extend to twenty five thousand rupees, or with imprisonment for a term which may extend to three years or with both;]

⁴³⁷[62. x x x]

434. Substituted for the words “on conviction before a magistrate, be punished for each such offence, with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both”, by Act 16 of 1997 with effect from 3/6/1997.

435. Substituted for the words “on conviction before a magistrate, be punished with fine which may extend to two hundred rupees” by Act 16 of 1997 with effect from 3/6/1997.

436. Substituted for the words “on conviction before a magistrate, for every such offence, be punished with fine which may extend to five hundred rupees, or imprisonment for a term which may extend to six months, or with both”. by Act 16 of 1997 with effect from 3/6/1997.

437. Repealed by Section 13 of Act L of 1112.

63. For offences not otherwise provided for:- Whoever is guilty of any act or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such wilful act or omission with fine ⁴³⁸[which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both;]

SYNOPSIS

Transportation of liquor in excess quantity → Accused-transporting liquor purchased from Beverages Corporation for a house warming party slightly in excess of the permissible quantity. Such offence comes only under Section 63 of the Act. ⁴³⁹

Possession of foreign liquor in excess of prescribed quantity, amounts to violation of provisions of Foreign Liquor Rules and attracts punishment under S. 63. ^{439A}

64. Presumption as to commission of offence in certain cases:- In prosecutions under ⁴⁴⁰[Section 55, Section 55B, Section 56A, Section 57, Section 58, Section 58A and Section 58B] it shall be presumed until the contrary is proved, that the accused person has committed an offence under that section in respect of any liquor or intoxicating drug, or any still, utensil, implement or apparatus whatsoever for the manufacture of liquor other than toddy or of any intoxicating drug, or any such materials as are ordinarily used in the manufacture of liquor or of any intoxicating drug, of the possession of which he is unable to account satisfactorily; and the holder of a licence or permit under this Act shall be punishable, as well as the actual offender, for any offence committed by any person in his employ and acting on his behalf under ⁴⁴¹[Section 8 or Section 55 or Section 55B or Section 56 or 56A or Section 57 or Section 58 or Section 58A or Section 58B] as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence;

⁴⁴²[x x x x]

438. Substituted for the words "which may extend to two thousand rupees" by Act 16 of 1997 with effect from 3/6/1997.

439. **Sabu and others v. State of Kerala, ILR 2003 (3) Ker. 130.**

439A. **Raman v. State of Kerala, 2007 (4) KLT 223.**

440. Substituted for the words and figures "Section 55" by Act 16 of 1997 with effect from 3/6/1997.

441. Substituted for the words and figures "Section 55 or Section 56 or Section 57 or Section 58" by Act 16 of 1997 with effect from 3/6/1997.

442. The proviso omitted by Act 16 of 1997 with effect from 3-6-1997, It ran as follows : "Provided that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine."

SYNOPSIS

Presumption as to commission of offence: Comparison with similar provision in the NDPS Act ⇒

Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. S. 35 Narcotic Drugs and Psychotropic Substances Act give a statutory recognition of this position because of presumption available in law. Similar is the position in terms of S. 54 of the N. D. P.S Act where also presumption is available to be drawn from possession of illicit articles.⁴⁴³ It is pertinent to note that section 64 of the Abkari Act corresponds to Section 54 of the N.D.P.S Act Section 64 stipulates that, in prosecution, until the contrary is proved, it shall be presumed that the accused has committed an offence in respect of the following Sections:

Sec. 55, Sec. 55B. Sec. 56A, Sec. 57, Sec. 58, Sec.58A, Sec. 58B

Unjust enrichment by State not permissible ⇒ In a case where the vehicle is confiscated the owner's liability is only to produce the vehicle before the officer in terms of the conditions of the bond executed by him as ordered by this court as a condition for releasing the vehicle to him. The-action of the Asst Commissioner to encash the bank guarantees for a sum of Rs. 2 lakhs and to simultaneously enforce of the order of confiscation is illegal. The petitioner cannot be vexed twice for the same cause in the absence of legal authority for the same. Confiscation of the vehicle along with invoking of the bank guarantee for a sum of Rs. 2 lakhs amounts to unjust enrichment by the State⁴⁴⁴.

