IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

THURSDAY, THE 18TH DAY OF FEBRUARY 2021 / 29TH MAGHA,1942

Crl.MC.No.2719 OF 2020(H)

AGAINST THE ORDER/JUDGMENT IN CC 66/2016 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I ,SULTHANBATHERY

CRIME NO.100/2015 OF Sulthanbathery Excise Range Office , Wayanad

PETITIONERS/ACCUSED NO.1 AND 2:

1 KRISHNAN M.C
AGED 52 YEARS
S/O. CHOI, MANIYENGAL HOUSE, CHULLIYODU P.O.
CHULLIYODUDESOM, NENMENI VILLAGE, BATHERY TLAUK,
WAYANAD DISTRICT 673 592.

2 C. GOPALAN,
AGED 50 YEARS
S/O. UNNEERI, CHERIYENCHERI HOUSE, VALLUVAMBRAM P.O.
POOKKOTTOOR VILLAGE, ERANADU TALUK, MALAPPURAM DISTRICT
673 642.

BY ADVS.
SHRI.R.VINU RAJ
SRI.E.M.MURUGAN

RESPONDENTS/COMPLAINANT-STATE:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI 682 031.

2 THE ASSISTANT CHEMICAL EXAMINER TO GOVERNMENT OF KERALA,
REGIONAL CHEMICAL EXAMINER'S LABORATORY, KOZHIKODE-673001.

R1-2 BY SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 22.12.2020, THE COURT ON 18.02.2021, PASSED THE FOLLOWING:

C.R.

ORDER

Dated : 18th February, 2021

M.R.Anitha,J.

1. Whether the accused persons facing trial under Secs.56(b) and 57(a) of the Abkari Act (Act 1 of 1077) are entitled to get 'B' sample of toddy collected by an Abkari Officer under Rule 8 Sub-Rule(2) of Kerala Abkari Shops of Disposal Rules, 2002 forwarded for examination to Chemical Examiner's Laboratory and get a report for trial and disposal of the case is the question under reference.

2. In Girish Kumar and another v. State of Kerala (2010 (3) KHC 171), Joshy George v. State of Kerala (2011 (4) KHC 818), Rajappan and Another v. State of Kerala (2012 (2) KHC 657), Harikrishnan R. v. State of Kerala (2016 (4) KHC 57), Santhosh and Another v. State of Kerala (2020 (1) KHC 480) and Saneesh v. State of Kerala (2020 (1) KLT 289) this court more or less took the view that the accused has got a right to get the second sample analyzed though there is no specific provision in the Kerala Abkari Shops Disposal Rules,2002 (hereinafter be

called as “the Rules”).

3. Whereas in **Santhosh T.A. and another v. State of Kerala (2017 (5) KHC 107)** another learned single Judge, took a divergent view based upon **Thana Singh v. Central Bureau of Narcotics (2013 (2) SCC 590)** that the declaration made by the Apex Court in relation to cases registered under the NDPS Act is applicable to cases under the Abkari Act also. Hence, even if a second sample is available it cannot be sent for examination at the request of the accused merely for the reason that the 1st report is not favourable to him.

4. In view of the conflicting opinions, this reference has been made to resolve the uncertainty in the field of sending the second sample for analysis to the Chemical examiners laboratory.

5. Before probing into the legal issues, factual matrix of the case also to be summarized in view of the fact that the entire case has been referred as per the settled position in **Kallara Sukumaran v. Union of India (1987 (1) KLT 226)** that a single Judge is not competent to refer a question of law only.

6. Petitioners are the accused numbers 1 and 2 in C.C.66/16 on the file of the Judicial First Class Magistrate-I, Sulthan Bathery in crime No.100/15 of Excise Range Sulthan Bathery, Wayanad. Petitioners 1 and 2 are the salesman and licensee respectively of toddy shop No.30/14-15 in group No.1 of Sulthan Bathery Excise Range. It is alleged that Petitioners committed the offence punishable under Secs 57(a) and 56(b) of the Abkari Act (Act 1 of 1077). Prosecution case is that samples of toddy were taken as per Rule 8 from the toddy shop of the petitioners on 12.1.2015 at 11.20 am. The Chemical analysis report dated 24.6.2015 stated that starch was detected in the sample of toddy and crime and occurrence report was registered against the petitioners. Thereafter Excise Inspector, Sulthan Bathery conducted the investigation and filed final report before the Judicial First Class Magistrate-I, Sulthan Bathery along with a charge-sheet and the case is pending as C.C.66/16. 'B' sample prepared as per Rule 8 was sent to the 2nd respondent for analysis and the report of the Chemical analysis in pursuance of the same stated that presence of

starch was not detected in the sample of toddy. Hence the petitioners approached this court to quash the entire proceedings in C.C.66/16 pending before the Judicial First Class Magistrate-I, Sulthan Bathery.

7. On hearing the matter since the learned single Judge came across the conflict in views expressed by learned Single Judges in various decisions, the case was referred to Division Bench and thereby case came before us.

8. At the outset it is apposite to extract Rule 8 since the entire issue is revolving on it.

> **PROCEDURE IN TAKING SAMPLES FROM TODDY SHOPS** "[x x x]
>
> 8. (1) All Abkari Officers not below the rank of a Preventive Officer shall have the authority to take samples of any chemical analysis.]
>
> (2) While taking sample of any liquor by the Abkari Officer for chemical analysis, the following procedure shall be followed, namely.
>
> (a) The quantity of sample taken for analysis shall not be less than [500 ml.) [x x x]. Benzoic Acid should be added as preservative in toddy at the rate of one gram for 100 ml. of toddy:
>
> (b) The contents in the vessel in which the liquor is stored shall be thoroughly mixed so as to get a

representative sample;

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

(d) The bottles or containers shall be securely fastened with suitable caps or corks so as to make it leak proof to prevent any spillage. The neck portion of bottles or containers and the caps or corks shall be covered with a piece of cloth and tied together with a string securing the covered cloth. The officer taking the samples shall inform the licensee or his representative to put his seal if he so desires. If he desires to put his seal, the string shall be tied such a way that it shall have two knots in opposite sides. The officer taking the sample shall put his seal on one knot and the licensee or his representative shall put his seal on the other knot. If the licensee or his representative is not willing to put his seal, in such cases, the string shall be tied with one knot and the officer shall put his seal on that knot. The seal shall be affixed on the knot of the string using sealing wax in such a manner that the caps or corks cannot be removed unless the string is cut or the seal is broken.

Only the official or personal seal of the officer taking sample shall be used for sealing. The seal shall be legible and decipherable. If the licensee

or his representative has no seal or if they are not willing to put their seal, it shall be recorded in the mahazer/report drawn at the time of taking sample. The specimen of the seal(s) used for sealing the samples shall also be put on the Mahazer/report.]

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

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

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

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

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

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

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

registered, the sample marked 'B' shall be destroyed."

9. In **Girish Kumar v. State of Kerala (2010 (3) KHC 171)** the accused persons approached this court to quash the proceedings when a crime was registered and report of the chemical Examiner's laboratory detected Ethyl alcohol content as 21.19 % by volume and the second sample was not available to be examined at the laboratory. That was a case in which sample of toddy was taken from the toddy shop of the petitioners. Even before getting the report of chemical analysis, a crime was registered. At that juncture petitioners approached this court to quash the proceedings contending that registration of case is premature as the report of the examiner was not received though sample was sent. So recording the submission of the learned Public prosecutor that no action would be taken against the accused before the receipt of the report of the chemical examiner and no adverse consequence would take place or be initiated against them till a report was received, Crl.MC was allowed in part making it clear that no further proceedings should be taken against the accused

on the basis of the registration of the crime. Subsequently on receipt of the report, reporting that ethyl alcohol was detected in the sample and percentage by volume is 21.19%, the accused filed a petition before the magistrate to send the second sample. But Excise inspector submitted a report to the effect that only one sample was prepared and second sample could not be produced. The contention of the accused was that though the Rules 2002 does not specifically provides that an accused has a right to send the second sample to laboratory as under the Prevention of Food Adulteration Act, this Court has held in several decisions that the accused has a right to get the second sample examined. When no second sample was prepared and report submitted there is utter violation of the mandatory provisions of rule 8 of the Rules and accused would be seriously prejudiced. Hence it was found that consequent to the violation of the mandatory provision, there could be no likelihood of a successful prosecution and hence finding that it was not in the interest of justice to continue the prosecution, the case against the accused persons was quashed.

10. So, as rightly contented by the learned counsel for the petitioner the dictum laid down in that case is that Rule 8 mandates preparation of two samples and production of the second sample before the court and in the absence of collection of second sample there is a violation of procedure prescribed by the Rules. So there is one distinction in that case because there was no second sample prepared at all which is the mandate of Rule 8(2) of the Rules.

