

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 28TH DAY OF OCTOBER 2020 / 6TH KARTHIKA, 1942

WP(C).No. 20480 OF 2020(S)

PETITIONER:

**K. FAIZEL, AGED 57,
RESIDING AT KALARIKKAL HOUSE, GANDHI ROAD,
CALICUT-673001.**

BY K.FAIZEL(PARTY IN PERSON)

RESPONDENTS:

- 1 THE KERALA STATE POLICE CHIEF,
VAZHUTHACAUD, TRIVANDRUM-695014.**
- 2 THE STATE OF KERALA,
REPRESENTED BY CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM-695001.**

BY SRI. SUMAN CHAKRAVARTHY, SENIOR GOVT. PLEADER

SRI. TEK CHAND SR. GOVERNMENT PLEADER

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 28.10.2020,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

J U D G M E N T

S. Manikumar, CJ

Instant writ petition is filed by Mr. K. Faizel, party-in-person, challenging the authority of Kerala State Police Chief, respondent No.1, to register a crime under the provisions of Kerala Abkari Act, 1077. He seeks for issuance of a writ of mandamus directing the 1st respondent, to restrain from registering a crime under the Abkari Act, 1077, by an FIR, as per Section 154 of Criminal Procedure Code, 1973, without complying Section 30 of the Abkari Act. He has also prayed to declare such FIRs as *non est*.

2. Facts leading to the filing of instant writ petition are that Kerala Abkari Act 1 of 1077 came into existence in the year 1077, to register a crime in respect of spurious liquor and other allied offences. By Exhibit-P1 S.R.O. No.321/1996 dated 29.03.1996, Government have authorised all the police officers, above the rank of Sub Inspector of Police, in charge of law and order, to exercise and discharge the powers under Sections 31 to 35, 38, 40 to 53 and 59 of the Abkari Act, 1077 (hereinafter referred to as, the 'Act').

3. Petitioner has contended that in Exhibit-P1, there is no provision to exercise the power under Section 30, for registering a crime against a person under the provisions of the Act, by invoking Section 154 of the Code of Criminal Procedure, 1973. The 1st respondent has no power to exercise Section 30, to register a crime under the Act.

4. Registering a crime, by invoking Section 154 of Criminal Procedure Code, is in violation of Section 30 of the Act. Exhibit-P1 S.R.O. No.321/1996 dated 29.03.1996 does not disclose the authority to register a crime under the penal provisions of the Act.

5. Petitioner has further stated that now, several cases are being registered by the 1st respondent under the Act. According to him, to register a crime under the Act, 1st respondent has to submit a written request before the learned jurisdictional Magistrate under Section 30 of the Act and if the averments and the documents are tenable to register a crime, the Court may take steps to arrest the person/s against whom, the allegation is levelled.

6. Petitioner has also stated that there is no legal sanction to supersede Section 30 of the Act by the 1st respondent, by invoking Section 30A, to register a crime (FIR) under Section 154 of the Cr.P.C. Thus, according to him, the 1st respondent is registering a crime under the Abkari Act, without any authority and is against the principles of natural justice.

7. Relying on the decision in **Gadde Ventateswara Rao v. Government of A.P. & Others** (AIR 1966 SC 828), petitioner has contended that if a penal provision or procedure is made on a certain matter, that matter is excluded from the general provision. That apart, he has relied on the decisions in **Jasbir Singh v. Vipin Kumar Jaggi & Ors.** [AIR 2001 SC 2734] and **P.V. Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda and**

another (AIR 2002 SC 2445). He has also relied on a decision of this Court in **Subash v. State of Kerala** [2008 (2) KLT 1047] and submitted that while dealing with Abkari offences, the special provisions made therein have to be strictly adhered to.

8. Based on the above, Mr. K. Faizel, party-in-person, made submissions.

9. Referring to the statutory provisions, both in the Code of Criminal Procedure, 1973 and the Act, and Exhibit-P1 notification dated 29.03.1996, Mr. Surin George Ipe, learned Senior Government Pleader, submitted that police officers are empowered to register cases under the Act.