Holder of a licence or permit under the Abkari Act can be punished only when the actual offender in his employment is found guilty of having committed offence. When the prosecution fails to prove that the employee committed the alleged offence under Ss.55 (a) and 64 then the employer cannot be roped in under the above provision.^{444A}

⁴⁴⁵[64A. **Penalty for allowing land, building, room etc. for manufacture, sale or storing for sale of liquor or intoxicating drug.-** Notwithstanding anything contained in this Act, or in any other law for the time being in force, any owner or occupier or person having control of, any land, building, room, space or enclosure, permits any person to use such land, building room, space or enclosure for manufacture sale or storing for sale of liquor or intoxicating drug in contravention of this Act or of any rule or order made thereunder or of

443. *Megh Singh v. State of Punjab* AIR 2003 SUPREME COURT 3184 / 2003AIR SCW 4536

444. *Asoorty v. Asst. Commissioner*, 1996(1) KLT 359

444A. *Muraleedharan v. S.I. of Police*, 2007 (2) KLT 662

445. Inserted by Section 6 of Act 12 of 1995.

any licence or permit obtained under this Act shall be punishable with fine which shall not less than twenty-five thousand rupees unless he proves to the satisfaction of the court that all due and reasonable precautions were taken by him to prevent such use.]

SYNOPSIS

Penalty for allowing land etc. for manufacture sale or storage for sale of alcohol. ⇒

If a building is used for illegal activities, it will be the primary concern of the owner or the person in control of the building rather than anybody else. The mere fact that building has been let out does not mean that the owner ceases to have any control over the building. No building can be rented out for an activity, which is illegal and opposed to law. Restrictions, which are not permissible with other trades, are lawful and reasonable with regard to various matters covered by the above-mentioned legislations. Therefore, S.64A does not impose any unreasonable restriction or infringe the freedom on the persons like the petitioner. Therefore, S.64A is not violative of Arts.14, 19(1) (g) and 21 of the Constitution of India.⁴⁴⁶ S.64A is not attracted merely because accused is the registered owner of the vehicle. S.64A is applicable only if land, space, or enclosure is allowed to be used for manufacturing, sale, or storing for sale of liquor and not the vehicle used for transporting.⁴⁴⁷

In *V. P. Paulson Asst. Excise Commr., v. Thrissur*^{447A} vehicle involved though it was not actually used for carrying contraband liquor was used for allowing culprits to escape from scene of occurrence. The Hon'ble High Court held that the expression '*conveyance used in carrying the same*' used in Ss. 65 and 67-B of Abkari Act makes it clear that those conveyances used in carrying contraband liquor and articles only are liable to be confiscated. The High Court further held that giving a wider meaning to these words to mean '*used in connection with the commission of an offence under Act*' would be contrary to intention of Legislature.

In *Hassanar v. State of Kerala* the contraband liquor was carried in the motorcycle and the prosecution has no case that the accused, was one among the two riders of the motorcycle. Since S. 64 A of the Abkari Act does not take in any vehicle, the prosecution of the accused under S.64A held unsustainable^{447B}.

65. What things liable to confiscation:- In any case in which an offence has been committed under this Act, the liquor, drug, materials, still, utensil, implement or apparatus in respect ⁴⁴⁸[or by means] of which an offence has been committed shall be liable to confiscation.

446. *Salam Haji v. State of Kerala*, 1999(1) KLT 102 / 1999(1) KLJ106

447. *Rajan v. Excise Inspector* 2004 (2) KLT 430

447A. 2007 CRI. L.J. 614

447B. 2008 (1) KLT 921

448. Inserted by Section 20 of Act V of 1091.

Any liquor or intoxicating drug lawfully imported, exported, transported, manufactured had in possession or sold or toddy lawfully drawn or tapped along with, or in addition to any liquor, intoxicating drug or toddy, liable to confiscation under this section, and the receptacles, packages and coverings in which any such liquor, intoxicating drug, materials, still, utensil, implement or apparatus as aforesaid is or are found, and the other contents, if any, of the receptacles or packages in which the same is or are found, and the animals, carts, vessels or other conveyances used in carrying the same, shall likewise be liable to confiscation.

66. Confiscation how ordered.- When the offender is convicted or when the person charged with an offence under this Act is acquitted but the Magistrate decides that anything is liable to confiscation, such confiscation may be ordered by the Magistrate, Whenever confiscation is authorised by this Act, the Magistrate ordering it may give the owner of the thing liable to be confiscated an option to pay in lieu of confiscation, such fine as the officer thinks fit. When an offence under this Act has been committed, but the offender is not known or cannot be found or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the ⁴⁴⁹[Commissioner] or by any other officer authorised by the Government in that behalf, who may order such confiscation.