11. In **Joshy George v. State of Kerala (2011 (4) KHC 818)** a crime was registered against the accused under Sec.57(a) of the Abkari Act. Two samples of toddy were taken from the toddy shop. One sample was sent for analysis and the chemical examination report showed that the strength of ethyl was 8.72% which was in excess of the permissible strength of 8.1 % by volume based on Rule 9 of the then prevailing Rule. Subsequently Rule 9(2) was amended. But in that case also the second sample was sent by the magistrate to chemical examiner and as per that report the strength of ethyl alcohol contend was only 7.66%. Since it is less than 8.1 % as per the then existing Rules, it was contended on

behalf of the accused that offence under Sec.57 (a) is not attracted. The accused raised a contention that it is open to the prosecution to challenge the said report by examining the analyst/chemical examiner who issued the certificate. In the charge-sheet and memorandum of evidence there was nothing to show that the prosecution intended to challenge the second report. So relying on the dictum that the report on the second sample is admissible in evidence under Sec.293(1) Cr.P.C but reserving the right of prosecution under S.293 (2) Cr.P.C to examine the expert who analyzed the second sample and issued the report and prove that the second sample is not proper or valid etc. ultimately Crl.M.C was allowed and charge-sheet filed against the accused for the offence under S.57(a) was quashed with liberty to take cognizance of the offence under Sec.56 if disclosed.

12. In that case also acceptability of the report of the second sample was taken into consideration to find that no offence under S.57(a) is attracted.

13. In **Sudhakaran and Others v. State of Kerala**

(2011 (1) KHC 610), the accused approached this court under S.482 Cr.P.C on receiving the report of the chemical examination of the second sample favourale to him. But in that decision this court after discussing the scope and ambit of Sec.293 Cr.P.C held that the report on the second sample relied on by the accused is admissible in evidence under S.293(1) Cr.P.C. The prosecution has a right under sub-section (2) of Sec.293 Cr.P.C to examine the expert who analyzed the second sample and issued the report and prove that second sample is not proper or valid or otherwise is not acceptable and hence those reports cannot be relied on. But it is also held that it could not be said that a report obtained by the abkari officer on the first sample is superseded by the report on the second sample. And whether one of the first or on the second sample is acceptable was left for decision of the court. It is also held that accused cannot request to quash the proceedings against them based on the report of the second sample. While disposing that case this Court also took into account Sec. 13(3) of the PFA Act which provides that the certificate issued by

the Director of Central Food Laboratory (under sub-section (2B)) shall supersede the report given by the Public Analyst under sub-section (1). Proviso to sub section 5 of Sec.13 of the PFA Act made the certificate signed by the Director of Central Laboratory (subject to the exception provided therein) final and conclusive evidence of the facts stated therein. So the fact is that a report of the Central Food Laboratory supersedes the report of the public analyst and makes the facts therein final and conclusive but such a provision is not contained in the Abkari Act or the Rules.

14. The learned senior Public prosecutor submitted that the observation of this court that which of the two reports, whether one of the first or the second sample, is acceptable leaving it for the decision of the court has been challenged by the State and the matter is pending before the Apex court.

15. In **Hariksrishnan R. v. State of Kerala (2016 (4) KHC 57)** also the question regarding acceptability of two of the reports based on the examination of A sample and also of B sample came up for consideration.

16. The view taken by the court in that decision was that nowhere in the Rules the purpose behind preparation and forwarding the second sample has been dealt with unlike in the case of PFA Act. It is further found that in the absence of a provision in the Rule it cannot be concluded that the second sample is not meant by the legislature to be put for a further examination or otherwise there is no meaning in preparing a second sample and keeping it with the court. Ultimately the Court found that when two certificates of analysis of two samples prepared from the very same toddy are available in the absence of any materials to show that any of the samples were tampered, it is not proper on the part of the court to rely on the one which is liable to fix culpability on the accused. Since two conflicting certificates are available before the court even if the petitioner is directed to face the trial with the materials collected by the prosecution there is no likelihood for the trial to be ended in conviction. It is further found that such trial would be a wastage of time of court and a futile exercise and ultimately further proceedings

based on the final report against the accused was quashed.

17. In **Rajappan and Another v. State of Kerala (2012 (2) KHC 657),** the accused approached this court to quash the proceedings when the report of the second sample sent for chemical examination at the instance of the accused containing ethyl alcohol within the permissible limits. The court discussed the scope and ambit of S.293 Cr.P.C which reads thus:

> 5. "On carefully going through the above provision, I find that sample A was sent for analysis and obtained Annexure-A report not in the course of any proceedings under the Code of Criminal Procedure. At the same time, Annexure-B report was obtained by forwarding sample B in the course of the proceedings. So, Annexure-B report has the support of S.293 of the Code of Criminal Procedure. Annexure-A report wouldn't get such a support as sample A was not sent for examination in the course of proceedings under the Criminal Procedure Code. In this view of the matter, I find that the principle followed in Joshy George's case (supra) is in tune with the statutory provisions.
>
> 6.Adding to the above, when there are two conflicting reports in one case, the one which

> in favour of the accused is to be relied upon so long as the prosecution has no good explanation for impeaching the report in favour of the accused. In this case, as mentioned earlier, in the final report there is nothing to assail Annexure-B report. Therefore the prosecution cannot now turn round and say that the prosecution could adduce evidence to impeach Annexure-B report or to support Annexure-A report. Therefore I find no reason to arrive at a divergent conclusion than the one arrived at by this court in Joshy George's case (supra).”

18. While disposing the matter the court also opined that there should be an Apex laboratory with more experienced high ranking and expert examiners where examination/analysis can be done more scrupulously, so that second report would get more credibility and would supersede the first report. Hence amendment of the rule is also suggested.

19. **Sasidharan and Another v. State of Kerala (2013 (3) KHC 402)** was also drawn to our attention. Challenge in that case is with regard to the registration of crime on the ground that it was registered after 24 hours of the receipt of the chemical analysis report in

violation of Rule.9(2). Hence it was held that the registration of crime is in violation of the Rules and hence it will not stand.

20. Though there was an attempt on the part of the counsel for the petitioner to contend about the delay in the registration of the crime the learned senior public prosecutor brought to our attention a chart showing that A sample was drawn on 12.1.2015 at 11.20 am and was sent for chemical analysis on 13.1.2015 and it was received in the laboratory on 13.1.2015 itself and the sample was analyzed on 10.6.2015. The chemical examiners report is dated 24.6.2015 and that was despatched on 24.7.2015. It was received in the office on 28.7.2015 and crime 100/2015 was registered on the same day ie, 28.7.2015. So crime was registered within the prescribed time of 24 hours and hence there was no delay and that aspect was not further challenged by the learned counsel for the accused also.

21. **Subair v. State of Kerala (2016 2 KHC 167)** arose in a case charged under Narcotic Drugs and Psychotropic Substances Act, 1985 and it has been held that when an application is filed

seeking for retesting, it is obligatory for the court to see whether it was filed as a delaying tactics or whether it is expedient in the interest of justice to afford a fair trial to the accused or that would help the prosecution to establish the case. The Court has to exercise its discretion for sending the sample for re-testing cautiously.

22. In **Saneesh v. State of Kerala (2020 (1) KLT 289)** while dealing with rule 8(3) of the Rules this court after discussing the dictum laid down in Girish kumar, Rajappan, Sudhakaran, Joshy George etc., referred above stated in paragraph No.17 as follows :

> "Rule 8(3) of the Rules mandates that if the report in respect of the first sample is positive of adulteration of the toddy, a case shall be registered within 24 hours and the sample marked 'B' shall be produced before the concerned court. What is the purpose of preserving the 'B' sample even after the Abkari Officer obtains a positive result of adulteration in respect of the 'A' sample ? The purpose is only to give an option for the accused to get the second sample sent for analysis. Even though there is no specific

> provision contained in the Rules enabling the accused to send the second sample for chemical analysis the mandate of Rule 8(3) regarding preservation of second sample implies that the accused has got the right to get that sample analysed."

23. So the Court reiterated the previous view and held that preparation of the second sample and preservation of B sample even after the Abkari officer obtained a positive result of adulteration with respect to A sample is only to give an option to the accused to get the second sample sent for analysis, even though there is no specific provision contained in the Rules enabling the accused to send the second sample for chemical analysis. It is also found that in order to minimize the chances of loss, destruction and tampering with the second sample it is advisable that it is to be send at the earliest opportunity with out any delay after registration of the case against the accused. Ultimately the order passed by the Magistrate dismissing the application filed by the accused was set aside and the petition filed by the accused for sending the second sample for

chemical analysis was allowed.

24. In **Vijayan and Another v. State of Kerala (2020 (3) KHC 573)** the accused in a case charged under S.56(b) and 57(a) of Abkari Act approached this court seeking to quash the case on the ground that the second sample (sample B) showed permissible 7.72 % (within the then permissible limits) by volume of Ethyl alcohol.

25. The learned Senior Public Prosecutor on the other hand, placed reliance on a series of decisions to controvert the argument above advanced by the learned counsel for the petitioners.

26. The learned Senior Public Prosecutor supports the view in **Sudhakaran's** case to the extent that the report of the second sample will not supersede the first sample. The provisions in the PFA Act viz., S.13(3) that the certificate issued by the Director of Central Food Laboratory shall supersede the report given by the Analyst under sub section (1) and absence of such provision in the Abkari Act and Rules has also been highlighted.

27. **Devaky v. State of Kerala (1986 KHC 1),** is a case charged under S.55(g), the question arose

is whether accused was entitled to get a second analysis of the sample. The allegation against the accused was that he was carrying 40 litres of wash intended for the manufacture of illicit arrack in a mud pot. On examination of the sample it was found to contain 1.86% ethyl alcohol. He was sentenced under S.55(g) of the Abkari Act. Assailing the conviction and sentence the accused came up before this court and one of the contentions advanced on behalf of the accused was that sample of wash was not given to him and further that the report of analysis did not contain any data. While answering those issues learned Judge found that there is no provision in the Abkari Act as in the PFA Act, enabling the accused to have a second analysis of the sample. So also there is no provision to supply sample to the accused and samples are sent and reports are received from the court. Hence it was held that there is absolutely no legal basis for the contention that the trial and conviction is vitiated by the alleged irregularity or illegality of not supplying the sample of wash to the accused. Supply of sample is not a mandate of any legal

provisions and hence accused has no right to insist on such a condition.