10. Firstly, we shall consider what Exhibit-P1 notification dated 29.03.1996 states. Exhibit-P1 notification dated 29.03.1996 issued by the Secretary to Government, Taxes (G) Department, is extracted hereunder:

GOVERNMENT OF KERALA
Taxes (G) Department
Notification

G.O. (P) No.69/96/TD

Dated, Thiruvananthapuram, 29th March, 1996.

S. R. O. No.321/96.- In exercise of powers conferred by section 4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective Jurisdiction for the purpose of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers, in the sections aforesaid.

This notification shall come into force with immediate effect.

By order of the Governor

N.M. SAMUEL
Secretary to Government"

11. Now, let us consider the statutory provisions.

12. Kerala Abkari Act was passed by His Highness the [Maharaja] of Cochin on the 5th day of August, 1902, corresponding to the 31st day of Karkidakam, 1077. Section 3 of the Act speaks about interpretation and the same is extracted hereunder:

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

(1) xx xxx xxxxx

(2) **Abkari officer**:- "Abkari Officer" means the [Commissioner of Excise] or any officer or other person lawfully appointed or invested with powers under Sections 4 or 5.

[(2A) xx xxx xxxxx

(2B) xx xxx xxxxx

(3) **Commissioner**:- "Commissioner" means the officer appointed by the [Government] under Section 4, clause (a).

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

(5) xx xxx xxxxx

(6) **Abkari Inspector**:- "Abkari Inspector" means an officer appointed under Section 4, clause (d).

xxx xxxx

xxx xxxxx"

13. Chapter II of the Act deals with establishment and control. Section 4 of Chapter II reads thus:

"4. The Government may, by notification in the Gazette. -

(a) The Government may appoint an officer to control the administration of the Abkari Department:- Appoint an officer, who shall be styled the [Commissioner of Excise] and who shall, subject to the general control of the Government have [Control] of the administration of the Abkari Department and of the collection of the Abkari Revenue or of both;

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

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

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

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

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

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

14. Section 5 of the Act 1 of 1077 states that the Government may, from time to time, make rules and it reads thus:

"5. The Government may, from time to time, make rules. -

(1) Prescribing the powers and duties under this Act to be exercised

and performed by Abkari Officers of the several classes; and

(2) regulating the delegation by the Government or by the Commissioner of Excise of any powers conferred by this Act or exercised in respect of Abkari Revenue under any law for the time being in force.”

15. Section 5A of the Act speaks about the power of the Government to authorise officers to admit persons arrested to bail and it reads thus:

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

16. Section 30 of the Abkari Act, 1077 states that Magistrate may issue a search warrant on application and it reads thus:

“30. Magistrate may issue a search warrant on application: If the Commissioner of Excise or any Magistrate, upon information obtained and after such enquiry as he thinks necessary, has reason to believe that an offence under this Act has been committed, he may issue a warrant

for the search for any liquor, intoxicating drug, materials, stills, utensil, implement or apparatus in respect of which the alleged offence has been committed.

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

17. Section 30A of the Abkari Act states that abkari officers to have similar powers of police officers for the purpose of investigation of offences and it reads thus:

“30A. Abkari officers have similar powers of police officers for the purpose of investigation of offences. - For the purpose of investigation of offences under this Act, the abkari officers shall have the same powers of investigation which the police officers have under the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

18. Section 31 of the Act speaks about the power of certain Abkari and Police Officers to search houses etc., without warrant and it reads thus:

“31. Power to certain Abkari and Police Officers to search houses, etc., without warrant.- Wherever the Commissioner of Excise or any Abkari Officer not below such rank as may be specified by the Government in this behalf any Police Officer not below the rank of Sub Inspector or a Police Station Officer, has reason to believe that an offence under [***] this Act has been committed and that the delay occasioned by obtaining a search warrant under the

preceding section will prevent the execution thereof, he may, after recording his reasons and the grounds of his belief at any time by day or night, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act, and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act.”

