SUPREME COURT OF INDIA

K.R.SURAJ

Vs.

THE EXCISE INSPECTOR, PARAPPANANQADI & ANR. .. .

04/12/2000

(S.S.M.quadru, S.N.Phukan)

Appeal (crl.) 1054 2000

JUDGMENT

SYED SHAH MOHAMMED QUADRI, J.

Leave to appeal is granted in all the special leave petitions.

These appeals arise from judgments and orders of the High Court of Kerala at Ernakulam in Crl.M.C.Nos.2409/97, 431, 435, 444 and 448/98, 502, 503, 504 and 506/97, 4000, 2158, 2159/97, 791/98 and 788/98, passed on May 19, 1998. The common question that arises for consideration in these appeals, is: whether the impugned proceedings initiated against the appellants on the basis of samples collected from their shops under Section 31 of the Kerala Abkari Act, 1077 (before its amendment in 1997) are liable to be quashed under Section 482 of Code of Criminal Procedure. Briefly stated, the following facts give rise to these appeals. In 1993, under Section 31 of the Kerala Abkari Act, 1077 (for short, the Act), the Excise Inspectors of various ranges of Kerala State, collected samples from the liquor shops of the appellants who were licensed to carry on the business of liquor. The Excise Inspectors lodged complaints against the appellants under various provisions, including Section 57A, of the Act alleging, inter alia, that the samples show adulteration of liquor or intoxicating drugs with noxious substance. The learned Magistrates took cognizance of the offences. The appellants then moved the High Court by filing Crl.M.Cs. to have the proceedings, initiated on the report of the Excise Inspector, quashed under Section 482 of the Code of Criminal Procedure (for short, Cr.P.C.). They were dismissed by the High Court on the date noted above. It is from those orders that the present appeals arise. Mr.Mahendra Anand, the learned Senior Advocate, appearing for the appellants in Criminal Appeal Nosof 2000 [@ S.L.P. Nos.692-95/99 & 1708- 10/99], contended that on the date the Excise Inspector collected the samples from the shops of the appellanats under unamended Section 31 of the Act, he had no authority to do so in respect of the offence under Section 57A of the Act, so no prosecution for the said offence can be launched against them based on such collection of material. Mr.Anand has argued that if the last part of Section 31 is to be interpreted as authorising search for offences not mentioned in the first part then specifying offences in the first part will become redundant. His further contention is that the first part contains offences which are triable by a Magistrate whereas the offence under Section 57A is triable by a Court of Session for which no machinery was provided on its insertion in the Act till 1997 when Section 31 was amended, Section 50 of the Act was substituted and Section 50A was inserted to provide for trial of offence under Section 57A. As such before 1997 collection of samples under Section 31 and booking of cases for violation of Section 57A, not being within the

contemplation of the Act, was illegal. The proceedings are, therefore, liable to be quashed. After insertion of Section 50A, if the offence under Section 57A, alleged to have been committed in 1993, is permitted to be tried now, it would amount to giving retrospective effect to Section 50A which, in the absence of any specific provision, will be impermissible. Mr.Sukumaran, the learned senior counsel appearing for the appellants in Criminal Appeal Nosof 2000 [@ S.L.P. Nos.3312-15/98, 1536/99 & 153799] canvassed for the plea that collection of samples under Section 31 for prosecution under Section 57A was illegal. He invited our attention to Sections 63, 64 and 67 of the Act to urge that under the scheme of the Act before amendment of 1997, offences under the Abkari Act were minor offence triable by a Magistrate for which maximum punishment prescribed was less than two years and they were also compoundable; but an offence under Section 57A is a grave offence triable by Court of Session. He contended that a search qua offence Section 57A was different from a search qua any of the offences mentioned in the first part of Section 31 and, therefore, on the material collected during the search in respect of the said offences, no prosecution for violation of Section 57A can be launched. He submitted that amendments of some provisions including Sections 30 and 31 and insertions of some other provisions in the Act were purposive amendments to enable the Excise Officer to make search for all the offences and to provide machinery for trial of all the offences in the Act and they could not be treated as mere declaratory amendments. The learned counsel appearing for the appellants in other appeals adopted their arguments. Mr.Mukul Rohtagi, the learned Additional Solicitor General, contended that the last part of unamended Section 31 was not controlled by the first part of that section and that on the basis of collection of samples prosecution was properly initiated against the appellants who could raise all questions relating to absence of machinery, retrospectivity of Section 50A and other related aspects before the Trial Court and the High Court rightly declined to quash the proceedings. While adopting the arguments of the learned Additional Solicitor General, Mr.Rajiv Mehta, learned counsel appearing for the State of Kerala, added that Section 57A was inserted in the Act in 1984, and the offence was committed in 1993, therefore, the appellants were liable to be prosecuted for the said offence. On these submissions we shall ascertain the true position in the light of the relevant provisions of the Act. Sections 30 and 31 of the Act dealing with search and arrest as on the material date, read as under : 30. Magistrate may issue a search warrant on application: - 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 Section 55 or Section 57 or Section 58 of 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 of 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.