Provided that no such order shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and evidence if any, which they produce in support of their claims:

⁴⁵⁰[Provided further that if the thing in question is liable to speedy and natural decay, or if the ⁴⁴⁹[Commissioner] or any other officer authorised by the Government in that behalf is of opinion that the sale would be for the benefit of its owner, he may at any time direct it to be sold, and the provisions of this section shall, as nearly as may be practicable, apply to the net proceeds of such sale.]

449. Substituted for "Superintendent" by Section 2 of Act III of 1106.

450. Added by Section 21 of Act V of 1091.

SYNOPSIS

Confiscation and how it is ordered. ⇒ The Abkari Officer acting under the Abkari Act have no jurisdiction to retain any other articles except liquor and articles used as packages, receptacles, coverings, conveyances etc. used for the commission of offence. Two courses are open to the police authorities whenever foreign made foreign liquor are seized, namely (i) a criminal action can be initiated before the concerned Magistrate and (ii) the officer empowered under the Abkari Act can, if he so desires, proceed with the confiscation proceedings.⁴⁵¹ The mere fact that any of the passengers travelling in the bus or the van is found to have in his possession some contraband article either concealed on his person or kept in a suit-case, package etc. carried by him will not entitle the excise authorities to regard the bus or the van as a conveyance “used for carrying” such contraband article. Hence confiscation of a bus or van operating a scheduled passenger transport service on the strength of a permit issued under the Motor Vehicles Act is not contemplated or warranted by S.67B and it must ipso facto follow that seizure of such bus or van is not also warranted under the Act even if it be found that any of the passengers was carrying any contraband liquor etc.⁴⁵² Refusal to release the vehicle involved in smuggling of Abkari items is unauthorised and illegal.⁴⁵³ A vehicle, which is liable to be confiscated under Section 67 B of the Act, could be released temporarily under Rule 4 (2) (a) of the Kerala Abkari (Disposal of Confiscated Articles) Rules 1996, if the owner deposits the amount. Execution of bank guarantee will also safeguard the interest of the state.⁴⁵⁴ The authorised officer should exercise his discretion on proper and relevant grounds when ordering confiscation of the conveyance.⁴⁵⁵ Confiscation of lorry carrying rectified spirit, without permit. The burden is upon the owner to prove his innocence in the manner laid down under Section 67 (C) 2. ⁴⁵⁶The Abkari Officer acting under the Abkari Act have no jurisdiction to retain any other articles except liquor and articles used as packages, receptacles, coverings, conveyances, etc. used for the commission of offence.⁴⁵⁷ Confiscation ordered on the finding that the driver have knowledge at connivance in transporting the contraband articles held valid.⁴⁵⁸ To confiscate a vehicle it is necessary that its owner, his agent, or the person to whom it is entrusted have a guilty mind (mens rea) though not to the extent of an

451. *Sajin v. District Superintendent of Police*, 1999(2) KLT 490 / 1999(1) KLJ 1009

452. *Assistant Excise Commissioner v. Vijayan*, 1981 KLT 366

453. *Mahavir Kumar Surana v. Assistant Excise Commissioner Palakkad*, ILR 1993 (3) Kerala 272 / 1993 (1) KLT 831.

454. *Aji Kumar v. The Asst. Excise Commissioner and another*, ILR 1999 (1) Kerala 862 / 1999 (1) KLT 132.

455. *Vamadevan Pillay v. The State of Kerala*, ILR 1982 (2) Kerala 494 / 1982 KLJ 304 / 1982 KLT 518.

456. *Venkatachalapathy v. The Assistant Excise Commissioner, Trichur & others*, ILR 1982 (1) Kerala 635.

457. *Sajin S. v. District Supt. of Police and others*, 1999 (1) KLJ 1009.