19. Section 32 of the Act speaks about the power to enter and inspect place of manufacture and sale and it reads thus:

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

20. Section 34 of Kerala Abkari Act speaks about offenders may be arrested and contraband liquor, vehicles, etc. seized without warrant, and it reads as under:

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

(a) Seize and detain-

(i) any liquor or intoxicating drug;

(ii) any materials, still, utensil, implement or apparatus;

(iii) any receptacle or package or covering; and

(iv) any animal, cart, vessel or other conveyance, which he has reason to believe to be liable to confiscation under this Act;

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

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

21. Section 40 of the Act speaks about Procedure on arrest and seizure and it reads thus:

“40. Procedure on arrest and seizure. - (1) (a) Any Officer arresting a person under Section 31, Section 34 or Section 35 shall (we assume that the word “inform” is omitted to be added in this provision) him of the grounds for such arrest.

(b) Where an Abkari Officer arrests without warrant any person other than a person suspected of, or accused of, any non-

bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

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

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

- (a) to the Officer in charge of the nearest Police Station; or
- (b) to the Officer empowered under section 5A, or to the Abkari Inspector.

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

(5) The authority or Officer to whom any article is forwarded under sub section (2) or sub section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article."

22. Section 41 of the Act speaks about disposal of persons arrested and

it reads thus:

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

(2) Where a person accused of, or suspected of the commission of an offence punishable with imprisonment which may

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

23. Section 41A of Kerala Abkari Act speaks about the offences to be cognizable and non-bailable and it reads as under:

"41A. Offences to be cognizable and non-bailable. - (1)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974),-

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

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

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

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

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

24. Section 42 of the Act deals with bond of accused and sureties and it reads thus:

"42. Bond of accused and Sureties. - Before any person is released on bail on bond, in such sufficient but not excessive, sum of

money as the officer admitting him to bail things proper, shall be executed by such person and by one or more sureties conditioned that such person shall attend in accordance with the terms of the bonds and shall continue to attend until otherwise directed by the Abkari Inspector before whom he was bailed to attend or by the Magistrate, as the case may be:

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

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

25. Section 43 speaks about procedure in case of default of persons admitted to bail to appear before Abkari Inspector and it reads thus:

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

26. Section 44 of the Act speaks about Abkari Officers may summon witnesses and it reads thus:

"44. Abkari Officers may Summon witnesses.- Any Abkari Officer holding an inquiry [under the Act] may summon any person to appear before himself to give evidence on such enquiry or to produce

any document relevant thereto which may be in his possession or under his control;

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

27. Section 45 of the Act speaks about terms of summons and it reads as under:

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

28. Section 45 speaks about examination of witnesses to be dispensed with, and procedure in such cases and it reads thus:

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

29. Section 47 speaks about when attendance of witnesses to be dispensed with, and procedure in such cases and it reads thus:

"47. When attendance of witnesses to be dispensed with, and procedure in such cases. - It shall be lawful for an Abkari Inspector, instead of summoning to appear before him any

person who, from sickness or other infirmity may be unable to do so, or whom by reason of rank or sex it may not be proper to summon, to proceed to the residence of such person and thereto require him to answer such questions as he may consider necessary with respect to such inquiry; and such person shall be bound so to answer accordingly, and the provisions of Section 46 shall apply to such answers.”

30. Section 48 of the Act speaks about Abkari Inspector may summon persons suspected of offences against Abkari laws and it reads as under:

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

31. Section 49 of the Act speaks about law relating to criminal courts as to summoning of witnesses to apply and the same reads as under:

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

32. Section 50 of the Act states that the report of Abkari Officer gives jurisdiction to a competent magistrate and it reads thus:

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

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

33. Section 50A of the Act speaks about procedure to be adopted on receipt of report and it reads thus:

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

34. Section 51 of the Act speaks about powers of Abkari Inspector to cause attendance of witnesses before Magistrate and it reads thus:

“51. Powers of Abkari Inspector to cause attendance of witnesses before Magistrate. - When an Abkari Inspector forwards in custody any person accused of an offence under this Act to the Magistrate having jurisdiction to try the case or admits him to bail to appear before such magistrate, such officer shall

exercise all the powers conferred by the [Code of Criminal Procedure, 1973 (Central Act 2 of 1974)] on an Officer in charge of a police Station in respect to causing the appearance before such Magistrate of such persons acquainted with the facts and circumstances of the case as he considers it necessary that such Magistrate shall examine as witnesses for the prosecution of such case.”