28. **Santhosh T.A. v. State of Kerala (2017 (5) KHC 107)** is a case charged under S.55(a) of the Abkari Act and a case of seizure of spirit. It has been held that there is no provision in the Abkari Act directing to take two samples. It is also found that when only one sample is available and it is lost or found unfit for analysis, accused only stands to gain in the absence of evidence to prove that articles seized from him was a contraband. So he will be acquitted. The learned Senior Public Prosecutor also relies on this decision in the context of acceptability of the Rules under the Kerala Excise Manuel which have been quoted by the counsel for the petitioner and that would be discussed in the paragraphs below.

29. **Thana Singh v. Central Bureau of Narcotics (2013) 2 SCC 590)** was relied on by the learned Public Prosecutor though it arose in a proceedings under Narcotics Drugs and Psychotropic Substance Act.

30. In that decision Apex court was actually deprecating the practice of retesting in a

haphazard manner by importing the rights of the accused from other legislation without its accompanying restrictions.

31. **State of Kerala and Others v. Unni and another (2007 (1) KHC 73)** was also placed before us by which Rule 9(2) of the Rules is held as ultra vires as the provision is ex facie unreasonable and unworkable being vague in nature. That may not be much relevant here because rule 9(2) in pursuance of the same has been deleted as per the Amendment Act of 2012. Now the percentage of ethyl alcohol content in toddy is not a criteria for fixing liability under S.57(a).

32. The learned counsel for the petitioners also placed reliance on the various provisions under the Excise Manual to support his contention regarding the violation of the procedures prescribed under law by the Abkari Officer while preparing the sample and sending it for analysis. He also drew our attention to the various procedures prescribed as per the Manuel in preparation of toddy.

33. Kerala Excise Manual Vol.II Chapter XXV which deals with crimes, detection, enquiry,

trials and prevention. Paragraph 34 reads as follows :

> “Contraband articles seized such as wash which may be, or are likely to become, so offensive as to be a nuisance need not be sent to the Range Office for safe custody. But if in any case an officer judges their retention to be necessary for production in court or for any other reasons, he must bury them or make such other arrangements for their safe custody as will not cause a nuisance. Generally speaking, such articles may safely be destroyed at once in the presence of the accused and the Inspector after taking samples of them. The accused may also be required to affix his seal to the samples. Three samples of not less than (1) 130 grams weight from each distinct kind of excisable drug and (2) two litres or such smaller quantity as may be available of each kind of liquor or wash, may be taken in the presence of the Excise Inspector or senior most Excise Officer present and the accused. Each set of these samples should then be sealed and marked with the same number or mark the particulars of which should be entered in the appropriate columns of the contraband register and in the occurrence report of the case. One sample of each set may be taken by the officer depositing it and two may be left

with the officer in charge of Range with the occurrence report of the case. If the articles are deposited a member of the Range staff, all the 3 may be retained in the Range Office. One of these samples will then be available for the use of the officer in charge of the Range for analysis, if need be and the other for the Magistrate's inspection, if the case is prosecuted before a Magistrate's.

34. Excise Manual Vol.2 chapter XI, page 84 which deals with sweet toddy , para No.9 was highlighted which reads as follows :

> "Sweet toddy shall be drawn only between 6 am and 6 pm. The sweet toddy drawn must at once be manufactured into jaggery or sold as such and no such toddy shall be kept on for the next day. Even where there has been effective coating of lime, sweet toddy begins to ferment within a short time at the most 6 hours. Sweet toddy should not therefore ordinarily be allowed to be kept by the licensees, after 6 pm in the case of sweet toddy drawn from coconut trees, and after 2 pm in the case of sweet toddy drawn from other kinds of trees unless it is actually in process of being manufactured into jaggery, sugar, sugarcandy or other products".

35. In paragraph 10 different modes of tests are prescribed in which boiling test has been highlighted by the counsel which reads as follows :

> “.....
> (i).....
> (ii).....
> (iii) Boiling Test:- The suspected toddy, whether from in a shop or a tope or in transit, should be well stirred and briskly boiled (not merely evaporated) in an aluminum basin in the presence of the shop-keeper or transporter until it is reduced to half its bulk. When sufficiently cook, it should be transferred equally to three bottles of 250 milliliters each. Before the toddy is poured into the bottles, however it should be thoroughly mixed and care should be taken to see that the settlement, if any, is equally divided between the three bottles so as to ensure that equal parts of lime are found in each of the samples. All the three bottles should be kept up to the neck for not less than 15 minutes in briskly boiling water and corked tightly before removal. The cork should be covered

> either with paper or with thin cloth, tied down and sealed both by the officer and the shop-keeper or transporter in such a way that the string securing the cover over the cork cannot be removed unless it is cut. A string should be tied round the bottles lengthwise and breadth wise in such a way that the knot may be over the label on the bottles and a seal should be affixed on the knot so as to make it impossible to remove the label without cutting the string and breaking the seal. The seal should bear clear impressions.

36. The above provisions are highlighted by the learned counsel to contend that as per the Manuel there are specific directions with regard to the conduct of various tests and in the case of sweet toddy, after conducting the boiling test and three samples are taken, one of the samples is to be handed over to the shop keepers to enable them to have an independent analysis made in case he disputes the analysis in the laboratory. He would contend that even as per the amended Kerala Excise Manual Vol.11 in the case of procedure for taking samples of sweet toddy (neera) there is still a provision that

two samples shall be taken and to be labeled as A and B and A bottle shall be send to the Examiner for analysis and B sample shall be handed over to the licensee for safe custody. According to him, there are clear provisions even as per the amended Rules to hand over the samples to the licensee for safe custody.

37. But it is to be noted that there is a specific direction as per the Manuel in the case of sweet toddy to hand over one sample after boiling test to the shop keeper and his right to get it independently analyzed in case he disputes the analysis in the laboratory also has been expressly provided. But that is expressly absent in the case of toddy. That would indicate that the Manuel would prescribe different standards or procedures for preparation of sample and right of the party to get it examined independently in case of any dispute.

38. But Chapter X of Vol.II of Kerala Excise Manuel which deals with toddy does not provide any such provision with regard to the sample collection or test to be conducted. The Kerala Excise Manuel, Vol.II revised – 2018 page 101 Chapter XI which deals with sweet toddy (neera).

Page 104 which states about the procedure for taking sample specifying the two samples labelled as A and B contained 300 ml each to be collected and bottle A to be sent to the chemical Examiner for chemical analysis and B sample to be handed over to the licensee for safe custody and the necessity to affix seals of officers and the licensees or the representatives, if the licensee desires so, was also brought to our attention to support the contention that even as per the revised Manuel there is a direction to take two samples and to hand over one sample to the licensee or the representatives.

39. Chapter XVI of the Revised Manuel -2018 deals with the collection of samples for chemical analysis of toddy. But on looking at the procedure prescribed while taking sample of toddy following procedure can be seen.

> "Toddy :- (I) The quantity of sample taken for chemical analysis shall not be less than 500 ml.
>
> (ii) Bensoic Acid should be added as preservative in toddy at the rate of one gram for 100 ml of toddy.
>
> (iii) The contents in the vessel in which the

liquor is stored shall be thoroughly mixed so as to get a representative sample. Divide the sample in to two parts and put each part in two separate bottles or containers which are properly cleaned and dried. If toddy is kept for sale in bottles, sufficient number of bottles of toddy may be taken and they may be poured in a separate vessel and thoroughly mixed, as as to get a representative sample.

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

(v) The Officer taking the sample shall inform the licensee or his representative to put his seal if he so desires. If he desires to put his seal, the string shall be tied in such a way that it shall have two knots in opposite sides.

….....”

40. So on analyzing the amended Manuel with respect to collection of sample of toddy, chemical analysis and the procedure to be followed, it would go to show that almost the

same procedure as prescribed under the Rules have been reiterated in it. But it is very pertinent to note that even in the said procedure there is no clause enabling the licensee or the representative to send B sample for analysis if there is any violation of the provisions in the chemical analysis report of sample A.

41. The learned Senior Public Prosecutor would vehemently contend that a report of scientific expert cannot be discredited on a mere apprehension of the accused. If such contention is accepted no report of scientific expert saved in Sec.293 sub clause (4) Cr.PC can be relied in evidence and there will be no finality to such reports. He would also contend that the decisions relied on in **Sasidharan**, and **Gireesh Kumar**, have no relevance in the present case and there is no violation of Rule 8 (2) and (3). It is his contention that there is no statutory requirement as per rule 1 and 2 for sending B sample for analysis. Such a situation is not envisaged by the statute and it is not the intention of the Legislature also. What was not there originally in the statute cannot be

imported by way of judicial interpretation is the golden rule of interpretation. He would also contend that Rule 8(2) only deals with the method of sampling and does not confer any right upon the accused to send the B sample for Chemical Examination. He would further contend that there is no provision like Sec.13(5) of PFA Act, in the Abkari Act and Rules, which stipulates that the certificate sent by the director of Central food laboratory is final and conclusive and it supersedes the report of public analyst. There is also no provision either in the Act or Rules indicating that the test result of the second sample if favourable to accused, would *ipso facto* supersede the test result of the first sample.