458. *Sathyaseelan v. Commissioner of Excise*, 2002 (3) KLT SN 31.

intention on his part to commit an abkari offence but at least to the extent of knowingly and willingly permitting the carrying of contraband goods. The onus is on the owner to establish the absence of guilty mind and should have taken all reasonable and necessary precautions.⁴⁵⁹ In the absence of express provision relating to disposal of seized articles, order of Magistrate for destruction of seized articles is beyond jurisdiction.⁴⁶⁰ In a case of Seizure under special statute over which provisions of Cr.P.C having limited application, the Magistrate cannot exercise his powers under Cr.P.C in connection with property seized under the Act.⁴⁶¹ When a party to a proceeding requests for examining or cross-examining a witness, opportunity should be given. It cannot be denied for the reasons that the proceedings cannot be equated with criminal proceedings in his vehicle.⁴⁶² It is not the registration certificate of motor vehicles that confers ownership. As far as S.67 of the abkari act is concerned, the owner is to be understood as the person in possession and control of the vehicle at the time of commission of the offence⁴⁶³. The person who is in possession and control of the vehicle at the relevant time must take precaution contemplated under S. 67(2). Merely because there is breach of contract, or the terms of sale, it cannot be said that the transferor automatically resumes ownership, unless it is declared so by a competent forum. The reasonable and necessary precaution contemplated under S. 67(2) against use of the vehicle in respect of abkari offence has to be taken by the person who is in possession and control of the vehicle at the relevant time⁴⁶⁴. S.67B, S.67C Word “owner” need only be understood as the person in possession and control of the vehicle at the time of commission of the offence (Sale of Goods Act, 1930, S.19) Motor vehicles Act, 1988, S.2(30). Unless the vehicle has factually been transferred, there cannot be any change in the registration. In other words, ownership precedes registration and registration follows ownership⁴⁶⁵. A vehicle, which was not used for transporting the liquor, but alleged to have been used for allowing the culprits to escape from the scene, cannot be confiscated under S.67B of the Abkari Act. the word ‘used’ mentioned in the section is accompanied by the words ‘in carrying the same’ and different words are used in respect of liquor, drug

459. C.M. Vijayan v. Assistant Excise Commissioner, Cannanore and another, ILR 1980 (1) Kerala 491 / 1980 KLT 45.

460. The Chairman of the Bankura Municipality v. Lalji Raja and Sons, 1960 AIR (SC) 871/ 1960 CrLJ 1244 / 1960(3) SCR 358

461. Nilratan Sircar v. Lakshmi Narayan Ram Niwas, 1965(1) CrLJ 100 / 1965 AIR (SC) 1 / 1964 (7) SCR 724

462. Lal. v. Assistant Excise Commissioner, 2001 (1) KLJ 434 / 2000 (1) KLT 840.

463. Hassan kunju vs Asst Excise commissioner, 2006(2) KLT 417

464. K.M. Hassankunju v. Assistant Excise Commissioner and others, 2006 KHC 522 / ILR 2006 (2) Ker. 181/ 2006 (2) KLT 417 / 2006 (2) KLJ 167, Dt. 15.03.2006. - 1980 KLT 43 Referred to

465. K.M. Hassankunju v. Assistant Excise Commissioner and others, 2006 KHC 522 / ILR 2006 (2) Ker. 181 / 2006 (2) KLT 417 / 2006 (2) KLJ 167. (1991 (10 KLT 832, 2001 (8) SCC 133, Referred to)

materials, implements etc. on the one hand and in respect of conveyance etc, on the other hand. Hence, a wider meaning cannot be attributed to the expression in S. 65 and 67B as evidently, the intention of the legislature is otherwise⁴⁶⁶.

⁴⁶⁷[**67. Power to compound offences in certain cases:-** (1) The Commissioner may impose a fine of Rs.10,000 (Rupees Ten thousand only) each on any person or persons holding a licence or permit under the Act, for the offences under section 56 (b) of the Act for variation of strength of foreign liquor beyond the prescribed limit as may be fixed from time to time.

(2) The Commissioner may impose a fine of Rs. 25,000 (Rupees Twenty five thousand only) each on any person or persons holding a licence or permit under this Act for the violation by way of reconstitution, alteration or modification without the permission of the Commissioner of any deed on the strength of which any licence is granted.]