35. Section 52 of the Act speaks about accused not to be detained in custody for a longer period than twenty four hours without special authority and it reads thus:

“52. Accused not to be detained in custody for a longer period than twenty four hours without special authority. -

No person accused or suspected of having committed an offence under this Act shall be detained for a longer period than under all the circumstances of the case is reasonable; and such period shall not, in the absence of a special order of a Magistrate, whether having jurisdiction to try the case or not exceed twenty-four hours, exclusive of the time necessary for the journey of such person to the place where an Abkari Inspector may be and from thence to the court having jurisdiction to try the case.”

36. Section 53 of the Act states that police to take charge of articles seized and it reads thus:

“53. Police to take charge of articles seized. - All Officers in charge of Police Stations shall take charge of and keep in safe custody pending the orders of a Magistrate or an Abkari Inspector, all articles seized under this Act which may be delivered to them and shall allow any Abkari Officer who may accompany such

articles to the Police Station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the Police Station.”

37. Chapter XII of the Code of Criminal Procedure, 1973 deals with information to the police and their powers to investigate. Section 154 of the Cr.P.C. speaks about information in cognizable offences and it reads thus:

“154. Information in cognizable cases.—(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 326-A, section 326-B, section 354, section 354-A, section 354-B, section 354-C, section 354-D, section 376, [section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376-DB], section 376-E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that—

(a) in the event that the person against whom an offence under section 354, section 354-A, section 354-B, section 354-C,

section 354-D, section 376, [section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376-DB], section 376-E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5-A) of section 164 as soon as possible.

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

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

37. Party in person has relied on Section 30 of the Act to contend that the 1st respondent has to submit an application to the learned jurisdictional Magistrate with all the documents and if the averments in the documents are tenable, then only the learned Magistrate can pass orders for arrest. Such a

contention is wholly fallacious and misconceived for the reason that Section 30 of the Act, does not speak of the arrest of a person alleged to have committed offences under the Act. The section only states as to when the Commissioner of Excise or any Magistrate can issue a search warrant. Section 30A of the Act has been introduced with effect from 07.12.2009, empowering the Abkari Officers to exercise the same powers of investigation which the police officers have under the Code of Criminal Procedure, 1973, meaning thereby that the the Abkari Officers under the Act can also exercise the same powers of investigation as that of police officers, under the Code of Criminal Procedure.

38. As per Section 34 of the Abkari Act, which speaks about offenders, who may be arrested and contraband liquor, vehicles, etc., seized without warrant, any Abkari Officer may arrest without warrant in any public thoroughfare or open place other than a dwelling house, any person found committing an offence punishable under this Act, and in any such thoroughfare or public place may-

(a) seize and detain-

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

(b) search any person, animal, cart, vessel or other conveyance, package, receptacle or covering upon whom or in or upon which he may

have reasonable cause to suspect any such liquor or intoxicating drug to be, or to be concealed.

39. Section 34 further states that the provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), shall apply insofar as they are not inconsistent with the provisions of this Act, to all arrests, searches, and seizures made under this Act.

40. Now, let us consider the decisions relied on by the petitioner as under:

(i) In **Suleman Rehiman Mulani & Another v. State of Maharashtra** [AIR 1968 SC 829], the Hon'ble Supreme Court had occasion to consider a case of conviction of an accused under Sections 5 and 89 of the Motor Vehicles Act, 1988. Said decision is inapposite to the case on hand.

(ii) In **Jasbir Singh v. Vipin Kumar Jaggi and others** reported in AIR 2001 SCC 2734, the Hon'ble Supreme Court has considered a case of immunity from prosecution, provided under Section 64 of the Narcotic Drugs and Psychotropic Substances Act, 1985, conferred on the Central Government vis-a-vis the power of the Court under Section 307 of the Cr.P.C., for grant of pardon to approvers. After considering various decisions, at paragraphs 38 & 39, the Hon'ble Apex Court held thus:

"38. There is no conflict between the powers exercised by the Court under Section 307 and by the Government under Section 64.