42. The learned prosecutor further contend that in **Joshy George**'s case, the decision in **Gireesh Kumar** and **Sudhakaran** (supra) have been considered and it was held that since the ethyl alcohol content is less than 8.1% the proceedings are liable to be quashed. That principle is strictly not applicable in the present case. In Rajappan's case also, this court considered a similar issue. He would

contend the findings in Rajappan's case that chemical analysis report of Annexure-A would not get the support of Sec.293 is not correct for the reason that sample 'A' is drawn as per the provisions of Rule 8(2) of the Disposal rules. It is also his contention that in several situations a chemical report is necessary to decide whether prosecution could be launched against an individual or not and if the interpretation that report of chemical examiner's prior to the registration of FIR or occurrence report cannot be accepted the same should render S.293 Cr.P.C meaningless. He would further contend that the purpose of taking 'B' sample for analysis is to substitute 'A' sample in the case of any unforeseen situations like loss or damage etc. The intention is not to send the 'B' sample to the Chemical Examiners laboratory after a considerable time and to get a report to supersede 'A' sample report. The 'B' sample report of chemical analysis cannot supersede the chemical report of 'A' sample under any circumstances. He would further contend that the legislature in its wisdom considering such a situation and lapse of time

that could be involved has deliberately did not give an option to send 'B' sample for analysis. By efflux of time, considerable changes could happen in the chemical composition when compared between 'A' and 'B' samples. So the chemical decomposition and character of A' sample and 'B' sample would never be the same during the different times of examination of respective samples. Hence, sending 'B' sample after a considerable period for analysis would serve no purpose. Hence no provision was included in the Rules for the same.

43. The learned Prosecutor quoted **Manjith Singh Alias Mange v. Central Bureau of Investigation (2011 (11) SCC 578)** in the aspect of interpretation of statutes. It has been held therein that “it is the cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act”.

44. The learned Prosecutor further placed reliance on **Prakash kumar Alias Prakash Bhutto v. State of Gujarat (2005 (2) SCC 409) and May George v. Special Tahsildar and others (2010 (13) SCC 98)** wherein it has been held while considering a provision as mandatory or directory, that the Court has to examine the context in which the provision is used and the purpose it seeks to achieve.

45. In short, according to the learned Public Prosecutor, 'B' sample is not intended for sending to the chemical Examiner's Laboratory as per the Rules. The value of the report for 'A' sample is sufficient for prosecution. Accused cannot question the credibility of the report of Scientific Expert and insist for sending 'B' sample for analysis, since that is not provided in the Rules. Hence he prayed for dismissal of the Crl.MC.

46. The 2nd respondent, the Assistant Chemical Examiner, Government of Kerala, also filed a separate statement. It is contended by her that as per records, four sealed bottles were received from the Circle Inspector of Excise, Sulthan Bathery and that was accepted with

receipt No. 185/2015 on 13.1.2015. That sample was analyzed and report was despatched to the Circle Inspector, Sulthan Bathery on 24.7.2015.. As per the records, one sealed bottle containing 500 ml of white turbid liquid involved in crime No.100/2015 of Sulthan Bathery Excise Range was received from JFCM -I, Sulthan Bathery on 21.8.2015 and that was received with receipt No.4121/2015 as 'B' sample. That was analyzed and percentage by volume of alcohol content of 'B' sample was found to be 2.72 whereas that of the previous sample was 4.18. Both the analysis were done using gas, promatogram instrument. If the preservation was improper there is possibility for reduction of alcohol content due to evaporation as well as decomposition by time lapse. By efflux of time when two samples are examined, there are chances of variation in the result, since the alcohol in the sample may evaporate and escape due to the volatile nature of alcohol in the changing atmospheric temperature. Decomposition may occur in the case of starch also. Hence according to the Asst. Chemical Examiner the value of A sample is more authentic and acceptable considering the time at

which it was analyzed.

47. Rule 8 would obviously show that there is no provision for sending 'B' sample to the chemical examiner for report. But the learned counsel for the petitioners was relying upon the Rules in the Kerala Excise Manuel Vol.II with regard to preparation of sample of toddy and also sweet toddy which have been narrated in the previous paragraphs. To avoid the risk of repetition we are not extracting it again here. We have also stated therein that even in the Manuel there is no rule giving an option to the accused either for getting a sample or to get it analyzed through chemical examiner. Only in the case of sweet toddy such an option has been given to the licensee or the vendor, as the case may be. So, the question that may arise is as to whether the rules in the Excise Manuel would enable the petitioners for seeking to send the B sample to the Chemical analyst. In this context the learned senior Public Prosecutor would contend that Excise Manuel and the directions thereof are only administrative directions and has no force of law. In this context the learned counsel brought to our attention **Santhosh T.A.**

and Another v. State of Kerala (2017 (5) KHC 107). In that decision, applicability of the Excise Manuel has been discussed in paragraph 16,17,18,and 19 which reads as follows :

" 16. The nature of a Manual containing directions similar to those in Volume II of the Kerala Excise Manual came to be considered by the Supreme Court in several of its decisions. Some of them are State of Rajasthan v. Ram Saran, 1964 KHC 568 : AIR 1964 SC 1361 : 1964 (2) SCR 982 : 1965 (1) LLJ 103, S. G. Jaisinghani v. Union of India and others, 1967 KHC 699 : AIR 1967 SC 1427 : 1967 (2) SCR 703 : 1967 (1) ITJ 903 : 65 ITR 34, State of U.P v. Kishori Lal Minocha, 1980 KHC 672 : AIR 1980 SC 680 : 1980 (3) SCC 8 : 1980 ALJ 278, Union of India v. Navin Jindal, 2004 KHC 446 : AIR 2004 SC 1559 : 2004 (2) SCC 510 : 2004 (109) DLT 717 : 2004 (3) CHN 30, State of U.P and another v. Johri Mal, 2004 KHC 993 : AIR 2004 SC 3800 : 2004 (4) SCC 714 : 2004 (3) SLR 734 : 2004 (19) AIC 69 (SC) : 2004 (3) LLN 13, Municipal Corporation, Amritsar v. Senior Superintendent of Post Offices, Amritsar Division and another, 2004 KHC 468 : 2004 (3) SCC 92 : AIR 2004 SC 2912, Punjab Water Supply and Sewerage Board v. Ranjodh Singh and others with Punjab Water Supply & Sewerage Board, Hoshiarpur v. Harihar Yadav and others, 2007 KHC 3073 : 2007 (2) SCC 491 : AIR 2007 SC 1082 : 2007 (1) SCC (L&S) 713 :

2007 (2) LLN 84.

17. The three Judge Bench of the Apex Court in Ramsaran's case (supra) held that unless the 'Rules' in the Manual have been issued by a competent authority under the provisions of a Statute they are merely administrative instructions. In Jaisinghani's case (supra) the Government of India had in a letter issued by it fixed the quota for promotion of certain categories of officers in the Income Tax Department. It was argued on behalf of the Government that it was merely an administrative direction and hence was not a justiciable issue. The Constitution Bench held:

In the letter of the Government of India dated October 18, 1951 there is no specific reference to R.4, but the quota fixed in their letter must be deemed to have been fixed by the Government of India in exercise of the statutory power given under R.4. Having fixed the quota in that letter under R.4, it is not now open to the Government of India to say that it is not incumbent upon it to follow the quota for each year and it is open to it to alter the quota on account of the particular situation (See para 24 of the counter affidavit of respondents 1 to 3 in Writ Petition No. 5 of 1966). We are of opinion that having fixed the quota in exercise of their power under R.4 between the two sources of recruitment, there is no discretion left

with the Government of India to alter that quota according to the exigencies of the situation or to deviate from the quota, in any particular year, at its own will and pleasure.

Lalita Kumari v. Government of U.P and others, 2013 (4) KHC 552 : AIR 2014 SC 187 : 2013 (4) KLT 632 : ILR 2013 (4) Ker. 633 : 2013 (4) KLJ 686 : 2014 (2) SCC 1 : 2014 CriLJ 470 is another decision of the Constitution Bench of the Supreme Court which requires notice. The Manual involved in that case was Crime Manual of the Central Bureau of Investigation. The Supreme Court has observed: "However, this Crime Manual is not a Statute and has not been enacted by the Legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary enquiry in the scheme of the Code of Criminal Procedure."

18. All the decisions of the Supreme Court referred to above hold that mere executive instructions - whether they are called rules, circulars or orders - have no force of a statutory provision.

19. This Court had occasion to consider the effect

> of non - compliance with the directions in Volume II of the Kerala Excise Manual. In Thankachan v. Circle Inspector of Excise, 1989 KHC 414 : 1989 (2) KLT 316 the argument advanced on behalf of the accused was that the non - compliance with the direction in the Manual that the Excise Inspector should obtain sanction from the higher officials to prosecute the offenders was fatal. This was repelled by the learned Judge observing thus: "The Manual placed before me is not shown to have been issued under the provisions of any Statute. The Manual contains administrative instructions issued by the department for the guidance of its subordinate officials".