⁴⁶⁸[**67A. x x x**]

466. V.P. Paulson v. The Asst. Excise Commissioner and Others, 2006 KHC 1661 / 2006 (3) KLJ 742 / ILR 2006 (4) Ker.

467. Section 67 inserted by Finance Act, 2002 (Act 7 of 2002) w.e.f. 1-4-2002. Earlier section 67 omitted by Act 16/1997, with effect from 3-6-1997 Section 67 ran as follows : “**67. Power to compound offences:-** Any Abkari Officer specially empowered in that behalf may accept from any person:-

(a) Whose license or permit is liable to be cancelled or suspended under clauses (a) & (b) of section 26 or who is reasonably suspected of having committed an offence under clause (2) of Section 55, Section 56, 57 or 63, a sum of money not less than two thousand rupees, and

(b) Whose license or permit is liable to be cancelled or suspended under clause (bb) or section 26 or who is reasonable suspected of having committed an offence under clause (1) of section 55 or section 58 or 64A, a sum of money not less than twenty-five thousand rupees, in lieu of such cancellation or suspension or by way of compensation for the offence which may have been committed, as the case may be.

On the payment of such sum of money to such Officer, the accused person, if in custody shall be discharged and no further proceedings shall be taken against such person.]

468. Omitted by Act 16 of 1997 with effect from 3/6/1997. It ran as follows: “**Power of Abkari Officer to impose penalty:-** (1) Any Abkari Officer specially empowered by the Government in that behalf may impose a penalty [of rupees five thousand] on any person holding a licence or permit issued under this Act for the contravention of any rule made under Section 29 or any condition of his licence or permit, as the case may be :

[Provided that if the holder of such licence or permit sells or stores for sale liquor in any premises, other than the licensed premises, such penalty shall not be less than twenty-five thousand rupees.]

(2) No order imposing any penalty on any person shall be made under this section unless such person-

(a) is given a notice in writing informing him of the grounds on which it is proposed to impose the penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of imposition of the penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter.]”

⁴⁶⁹[**67B. Confiscation by Abkari Officers in certain cases.**- (1) Notwithstanding anything contained in this Act or in any other law for the time being in force, where any liquor, intoxicating drug material, still, utensil, implement or apparatus or any receptacle, package or covering in which such liquor, intoxicating drug, material, still, utensil, implement or apparatus is found or any animal, cart, vessel, or other conveyance used in carrying the same is seized and detained under the provisions of this Act; the officer seizing and detaining such property shall, without any unreasonable delay, produce the same before an officer authorised by the Government in this behalf by notification in the Gazette, not being below the rank of an Assistant Excise Commissioner (hereinafter referred to as the authorised officer.)]

(2) Where an authorised officer seizes and detains any property specified in sub-section (1) or where any such property is produced before an authorised officer under that sub-section and he is satisfied that an offence under this Act has been committed in respect of or by means of that property and that such property is liable to confiscation under this Act, such authorised officer may, whether or not a prosecution is instituted for the commission of such offence, order confiscation of such property and where such property consists of any receptacle or package, the authorised officer may also order confiscation of all contents thereof.

(3) When making an order of confiscation under sub-section (2), the authorised officer may also order that such of the properties to which the order of confiscation relates, which in his opinion cannot be preserved or are not fit for human consumption, be destroyed.

SYNOPSIS

Irrespective of whether the accused is prosecuted or not for the offence involved and irrespective of its outcome, in view of the non obstante clause contained in S.67 (B), a vehicle involved in an Abkari offence is liable for confiscation^{469A}.

In **Subair v. Asst. Excise Commissioner**^{469B} a mini lorry carrying spirit was accompanied by a motorcycle owned by driver of lorry. It was held that the act of escorting a lorry carrying contraband is a composite ingredient of transaction which can be called as “used” in carrying the contraband. Motorcycle held cannot be taken out of sweep of S.67B.

469. Sections 67B to 67H inserted by Act 24 of 1975.

469A. **Shaiju v. Assistant Excise Commissioner, 2008 (3) KLT 78**

469B. **2008 (1) KLT 493**

S. 67B provides that where the authorised officer is satisfied that an offence has been committed in respect of or by means of the property and that such property is liable for confiscation, such officer may, whether or not a prosecution is instituted for the commission of such offence, order confiscation of such property. The section opens with a non-obstante clause and it also provides that irrespective of whether prosecution is instituted for the commission of such offence or not, the authorised officer may exercise his power of confiscation. S. 67B is independent of penal provisions contained in the Abkari Act. Irrespective of whether the accused is prosecuted or not for the offence involved and irrespective of its outcome, in view of the non obstante clause contained in S.67 (B), a vehicle involved in an Abkari offence is liable for confiscation.^{469C}

67C. Issue of show cause notice before confiscation under section 67B.- (1) No order confiscating any property shall be made under section 67B unless the person from whom the same is seized -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any animal, cart, vessel or other conveyance shall be made under section 67B if the owner of the animal, cart, vessel or other conveyance proves to the satisfaction of the authorised officer that it was used in carrying the liquor or intoxicating drug or the material, still, utensil, implement or apparatus or the receptacle, package or covering without the knowledge or connivance of the owner himself his agent, if any, and the person in charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

67D. Property not liable to confiscation to be returned to owner.- Where the authorised officer passes an order under Section 67B that any property seized and detained by him or produced before him under that section is not liable to confiscation under this Act, he shall, after the expiry of thirty days from the date of such order, release such property to the person from whom it was seized.