All that Section 64 does is to bring expressly to the fore the role which the Executive already has to play under Section 307. The only difference is in the authority which orders the pardon or the grant of immunity. Even under the Cr.P.C., 1898 it was held that the provisions of Section 337 and 338 of the Code contemplated concurrent jurisdiction in the Magistrate and the District Magistrate to tender a pardon. The powers were independent so that when the Magistrate rejected the grant of pardon under Section 337 it did not take away the power or jurisdiction of the District Magistrate to entertain a further application for grant of pardon.

39. Assuming there is a conflict between the powers of the Court under Section 307 Cr.P.C. and the power of the Central Government under Section 64 of the Act, then it must be held that Section 64 would prevail both on the ground that the Act being a special Act overrides the Cr.P.C. which is a general Act and also because the later enactment must prevail over the earlier one."

41. There cannot be any quarrel over the said provision of law. But, the decision in **Jasbir Singh** (cited supra) is not applicable to the case on hand, for the reason that in exercise of the powers under Section 4 of the Abkari Act, 1077, the Government have issued orders in G.O.(P) No.69/96/TD. Dated 29.03.1996, to act as Abkari Officers under the Act.

(iii) In **P. V. Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda and Another** reported in AIR 2002 SC 2445, the applicability of the Letters Patent Act of the Madras High Court, to a case from Calicut in Malabar district, which was in erstwhile Madras State, but later, formed part of the

Kerala State, after the States Reorganisation Act, 1956, by the Kerala High Court, was the issue. Going through the said decision, we find that it is not applicable to the case on hand.

(iv) In **Subash v. State of Kerala**, reported in (2008) 2 KLT 1047, the question considered was, whether a Magistrate can take cognizance of an offence under the provisions of the Abkari Act, 1 of 1077, on the basis of a report filed by an Assistant Sub Inspector of Police, who is not an Abkari Officer, as defined under the Act. Considering the facts and circumstances of the case, a Hon'ble Division Bench of this court held that, since the report was filed not by an Abkari Officer, cognizance of offence taken by the Magistrate was illegal and that the Magistrate ought to have discharged the accused. In that case, appeal was allowed, setting aside the the trial, conviction and sentence, and discharged the appellant therein, for taking cognizance of the case by the Magistrate, in the absence of report filed by the Abkari Officer, as defined under Section 5(2), who is specially empowered under Section 50 of the Abkari Act. The decision in **Subash** (cited supra) can be a precedent only for the issue raised and decided.

42. Taking cognizance by a learned Magistrate, in the absence of a report by an Abkari Officer, under Section 50 of the Act, is entirely different from registering a crime by an officer, empowered to do so, and to discharge the duties as per G.O.(P) No.69/96/TD. dated 29.03.1996.

43. None of the decisions relied on by the petitioner is applicable to the case on hand. By virtue of notification G.O.(P) No.69/96/TD. dated 29.03.1996 (Exhibit-P1), all police officers of and above the rank of Sub Inspector of Police in-charge of law and order and working in the General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective jurisdiction for the purposes of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act are appointed as Abkari Officers. Notification empowers the above officers to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers in the sections aforesaid.

In the light of the above discussion, the reliefs sought for by the petitioner cannot be granted. Writ petition fails and accordingly, dismissed.

Sd/-
S. MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P. CHALY
JUDGE

krj

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 COPY OF G.O.(P). NO.69/96/TD (SRO NO.321/96) DATED 29/03/1996.
- EXHIBIT P2 COPY OF THE EXTRACT OF SECTION 30 OF THE KERALA ABKARI ACT.
- EXHIBIT P3 COPY OF THE EXTRACT OF THE SECTION 154 OF CRIMINAL PROCEDURE CODE.
- EXHIBIT P4 COPY OF THE EXTRACT OF THE SECTION 30A OF THE KERALA ABKARI ACT.

RESPONDENTS' EXHIBITS:- NIL

//TRUE COPY//

P.A. TO C.J.