48. It is also relevant to quote **Thankachan v. Circle Inspector of Police (1989 (2) KLT 316)** wherein, while dealing with Section 57(a) (3) of the Abkari Act, 1077, a question arose whether sanction from Superior officers or Board of Revenue (Excise) is required in initiating prosecution against offenders under the Abkari Act. Reliance was placed by the Prosecutor on the Excise Manuel to contend that the Excise Inspector should take sanction from the higher officials to initiate the prosecution against the offenders. In that context, it was held that

Excise Manuel is not issued under the provisions of any statute. The Manuel contains administrative instructions issued by the Department as guidelines of the subordinate Officials. Those instructions cannot over ride the provisions of the Abkari Act.

49. So it can be deducted from the above settled principles that Excise Manuel contains instructions for the guidance of the subordinate officials of the Department. It will not have any force of law.

50. In the light of the above, in the case on hand, the learned counsel for the petitioners cannot harp upon the Rules in the Excise Manuel so as to make a request for sending B sample to the Chemical examiner for analysis. So also, as found in the previous paragraphs there is no express provision either in the then existing manual or the revised manual for enabling the licensee or the vendor to get the B sample forwarded for analysis in the case of toddy. So the contention advanced by the learned counsel for the petitioners based on the Rules in the Excise Manuel is only to be negatived.

51. As stated earlier, there is no express

provision either in the Act or the Rules for enabling the petitioners for requesting to send the second sample for chemical analysis and that actually led to this reference also. Only judge-made laws are available in the field with divergent views. **Gireesh Kumar and Another v. State of Kerala (2010 (3) KHC 171) and Sasidharan and Another v. State of Kerala (2013 (3) KHC 402)** relied on by the learned counsel for the petitioner would show that in both cases only one sample was prepared and second sample was not at all available for analysis. In Joshy George's case, Harikrishnan R's case etc as stated earlier this Court more or less took a view that accused has got a right to seek for sending B sample for analysis.

52. As stated in the beginning in **Devaki v. State of Kerala** which was relied on by the learned Public Prosecutor this Court had taken a stand that supply of sample to the accused is not a mandate of any legal provisions and hence accused has no right to insist on such a condition.

53. In Santhosh T.A. and Another also it has been held by this Court while dealing with

Sec.55(a) of the Abkari Act that (in a case of seizure of spirit) there is no provision in the Abkari Act for enabling the accused to request for sending sample for chemical analysis. It is also held that during investigation accused has no right to ask the Court to help him to collect evidence to disprove the prosecution case and after the Court takes cognizance of the offence, accused cannot adduce evidence before the case is posted for defence evidence unless such a right is conferred on him by a statute. It is also held that even if a second sample is available it cannot be sent for examination at his request merely because the report of the examination of the first sample is unfavourable to him.

54. That decision was actually held by following the dictum laid in **Thana Singh's** case referred to above, wherein the Apex Court deprecated the procedure adopted by the NDPS Courts in allowing retesting and re-sampling at every stage of the trial contrary to other legislation which defines a specific time frame within which right may be available. By analyzing Rule 8 of the Rules also it could be

seen that the mandate therein is to take two samples and label as 'A' and 'B' and to forward the sample bottle 'A' to the Chief Chemical Examiner or the Joint Chemical Examiner etc, as the case may be without any unreasonable delay and to hand over the sample 'B' bottle to the concerned deputy Commissioner of Excise, who is the authorized Officer, with a copy of the memorandum etc. The sub-rule (3) further provides that on receipt of the Chemical Examiner's report of sample 'A' if any violation of the provisions of Abakari Act and Rules or conditions of licence or any adulteration is noticed, the case shall be registered within 24 hours and the sample 'B' to be produced before the Court concerned. It is further specifically provided that if no case is registered the sample 'B' shall be destroyed. So obviously the Abkari Act or Rules does not contain any express provision for sending the sample 'B' to the Chemical Examiner's report, but in Girish Kumar, Sasidharan, Harikrishnan R etc, this Court was of the view that since there is a second sample prepared as per the Rules and marked as 'B' sample and produced before the Court there is no

other purpose than send the same to the Chemical examiner's Laboratory. The procedure pending before the Courts were also directed to be quashed if the report of B sample was favourable to the accused.

55. According to the learned Public Prosecutor it is against the legislative intent for reasons more than one. According to him, when there is no express provision in a statute to do a particular thing, the Court by interpreting the law cannot supply anything and give a benefit to the accused for enabling him to send the second sample for analysis. He would also contend that there is no standard data with regard to the change of properties of the second sample due to the passage of time and the Court is also not equipped with any data to determine the change of characters of the starch due to the passage of time during the examination of sample A and B. Further he would contend that the Chemical Examiner's report of 'A' sample cannot get automatically superseded by the analysis of the second sample. So all these creates a lot of legal issues which cannot be resolved by the Court with the existing law and the Rules.

56. We will deal with the admissibility of the two reports of Chemical Examination and the settled position of law in that field, first.

57. In **Ukha Kolhe v. State of Maharashtra (AIR 1963 SC 1531)** the admissibility of evidence under Sec.510 Cr.P.C which was corresponding to Sec.293 of the Code came up for consideration wherein the scope and ambit of Sec.510 Cr.P.C has been dealt with in a case where Secs 66(1)(b), 66(2), 129A, 129B of Bombay Prohibition Act (Act 25 of 1949) came up for consideration and it was ultimately held thus :-

> "19. On an analysis of S.129A and 129B, it is clear that the Legislature has provided in the first instant for compelling persons suspected of consuming intoxicants to be produced and to submit themselves for examination and extraction of blood which, under the law as it stood, could not be secured, but thereby the law did not provide for only one method of proving that a person had consumed illicit liquor within the meaning of S.66(2). The legislature has made the certificate of the examination under S.129A, sub-sec.(1) and (2) admissible without formal proof; but by sub-sec.(8) of S.129A, the adoption of any other method of collection of

evidence for proving that a person accused has consumed an intoxicant is not precluded and a report of any registered medical practitioner which tends to establish that fact in respect of matters specified in cl. (b) of Sec. 129B is also made admissible. On that view of S.129A and 129B, there is no warrant for assuming that it was intended thereby to exclude in trials for offences under S.66(1)(b) of the Act the operation of S.510 of the Code of Criminal Procedure. The Code makes a document purporting to be a report under the hand of a Chemical Examiner and certain other documents upon any matter or thing duly submitted to him for examination or analysis and report, admissible in any enquiry, trial or other proceeding under the Code. The terms of S.510 of the Code of Criminal Procedure are general; but in that account it cannot justifiably be assumed that by enacting, S.129A and 129B, the legislature intended that the certificate of a competent officer in respect of matters not governed thereby shall become inadmissible. It is open to the prosecution to rely in corroboration of a charge of consumption of illicit liquor upon a certificate under cl. (a) of S.129B if it is obtained in the manner prescribed by S.129A, and also to rely upon the report of a registered medical practitioner in respect of any person

examined by him or upon any matter or thing duly submitted to him for examination or analysis and report. It is also open to the prosecution to rely upon the report of the Chemical Examiner in cases not covered by S.129A as provided under S.510 of the Code of Criminal Procedure."

58. Paragraph 20 and 21 of the said judgment is also relevant which reads as follows :

20. It was, urged that by the enactment of S.129A and S.129B of the Act, S.510 of the Code stood repealed in its application to offences under S.66(1) of the Bombay Prohibition Act, and reliance in this behalf was placed upon Art.254(2) of the Constitution. It is true that power to legislate on matters relating to Criminal Procedure and evidence falls within the Third List of the Seventh Schedule to the Constitution and the Union Parliament and the State Legislature have concurrent authority in respect of these matters. The expression "criminal procedures" in the legislative entry includes investigation of offences, and Ss.129A and 129B must be regarded as enacted in exercise of the power conferred by entries 2 and 12 in the Third List. The Code of Criminal Procedure was a law in force immediately before

the commencement of the Constitution, and by virtue of Art.254(2) legislation by a State Legislature with respect to any of the matters enumerated in the Third List repugnant to an earlier law made by Parliament or an existing law with respect to that matter if it has been reserved for the consideration of the President and has received his assent, prevails in the State. Bombay Act No. 12 of 1959 was reserved for the consideration of the President and has received his assent : S.129A and 129B will prevail in the State of Bombay to the extent of inconsistency with the Code, but no more. That they so prevail only to the extent of the repugnancy alone and no more is clear from the words of Art.254 : Deep Chand v. The State of Uttar Pradesh, 1959 Supp (2) SCR 8 : AIR 1959 SC 648 and Ch. Tikaramji v. State of Uttar Pradesh, 1959 SCR 393 : (S)AIR 1956 SC 676. It is, difficult to regard S.129B of the Act as so repugnant to S.510 of the Code as to make the latter provision wholly inapplicable to trials for offences under the Bombay Prohibition Act. S.510 is a general provision dealing with proof of reports of the Chemical Examiner in respect of matters or things duly submitted to him for examination or analysis and report. S.129B deals with special class or reports and certificates. In the investigation of an

offence under the Bombay Prohibition Act examination of a person suspected by a Police Officer or Prohibition Officer of having consumed an intoxicant or of his blood may carried out only in the manner prescribed by S.129A: and the evidence to prove the facts disclosed thereby will be the certificate or the examination viva voce of the registered Medical Practitioner or the Chemical Examiner for examination in the course of an investigation of an offence under the Act of the person so suspected or of his blood has by the clearest implication of the law to be carried out in the manner laid down or not at all. Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act otherwise than in the manner set out in S.129A cannot therefore be used as evidence in the case. To that extent S.510 of the Code is superseded by S.129B. But the report of the Chemical Examiner relating to the examination of blood of an accused person collected at a time when no investigation was pending or at the instance not of a Police Officer or a Prohibition Officer remains admissible under S.510 of the Code.