^{469C}. *Shaiju v. Assistant Excise Commissioner*, 2008 (3) KLT 78

Provided that where the Commissioner has called for under section 67F the record of an order of the authorised officer, such property shall be released only subject to the orders of the Commissioner under that section.

67E. Appeal:- (1) Any person aggrieved by any order passed under section 67B may, within thirty days from the date of communication to him of such order, appeal to an officer not below the rank of Deputy Commissioner of Excise authorised by the Government in this behalf by notification in the Gazette (hereinafter referred to as the appellate authority)

(2) On receipt of an appeal under sub-section (1) the appellate authority shall, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further Inquiry as may be necessary, pass such order as he thinks fit, confirming, modifying or annulling the order appealed against.

(3) An order of the appellate authority under sub-section (2) shall, subject to the provisions of Section 67F, be final and shall not be called in question in any court.

67F. Revision:- (1) The Commissioner may, before the expiry of thirty days from the date of an order passed under section 67B or Section 67E, of his own motion, call for and examine the record of that order and may make such inquiry or cause such inquiry to be made and may pass such orders as he deems fit:

Provided that the Commissioner shall not call for and examine the record of any order passed under Section 67B if an appeal against such order is pending before the appellate authority;

Provided further that no order prejudicial to a person shall be passed under this section without giving him an opportunity of being heard.

(2) An order of the Commissioner under sub-section (1) shall be final and shall not be called in question in any court.

SYNOPSIS

Revision ➡ An aggrieved party can bring the illegality or irregularity contained in an order passed under S.67B or S.67E to the notice of the Commissioner and request him to invoke the power conferred on him under S.67F of the Act. When the aggrieved party makes such request, the Commissioner can exercise the power suo-moto based on the material brought to his notice calling for and examining the records of the case in question. The Commissioner cannot refuse to invoke the power

under S.67F suo moto on the ground that no such right has been conferred on the aggrieved party. The release of vehicle on exercising option to pay the fine in lieu of confiscation and the temporary release of vehicle on deposit of market value of the vehicle liable to be confiscated by the Government under S.67B or 67F of the Act are intended to ease down the rigour of law relating to confiscation and to preserve the confiscated properties from being wasted and damage during the pendency of the adjudication of the dispute. Abkari (Disposal of Confiscated Articles) Rules, 1996, R.4(2)⁴⁷⁰. The only revision power in relation to a confiscation order under s.67B or an appellate order under S.67E is the suo motu power contained in S. 67F. While a person may not have the right to seek revision of an order or even when there is no provision enabling him to file a revision, any suo motu power available with any authority can be triggered in a given case at the request of an aggrieved person^{470A}.
 Commissioners
 power of revision ⇨ Revision power enjoined on the Commissioner is applicable only against the order passed under S.67B or S.6-E. When there is no order under either S.67-B or S.67E and when there is only an order by the Joint Excise Commissioner regarding interim custody of the vehicle pending proceedings under S.67B and C, it cannot be revised by the Commissioner.⁴⁷¹ The aggrieved party can bring the illegality or irregularity contained in an order passed under Section 67 B or Section 67 E to the notice of the Commissioner and request him to invoke the power conferred on him under Section 67 F of the Act. The commissioner cannot refuse to invoke the power under Section 67 F suo motu on the ground that no such right has been conferred on the aggrieved party.⁴⁷²