21. It was urged before the Court of Session that the report of the Chemical Examiner was

submitted by that officer not to the Court nor to the medical officer but to the Police Officer and it was by virtue of S.162 of the Code of Criminal Procedure inadmissible except to the extent permitted within the strict limits prescribed by that section. But S.510 makes provision with regard to proof of documents by production thereof and the application of S.162(1) is expressly made subject to what is provided in the Code of Criminal Procedure. Exclusion from evidence of any part of a statement made to a police officer or a record from being used for any purpose at any enquiry or trial in respect of an offence under investigation at the time when such statement was made is "Save as hereinafter provided". The word "hereinafter" is in our judgment not restricted in its operation to S.162 alone but applies to the body of the Code to hold otherwise would be to introduce patent inconsistency between S.207A and S.162 of the Code for by the former section in committal proceeding statements recorded under S.162 are to be regarded as evidence. The contention raised that the report made to the police officer by the Chemical Examiner was inadmissible in evidence was rightly rejected."

59. **Public Prosecutor v. Pamarti Venkata**

Chlamaiah (MANU/AP/0075/1956 = AIR 1957 AP 286) was also brought to our attention. In that decision it has been held that a Chemical Examiner's report received prior to initiation of prosecution is admissible in evidence in any proceeding in a Code as it comes within the operation of Sec.510 of Cr.P.C. It would be more clear on reading of Sec.293 (1) Cr.PC wherein it has been specifically provided that any document purported to be a report under the hand of a Government scientific expert upon any matter or duly submitted to him for examination or analysis and a report in the course of any proceeding under the Code may be used as evidence in any enquiry trial or other proceeding under the Code. Investigation is also a course of proceeding under the Code.

60. So the finding of the learned Judge in Rajappan's case that the second sample was sent during the course of proceeding and hence much reliance can be placed on second report than the first report is not seems to be good law.

61. **Rajesh Kumar and Another v,. State Government of NCT of Delhi (2008 (4) SCC 493 = 2008 KHC 6140)** was brought to our attention to

emphasis the admissibility of the report of the Chemical examiner. Paragraph 9 was highlighted which reads thus :

> "A bare reading of sub-sections (1) and (2) of S.293 shows that it is not obligatory that an expert who furnishes his opinion on the scientific issue of the chemical examination of substance, should be of necessity made to depose in proceedings before Court. This aspect has been highlighted by this Court in Ukha Kolhe v. The State of Maharashtra, AIR 1963 SC 1531 (1964 (1) SCR 926 : 1963 (2) CriLJ 418 : 1964 Mah LJ 246) and Bhupinder Singh v. State of Punjab, AIR 1988 SC 1011 (1988 KHC 1010 : 1988 (3) SCC 513)".

62. So from the above settled position of law, the evidentiary value of the report of the Chemical examiner or Assistant Chemical Examiner under S.293 Cr.P.C is quite evident. So that would in turn uphold the proposition of law laid down in **Sudhakaran's** case that the accused cannot contend that the results of the second

sample which is favourbale to him should supersede the test result on the first sample is well founded and is perfectly in accordance with the settled principles of law. So the reports of a Chemical Examiner of 'A' sample obtained during investigation is equally admissible in evidence.

63. The next aspect is with regard to the absence of any express provision in the Abkari Act and Rules for sending B sample for analysis and the the power of the Court by interpreting the provisions under Rule 8(3) to forward the B sample for analysis. According to the learned Public Prosecutor in the absence of any express provision the Court is not expected to fill the lacuna or add any words so as to supply the omission.

64. In this context the learned counsel drew our attention to **Thana Singh v. Central Bureau of Narcotics (2013) 2 SCC 590 = 2013 KHC4067)** was a case which arose under Narcotic Drugs and Psychotropic Substance act, 1985 and the Apex Court was considering the delayed trial of offences under the Act. Paragraph 24 of the

said decision was highlighted by the learned counsel which reads as follows:

> 24. The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary: NDPS Courts have been consistently obliging to applications for re-testing and re-sampling. These applications add to delays a they are often received at advanced stages of trials after significant clause of the NDPS Courts seem to he permitting re-testing nonetheless by taking resort to either some High Court judgments see State of Kerala v. Deepak P. Shah and Nihal Khan v. State (Govt. of NCT of Delhi) or perhaps to Sections 79 and 80 of the NDPS Act which a permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act. 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time frame within which the right may be available. Besides, reverence must also be given to the wisdom of the legislature when it expressly omit a provision. which otherwise

> appears as a standard one and other legislations. The legislature. unlike for the NDPS Act, enacted Section 25ct of the Drugs and Cosmetics Act. 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for re-testing.

65. The Apex Court deprecated the practice of re-testing and re-sampling which every stage of trial under the NDPS Act contrary to such legislation. It was also taken note of that the wisdom of the legislation when it expressly omits a provision which otherwise appears as a standard one in other legislation. It is to be noted that the Apex Court had taken note of the practice of NDPS Courts in permitting retesting nonetheless by taking resort to either some High Court judgments.

66. In **Santhosh T.A.**'s case the learned Single Judge of this Court following the dictum laid down in **Thana Singh**'s case found while dealing with Sec.55(a) of the Abkari Act in a case of seizure of spirit that there is no provision in the Abkari Act for enabling the accused to

request for sending sample for chemical analysis. It is also held that during investigation accused has no right to ask the court to help him to collect the evidence to disprove the prosecution case and after the court takes cognizance of the offence he cannot adduce evidence before the case is posted for defence evidence unless such a right is conferred on him by a statute. Even if a second sample is available, it cannot be sent for examination at his request merely because the report of the examination of first sample is unfavourable to him. That would uphold the statutory mandate of admissibility of the report of chemical examiner under Sec.293 Cr.P.C without formal proof. So we are of the considered view that the law in **Santhosh T.A**'s case is correctly held.

67. The learned Public Prosecutor would vehemently contend about the absence of a provision for sending B sample for chemical analysis as per the Rules or Act. It is true that in **Thana Singh** the Apex Court in paragraph 23 has made a specific finding about the exercise of the powers of the NDPS Courts in

ordering retesting and re-sampling in cases of compelling circumstances. The Apex court also reminded that reverence to be given to the legislature intention when it expressly omits a provision which otherwise appears as a standard one in other legislations. PFA Act as discussed earlier, makes a specific provision for sending the second sample to the Central Food Laboratory at the instance of the accused and further makes an express provision that the report of the Central Food Laboratory would supersede the report of the Chemical Examination. But such a provision is conspicuously absent in the Abkari Act and Rules. So when such a provision is expressly omitted from a statute, the Court cannot supplement the same by adopting wrong precedents. According to the learned senior public prosecutor, when the intention of the legislature is clear and without ambiguity the courts are bound to give its effect in full.

68. In the aspect of interpretation of statute the learned Senior Public Prosecutor brought to our attention to **State of Uttar Pradesh v. Singhara Singh and Others (AIR 1964 SC 358 = 1964 KHC 370)** wherein the question arose as to

the admissibility of oral evidence of a Magistrate who recorded the confession of guilt made to him by the accused under Sec.164 Cr.P.C. In that decision, the Rule adopted in *Taylor v. Taylor (1875 (1) Ch.D 426, 431* is quoted and the relevant paragraph 8 reads thus :

> 8. The rule adopted in Taylor v. Taylor 1875 (1) Ch. D. 426, 431 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.....”

69. **Union of India (UOI) and others v. Deoki Nandan Aggarwal (MANU/SC/0013/1992 = AIR 1992 SC 96)** was further brought to our attention wherein while dealing with Sec.16 and 17A clause (3) of the High Court Judges (conditions of Services) Act, 1954 and High Court and Supreme Court Judges (conditions of Services) Amendment Act, 1986 the question of interpretation of statutes came up. Paragraph 14 of the said judgment which deals with the interpretation of statutes was highlighted by the learned Prosecutor which

reads as follows:

> 14. We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of Instrumentalities. Vide P.K. Unni v. Nirmala Industries

MANU/SC/0631/1990 : [1990] 1 SCR 482; Mangilal v. Suganchand Rathi[1965] 5 SCR 239; Sri Ram Ram Narain Medhi v. The State of Bombay MANU/SC/0132/1958 : [1959] SCR 489; Smt. Hira Devi and Ors. v. District Board, Shahjahanpur MANU/SC/0021/1952 : [1952]1SCR1122 ; Nalinkhya Bysack v. Shyam Sunder Haldai and Ors. MANU/SC/0076/1953 : [1953]4SCR533 ; Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha MANU/SC/0369/1979: (1980)ILLJ1375C ; S Narayanaswami v. G. Pannerselvam and Ors. MANU/SC/0362/1972 [1973]1SCR172 ; N.S. Vardachariv. G. Vasantha Pai and Anr. MANU/SC/0364/1972 : [1973]1SCR886 : Union of India v. Sankal Chand Himatlal Sheth and Anr. MANU/SC/0065/1977 : [1978]1SCR423 and Commissioner of Sales Tax, U.P. V. Auriaya Chamber of Commerce, Allahabad MANU/SC/0411/1986 : [1987]1671TR458(SC). Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts some times in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.