The Excise Circle Inspector seized a lorry and 45 barrels of spirit under the Abkari Act. The driver and the cleaner compounded the offence before the Excise Circle Inspector on payment of fine of Rs.10,000/- each. Subsequently, the Joint Commissioner, Excise, released the vehicle to its owner on furnishing the bank guarantee for a sum of Rs.1, 50,000/-. Aggrieved, an appeal was filed by the vehicle owner before the Joint Commissioner under Section 67B of the Kerala Abkari Act, 1977 and the same was dismissed. The vehicle owner thereafter filed a revision before the Excise Commissioner praying therein for suo moto exercise of revisional power by the Excise Commissioner for setting aside the order passed by the authority below. The Excise Commissioner rejected the said petition. Aggrieved vehicle owner filed a petition under Article 226 of the Constitution of India, which was dismissed. However, on a writ appeal filed by the respondent, the Division Bench of the Kerala High Court set aside the order of the learned Single Judge and allowed the appeal after having come to the view that as the Excise Commissioner was exercising powers under Section 67F of the Act, he was acting quasi judicially and as such an opportunity

470. Niketa Kishorekumar v. State of Kerala, 1998(1) KLT 50 / ILR 1998(1) Ker. 744

470A. Nirmala v. State of Kerala, 2008 (2) KLT 346.

471. Sunil v. Assistant Excise Commissioner, 1998(1) KLT 291 / 1998(1) KLJ 287

472. Niketa Kishorekumar v. The Assistant Excise Commissioner and others, ILR 1998 (1) Kerala 774 / 1998 (1) KLT 50.

of hearing ought to have been given to the respondent and further the Commissioner ought to have recorded reasons for rejecting the petition of the respondent. Hon'ble Supreme Court reversed the Judgment of the High Court. Section 67B empowers the Commissioner to examine the records on his own motion. The Commissioner may for the aforesaid purpose call for examination of the records wherein an order has been passed under Section 67B or Section 67E of the Act, before expiry of 30 days thereof for the purpose of making an enquiry or cause such enquiry to be made. But only because the party to the proceedings may bring an order passed under Section 67B or Section 67E to the notice of the Commissioner, the same would not ipso facto mean that he has to exercise his suo moto powers. A party to the appeal, in terms of Section 67B or Section 67E of the Act, has not been conferred any right to file a revision application. When the Commissioner examines the application only for arriving at a finding as to whether it is a fit case where suo moto power of revision should be exercised or not, no lis between the parties can be said to be pending. At that stage, he would not be exercising any quasi-judicial powers. In that view of the matter, the question of giving an opportunity of hearing to the applicant or for that matter assignment of reasons by the Commissioner would not be necessary. The second proviso appended to Section 67F of the Act provides that no order prejudicial to a person can be passed under this section without giving him an opportunity of being heard. The principles of natural justice because of the aforementioned statutory provision, therefore, have been extended only in a case where the proceeding is initiated in terms of the said provision and the order is proposed to be passed which would be prejudicial to the parties is a lis. As the vehicle owner had no statutory right to file a revision application only because his application requesting the Commissioner to exercise suo moto revision powers had not been entertained, the same would not mean that any order prejudicial to him had been passed⁴⁷³.

67G. Award of confiscation to interfere with other punishments:- The award of any confiscation under section 67B or section 67E or section 67F shall not prevent the infliction of any punishment to which any person is liable under this Act.

67H. Property confiscated when to vest in Government:- When an order for confiscation of any property has been passed under Section 67B or Section 67E or Section 67F and such order has become final in respect of the whole or any portion of such property, such property or portion thereof, as the case may be, shall vest in the Government free from all encumbrances.]

473. *State of Kerala and others v. Avanasiaappan*, 2004 (1) KLT 867

⁴⁷⁴[**68. Provisions of Code of Criminal Procedure and Indian Penal Code applicable to offences committed under the Act:-** The provisions of the ⁴⁷⁵[Code of Criminal Procedure, 1973 (Central Act 2 of 1974)], relating to execution, so far as the same are applicable, and section 67,68 and 69 of the Indian Penal Code shall apply to all offences committed and to all persons punished under the provisions of this Act.]

⁴⁷⁶[**68A. Appointment of Expert Committee:-** (1) The Government shall appoint an Expert Committee consisting of-

- (a) the Drugs Controller;
- (b) the Chemical Examiner to the Government;
- (c) two representatives each, one of whom shall be a non-official of the Allopathic, indigenous and Homeopathic systems of medicine, appointed, by the Government; and
- (d) an officer of the Excise Department not below the rank of Deputy Commissioner, appointed by the Government.

(2) The functions of the Expert Committee shall be-

- (a) to advise the Commissioner as to whether a medicinal preparation is a *bona fide* medicinal preparation or not;
- (b) to advise the Commissioner as to the total requirement of medicinal pre-parations 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;
- (c) such other functions as may be prescribed by rules made by the Government under this Act.

(3) The term of office, of and the allowances, if any, payable to the non-official members of the Expert Committee, the procedure to be followed by the Committee in the discharge of its functions and the manner of filling casual vacancies among the non-official members of the Committee shall be such as may be prescribed by rules made by the Government under this Act.]

474. Substituted by Section 38 of Act 10 of 1967, Before the substitution it ran as follows. "68. *Provisions of the Criminal Procedure and Cochin Penal Codes applicable to offences committed under this Act:-* The provisions of the Criminal Procedure Code relating to execution so far as the same are applicable and Sections 58, 59 and 60 of the Cochin Penal Code shall apply to all offences committed and to all persons punished under the provisions of this Act".

475. Substituted by Act 16 of 1997.

476. Inserted by Section 39 of Act 10 of 1967.

X.— MISCELLANEOUS

69. Publication of rules and notifications.— All rules made and notifications issued under this Act shall be made and issued by publication in the ⁴⁷⁷[Gazette], ⁴⁷⁸[x x x], All such rules and notifications shall thereupon have the force of law and read as part of this Act and may in like manner be varied, suspended or annulled.

70. The conferring of powers and making of appointments:— All notification and orders conferring powers, imposing duties and making appointments under this Act may respectively refer to the persons concerned specially by name or in virtue of their office or to classes of officials generally by their official titles, and all courts shall take judicial notice thereof.

⁴⁷⁹**71. The Government may exempt any liquor or intoxicating drug from the provisions of this Act:**— The Government may by notification, either wholly or partially, subject to such conditions as they may think fit to prescribe, exempt any liquor or intoxicating drug from all or any of the provisions of this Act either throughout the ⁴⁸⁰[x x x] State or in any specified area or for any specified period or occasion or as regards any specified person or class of person]

72. Bar of actions:— No action shall lie against the ⁴⁸¹[Government] or against any Abkari Officer, for damages in any Civil Court for any act *bona fide* done or ordered to be done in pursuance of this Act, or of any law for the time being in force relating to Abkari Revenue, and all prosecutions of any Abkari Officer, and all actions which may be lawfully brought against the ⁴⁸¹[Government] or against any Abkari Officer, in respect of anything done or alleged to have been done, in pursuance of this Act shall be instituted within six months from the date of the act complained of and not afterwards.

In such action, if for damages it shall be lawful for the Court, if tender of sufficient amends shall have been made before the action was brought, in awarding the amount so tendered, to refuse costs to the plaintiff and direct him to pay the costs of the defendant.

477. Substituted for the words "Cochin Sirkar Gazette" by Section 40(a) of Act 10 of 1967.

478. The words "Provided that all such rules and notifications where by the doing or the not doing of anything is made punishable shall be published in 3 successive issues of the said gazette" omitted by Section 40 (b) of Act 10 of 1967.

479. Substituted by Section 23 of Act V of 1091.

480. The words "Cochin" omitted by Section 9 of Act 10 of 1967.

481. Substituted for the word "Sirkar" by Section 21 of Act 10 of 1967.

SYNOPSIS:

Bar against Filing suits: ⇒ There is no express bar anywhere in the Abkari Act, for filing a suit to restrain the licensee from conducting the liquor shop within the prohibited distance.⁴⁸³

SCHEDULE

<i>Acts and proclamations</i>	<i>Subject</i>	<i>Extent of Repeal</i>
Act III of 1010	An Act for the better administration of the Police	So far as it relates to Abkari.
Act 1 of 1053	An Act prescribing rules for the confiscation of animals, conveyances, etc, used in contraband trade	do.
Proclamation dated 21st Kar-kadagam 1072.	A Proclamation regarding foreign liquors	The whole
⁴⁸⁴ [Travancore Act IV of 1073	An Act to amend the law relating to the import, export, transport, etc., of intoxicating liquor and of intoxicating drugs	The whole
Madras Act 1 of 1886 as in force in the Malabar district referred to in sub-section (2) of Section 5 of the states Reorganisation Act, 1956.	An Act to consolidate and amend the Abkari law	The whole]

483. Saseendran v. Viswambaran, 2003 (1) KLT 459 / ILR 2003 (2) Ker 395.

484. Added by Section 41 of Act 10 of 1967.