70. **Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors. [2013 11 SCC 451)** was further brought to

our attention. Paragraph 23 to 29 read thus :

> 23. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the court has no choice but to enforce it in full rigour. It is a well-settled principle of interpretation that hardship or inconvenience caused cannot be used as a basis to alter the meaning of the language employed by the legislature, if such a meaning is clear upon a bare perusal of the statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. [Vide CIT (Ag) v. Keshab Chandra Mandal and D.D. Joshi v. Union of India
>
> 24. In Bengal Immunity Co. Ltd. V. State of Bihar (SCC p. 685, para 43) it was observed by a Constitution Bench of this Court that, if there is any b hardship, it is for the legislature to amend the law, and that the court cannot be called upon to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however inequitable or unjust the result may be. The words, “dura lex sed ler” which mean

the law is hard but it is the law" may be used to sum up the situation. Therefore, even if a statutory provision c causes hardship to some people, it is not for the court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

25. In Mysore SEB v. Bangalore Woollen Cotton & Silk Mills Ltd. (AIR p. 1139, para 27) a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. In Martin Burn Ltd. V. Corp. of Calcutta this Court, while dealing with the same issue observed as under: (AIR p. 535, para 14)

"14. … A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not."
(See also CIT v. Vegetables Products Ltd.34 and Tata Power Co. Ltd. V.
Reliance Energy Ltd.)

26. Therefore, it is evident that the hardship caused to an individual, cannot be a ground for

not giving effective and grammatical meaning to every word of the provision, if the language used therein is unequivocal.

Addition and subtraction of words

27. The court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim “A verbis legis non est recedendum” means, “from the words of law, there must be no departure”. A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the a footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a statute, or read words into it which are not part of it, especially when a literal reading of the

same produces an intelligible result. (Vide Nalinakhya Bysack v. Shyam Sunder Haldar, Sri Ram Ram Narain Medhi v. State of Bombay M. Pentiah v. Muddala Veeramallappa, Balasinor Nagrik Coop. Bank Ltd. V. Babubhai Shankerlal Pandya and Dadi Jagannadham v. Jammulu Ramulu. SCC pp. 78-79, para 13.)

28. The statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The courts have to administer the law as they find it, and it is not permissible for the court to twist the clear language of the enactment in order to avoid any real or imaginary hardship which such d literal interpretation may cause.

29. In view of the above it becomes crystal clear that under the garb of interpreting the provision, the court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation.

71. **Ram Mohan v. State by Inspector of Police (unreported decision of Madras High Court dated 30.3.2015)** was further brought to our attention.

In that decision Nasiruddin v. Sita Ram Agarwal (2003 (2) SCC 577) paragraph 37 has been quoted which reads as follows :

> 37.“The Court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used ….. But the intention of the legislature must be found out from the scheme of the Act.

72. So the above principles would remind us that the Court cannot supply anything to a statutory provision which is clear and unambiguous. The Courts are not expected to supplant the legislature to cure any defect or

omission. That would be an encroachment to the powers of the legislature. Doctrine of Separation of Powers is also the basic structure of our Constitution.

73. Bearing in mind the above principles, the interpretation of Rule 8(3) has to be made. Obviously, sub-rule 2(f) specifically provides that sealed bottle or container marked as 'A' shall be forwarded to the Chief Chemical Examiner or Joint Chemical Examiner of the Government of Kerala etc., and sub-rule 2(h) provides that the bottle or container marked as 'B' shall be handed over to the Deputy Commissioner of Excise concerned. Sub-rule 2(i) further provides that the Deputy Commissioner of Excise shall maintain an exclusive register for registering the details of samples received by him and that the sample shall be registered serially and serial number shall be assigned as the register number. Sub rule (3) further provides that on receipt of the chemical analysis report, if any violation of the provisions of the Abkari Act and Rules or conditions of licence or any adulteration is noticed, the case shall be registered within 24

hours and it further provides that the sample marked as 'B' shall be produced before the court concerned and further that if no case is registered the sample 'B' shall be destroyed.

74. Obviously there is no provision in Rule 8 for enabling the licensee or the vendor for getting the 'B' sample or making a request to the Court for sending the 'B' sample for analysis once the report of 'A' sample is found to be not in favour of him.

75. So we are of the considered view that once the legislature has intentionally omitted to provide an option to a party to get the sample retested, the Court cannot add words to a statute or read words which are not there. Even if there is a defect or omission in the Statute the Court is not expected to correct the defect or supply the omission and provide a chance to the accused to send the B sample for retest which the Act and Rules do not envisage.

76. The learned senior Public Prosecutor also would contend that due to passage of time the starch content and its chemical equation may also vary and that may the reason why the rule making Authority has not given an option to the

licensee or the vendor to test 'B' sample.

77. It is to be remembered that if the Court gave an option to the accused to forward the 'B' sample for analysis it may not be possible for the Court to fix a uniform time in each case within which the 'B' sample can be forwarded. Efflux of time may cause decomposition of starch content in B sample also.

78. We would also note in this context that usually the consumers of toddy would be people from lower strata who cannot afford to go after costly liquor. The learned Public Prosecutor would also contend that legislature wanted to ensure the quality of toddy which could be sold from toddy shop and that is the reason why Rule 8 of the Rules has been specifically made applicable to toddy shops.

79. Rule 9 (2) of the Rules is relevant in this context to be quoted.

> 9. (1) x x x
>
> 9 (2) No toddy other than that drawn from Coconut, Palmyrah, or Choondapana palms and on which tree-tax due under the Act has been paid shall be sold by the licensee. All toddy kept or offered for sale shall be natural and conforming

> to such specifications and complying to such restrictions as may be notified by Government under clause (n) of rule 2. Nothing shall be added to it to increase its intoxicating quality or strength or to alter its natural composition or for any other purposes.

80. So there is an express prohibition as a safeguard taken by the Rule making authority to ensure sale of pure toddy without any foreign ingredient or noxious substance. Rule 5 (19) of the Kerala Abkari Shops Disposal Rules, 2002, is further relevant in this context to be quoted, which reads as follows:

> 5(19) The commissioner of Excise may cancell any licence issued under these Rules at any time on valid grounds. Any resale or disposal otherwise, ordered shall always be at the risk and loss of the original purchaser who shall not have any claim to any gain received by Government accruing from such disposal. Further, the original purchaser shall have no claim for refund of any amount he had paid to Government or any amount that had been forfeited from him.

81. So the above Rule enables the Commissioner

of Excise to cancel the licence on finding the violation of Rules by a licensee. In this context, the learned Senior Public Prosecutor drew our attention to **Pradeepkumar P.P. v. Excise Commissioner, Tvm, and Ors [ILR 2015 (2) Ker. 176 : 2015 (2) KHC 190].** In that decision the licensee approached this Court against cancellation of license in a case where starch was mixed with toddy on a report of analysis of 'A' sample. In that case a crime was registered under Section 57(a) since the toddy contained starch, a foreign substance. The licence was initially suspended and later it was cancelled. The contention of the accused was that since the substance is not noxious and that it could have been added allegedly for the purpose of increasing volume of the toddy, the authorities should have conducted a quantitative test to determine the extent of volume stood increased per litre by the alleged addition of starch. After discussing various decisions in paragraph No.14 the court has quoted the judgment in Crl.M.C.No.4360/2014 dated 20.12.2014, which reads thus:

> "Adding anything to the basic ingredients or the natural composition of toddy or adding anything alien which is not permitted under the Act or the Rules framed under the Act with the object of changing the natural composition or basic ingredients of toddy will amount to an act of adulteration Much thought is not required to find that adding starch to toddy, with the dishonest object of increasing the quantity, and thereby making unlawful profits dishonestly. will amount to adulteration meant under the law and it will definitely amount to violation of R 9(2) of the Rules."

82. Paragraph No.15 is also relevant to be extracted , which reads thus:

> "It is further seen that there have been sufficient provisions in the Act and also in the Rules to ensure that mere registration of a crime does not result in deprivation of licence. The Legislature had ensured that only upon charging of an accused ie after the filing of the charge sheet or in other words after taking cognizance, any disqualification has to be reckoned Once person is to take advantage of that provision he cannot be heard saying that the licence could have been cancelled or interdicted immediately the breach was found to

> have been committed in my view it is a contradiction in terms."

83. The contention of the accused in that case was that a very minimal quantity of starch was found mixed with the toddy and it could have been taken only for the purpose of increasing the volume of the liquid. So in the absence of any quantitative test, the authorities could not have inflicted a major blow of cancellation of licence. But by looking at Rule 9(2) the learned Judge held that the prohibition concerning the addition or mixing of any foreign substance has been couched in mandatory terms. So ultimately it was found that no degree of variation have been provided for under the Rule and until and unless the Statute provides any measure in terms of the quantity that is permissible, the Court cannot read something into the provision to say that once it is minimal, it can be condoned.

84. The learned Senior Public Prosecutor further placed reliance on **V.R. Prasad v. State of Kerala & Ors. (unreported judgment in W.P. (C).No.35730/2016 dated 06.02.2017)**. That was also a case in which a crime was registered

against the petitioner/accused under 56(b) and 57(a) of the Abkari Act alleging that the sample of toddy taken from one of the toddy shops run by the petitioner contained Poly Vinyl Acetate. Immediately after registration of the case the license issued to the petitioner to run the toddy shops was suspended. So the petitioner/accused took a contention that Poly Vinyl Acetate is neither a drug nor an ingredient which is likely to add the actual or apparent intoxicating quality or strength of the toddy and that therefore, the presence of the said article in the toddy would only amount to adulteration of toddy. Since toddy is a food article coming within the purview of the Food Safety and Standards Act (FSS Act) and since standards have been prescribed for toddy under the FSS Act by virtue of the provisions contained in the Food Safety Standards (Food Products Standards and Food Additives) Regulations, 2011, the standards prescribed for toddy by the State Government under the Abkari Act do not have the force of law any more, especially in the light of the overriding effect given to the standards prescribed for food

articles under the FSS Act by virtue of Section 89 of the FSS Act.

85. The learned Senior Government Pleader on behalf of the State on the other hand contended that in the light of the Entry 8 of List II of Schedule VII of the Constitution the State has power to make laws relating to production, manufacture, possessions, transport, purchase and sale of intoxicating liquors. It is also contended that repugnance under Article 254 of the Constitution would arise only when a State law is in its 'pith' and 'substance', a law relating to an entry in the concurrent list on which the Parliament has legislated. So according to the learned Special Prosecutor the Abkari Act being not a law relating to food, the question of repugnance between the statute and the FSS Act does not arise. The Court after an elaborate consideration of Section 57 (a) Rule 9 (2) of the Rules etc, it has been held that if any article other than the natural ingredient is found mixed with toddy the offence u/s. 57(a) is made out. Thereafter, discussing the rule of 'pith' and 'substance' and quoting the dictum laid down in **Security Association of India and**

Anr. v. Union of India and Ors [(2014) 12 SCC 65] and State of West Bengal v. Kesoram Industries Ltd [(2004) 10 SCC 201] and Article 254 of the Constitution of India it has been found that ultimately if a statute is found in substance relating to a topic within the competence of a legislature, it should be held to be intra vires, even though it might incidentally trench on topics within its legislative competence. A portion of paragraph No.8 of the said judgment is relevant in this context to be extracted, which reads as follows:

> ".....It is, therefore, clear that only if the court finds that the provision in a particular statute framed by the State Legislature in pith and substance falls within an Entry in the Seventh Schedule over which the Parliament is competent to enact or any provision to an existing law with respect to one of the matters enumerated in List III, the question of repugnancy arises or needs to be considered. In other words, where a law passed by the State Legislature while being substantially within the scope of the Entries in List II entrenches upon any of

the Entries in List I or List III, the Constitutionality of the law has to be upheld by invoking the rule of pith and substance, if on an analysis of the provisions of the Act, it appears that by and large the law falls within the four corners of List II and the encroachment, if any, is purely incidental or inconsequential. This aspect has been clarified by the Apex Court in **M.Karunanidhi v. Union of India** [(1979) 3 SCC 431], the relevant extract of the judgment reads thus:

> "Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential."

86. So in effect the act of suspension of the license and registration of crime against the petitioner under Section 57 (a)and 56 (b() of the Abkari Act was upheld, though poly vinyl acetate was the material found in the toddy as per the analysis report. The power of Excise Commissioner under Rule 5 (19) of the Rules to cancel the licence has been upheld by the above cited decisions. So there also the legislative intend for ensuring supply of pure toddy in the toddy shops for consumption has been emphasised. So the above cited decisions reiterates that the Rule 5 (19) with regard to cancellation of license on violation of any of the Rules and Act has to be strictly construed.

87. The learned counsel for the petitioners would further contend about the dilution of the penal consequences in adding starch with toddy by a subsequent amendment by the Abkari Amendment Act, 2018. He would contend that as per the amendment, Sec.67A is amended by including the offence of mixing starch with liquor as Sec.57(aa) and it has been made compoundable of a fee of Rs.25,000/-. So adding

starch according to him has become a lesser offence and that would also be an aspect to be taken into account. In this context the learned counsel placed reliance on **Sridharan K. and Others v. Excise Commissioner (2018 KHC 5267).** In that decision this Court took a view that Government in its wisdom has found that mixing of starch with toddy need not be included with the serious offences of mixing other foreign ingredients with toddy and has given the offence separate status which does not entail a serious punishment. So the request made by the petitioners who were charged under Sec.57(a) before the Amendment Act of 2018 made a request for compounding of offence was directed to be considered though the offences were committed at a time when they were not compoundable in terms of Sec.67A. A direction was given that the applications for compounding submitted by the accused have to be considered by the appropriate authority. But the learned Senior Public prosecutor would submit that W.A.2454/2018 is pending against the above said judgment. So we are not making any further discussion on the basis of the above judgment. But we would also

like to point out that if at all by a subsequent amendment punishment of the offence has been reduced,that by itself will not be a ground for the petitioners herein to claim a benefit for seeking re-testing by forwarding 'B' sample for analysis. If at all a lesser punishment is prescribed by a subsequent amendment, that would entail the court usually to take that fact into account while awarding the punishment.

88. Learned counsel for the petitioners would contend that there is a clear stipulation as per Rule 8(2)(g) of the Rules with a small quantity of preservatives used shall also be forwarded separately along with the sample to the Chemical Examiner/authorized officer. But the report of the Chemical Examiner does not reveal the forwarding of preservative as contemplated under Rle 8(2) (g). So that would cause prejudice to the accused and non-forwarding of preservative would also leads to an inference of adding preservative in the sample and that would definitely affect the ultimate result of analysis.

89. But the learned Senior Public Prosecutor in this context produced copy of Form-8 memorandum

for perusal and would contend the sample has been sent in the prescribed format and it would clearly prove that package of Benzoic acid has also been forwarded to the Chemical Examiner's Laboratory and usually that would not find a place in the report of the Chemical Examiner which is also in a prescribed proforma. In view of the copy of Form-8 prescribed under Rule 8 produced from the side of the learned Public Prosecutor, we do not find any merit in the contention advanced by the learned counsel.

90. Based on the above discussion, reference is answered as follows:

> “Petitioners/accused have no legal or statutory right to make a request for sending 'B' sample for chemical analysis. The dictum laid down by this Court to the contrary in Girish Kumar v State of Kerala (2010 (3) KHC 171), Joshy George v State of Kerala (2011 (4) KHC 818), Rajappan and Another v State of Kerala (2012 (2) KHC 657), Harikrishnan R. v State of Kerala (2016 (4) KHC 57), Santhosh and Another v State of Kerala (2020 (1)

KHC 480), Saneesh v State of Kerala (2020 (1) KHC 289) and Vijayan v. State of Kerala (2020 (3) KLT 602) are held to be not good law. The principles laid down in Santhosh T.A.and Another v. State Of Kerala (2017 (5) KHC 107) is held to be the correct law. The findings in Sudhakaran and others v. State of Kerala (2011 (1) KHC 610) to the extent that the report of the Chemical Examiner in 'B' sample will not supersede the report of the Chemical analysis in sample 'A' is upheld. Since the direction of the learned Judge that which among the two reports are acceptable is left with Court is stated to be pending before the Apex Court, we are not making any further observation in that regard."

91. In view of the above finding, the relief sought by the petitioners to quash the final report in C.C.66/2016 since the result of 'B' sample would show that no starch is present on analysis is not sustainable in law and hence Crl.M.C. is hereby dismissed. Hence the judicial

First Class Magistrate Court-I, Sulthan Bathery is directed to proceed with C.C.66/2016 in accordance with law, as expeditiously as possible, since the case is of the year 2016.

92. In the result, reference answered accordingly and Crl.M.C dismissed.

Sd/-

A.HARIPRASAD,

Judge

sd/-

M.R.ANITHA

Judge

Mrcs/29.12.xx

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A	**CERTIFIED COPY OF THE CHEMICAL ANALYSIS REPORT DATED 24.06.2015 ISSUED BY THE 2ND RESPONDENT.**
ANNEXURE B	**ACCUSED FREE TRUE COPY OF THE CRIME AND OCCURRENCE REPORT DATED 28.07.2015.**
ANNEXURE C	**ACCUSED FREE TRUE COPY OF THE FINAL REPORT DATED 11.01.2016 RECEIVED FROM TRIAL COURT.**
ANNEXURE D	**ACCUSED FREE TRUE COPY OF THE CHARGE REPORT FILED BY THE EXCISE INSPECTOR, SULTHAN BATHERY EXCISE RANGE DATED 11.01.2016.**
ANNEXURE E	**CERTIFIED COPY OF THE CHEMICAL ANALYSIS REPORT OF SAMPLE "B" DATED 02.02.2016.**
ANNEXURE F	**TRUE PRINT OUT OF THE JUDGMENT PASSED BY THIS HON'BLE COURT IN CRIMINAL APPEAL NO. 203/2011 DATED 01.06.2017.**

RESPONDENTS' ANNESURES

ANNEXURE R1(A):	**TRUE COPY OF CMP.NO.4079/2015 FILED BEFORE THE MAGISTRATE COURT BY THE 2ND ACCUSED.**
ANNEXURE R1(B):	**TRUE COPY OF CMP NO.4079/2015 FILED BEFORE THE MAGISTRATE COURT BY THE 2ND ACCUSED.**