31. Power to certain abkari and police officers to search houses, etc. without warrant - Whenever the Commissioner of Excise or any Abkari Officer not below such ranks may be specified by the Government in this behalf or any Police Officer not below the rank of Sub-Inspector or a Police Station Officer, has reason to believe that an offence under Section 8 or Section 15C or Section 55 or Section 58B or Section 56A or Section 57 or Section 58 or Section 58A or Section 58B of 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.

Provided that every person arrested under this section shall be admitted to bail by such officer as aforesaid if sufficient bail be tendered for his appearance either before a Magistrate or before an Abkari Inspector as the case may be

From a perusal of the provisions, extracted above, it is clear that under Section 30 of the Act the Commissioner of Excise or any Magistrate was empowered to issue a warrant for the search of any liquor, intoxicating drug, materials, stills, utensil, implement or apparatus in respect of which he had, upon information obtained and after such enquiry as he might deem necessary, reason to believe that an offence under Sections 55, 57 or 58 of the Act had been committed. Section 31 authorised the Excise Commissioner or any of the officers specified therein including the Excise Inspector to search the houses without warrant, at any time by day or by night, when he had reason to believe that (a) an offence under Section 8 or Section 15C or Section 55 or Section 58B or Section 56A or Section 57 or Section 58 or Section 58A or Section 58B of the Act, had been committed and (b) the delay occasioned by obtaining a search warrant under Section 30 would prevent the execution thereof. In such a case, after recording his reasons and the grounds of his belief, he was enabled to enter and search, at any time by day or night, any place and seize anything found therein which he had reason to believe to be liable to confiscation under the Act, and to detain and search and, if he thought proper, to arrest any person found in such place whom he had reason to believe to be guilty of any offence under the Act. Whereas in Section 30 there was no mention of seizure of any material or arrest of any person, Section 31 specifically provided for seizure of anything liable to confiscation under the Act and detention and search as also arrest of any person found in the place of search whom the officer had reason to believe to be guilty of any offence under the Act. It may be pointed out here that though the power of search under Section 31 of the Act was available in respect of an offence for which warrant could be obtained under Section 30 of the Act yet it appears that before incorporation of the amendments in the Act in 1997, issuance of warrant of search was confined to offences under Sections 55, 57 and 58 whereas under Section 31 search could have been made in respect of any of the offences under Sections 8, 15C, 55, 55B, 56A, 57, 58, 58A or 58B of the Act. Such a situation arose because when Sections 8, 15C, 55B, 56A, 58A and 58B were inserted in Section 31 in 1967, the legislature did not amend Section 30 correspondingly. In the same way when Section 57A was inserted in the Act in 1984, Section 31 continued to remain unamended. Be that as it may, a close reading of Section 31 discloses that it had three limbs. The first limb specified the officers who should have reason to believe that an offence under any of the provisions enumerated therein had been committed; the second authorised any of the specified officers to enter any place and search without a search warrant under Section 30, at any time by day or night, if in the opinion of any of them the delay occasioned by obtaining such warrant would prevent the execution thereof and he had recorded the reasons and grounds of his belief and the third enabled him to seize anything found in the place of search which he had reason to believe to be liable to confiscation under the Act and to detain and search and if he thought proper to arrest any person found in such place whom he had reason to believe to be guilty of any offence under the Act. In the absence of a warrant of search, for entering any place what is necessary is existence of reason for any of the specified officers to believe that any of the offences mentioned therein has been committed. Once an officer gains entry in any place he can exercise any of the powers authorised in the third limb which are not confined to offences specified in the first limb. It is too banal a contention to merit acceptance that having seized an article liable to confiscation under the Act or having detained and searched a person found in such place who is believed to be guilty of an offence under the Act, no person can be prosecuted in respect thereof for an offence under the Act except for the offences mentioned in the first limb of Section 31. It is true

in Roy V.D. vs. State of Kerala [Criminal Appeal No.967 of 2000 @ SLP (Crl.) No.2705 of 1998 decided on November 10, 2000], we have observed that the life and liberty of an individual is so sacrosanct that cannot be allowed to be interfered with except under the authority of law. That is because under our Constitution there is no protection against search and seizure as is the case under the fourth and the fifth amendment to the U.S.Constitution. In M.P.Sharma vs. Satish Chandra, District Magistrate, Delhi & Ors. [1954 SCR 1077 at 1096], a Constitution Bench of this Court observed thus : A power of search seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.

In 1984, as noted above, a new offence was created under Section 57A which is in the following terms : Whoever possess any liquor or intoxicating drugs in which any substance referred to in sub-section (1) is mixed, knowing that such substance is mixed with such liquor or intoxicating drug shall on conviction be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and with life which may extend to twenty five thousand rupees.

We find no force in the contention that on and after insertion of Section 57A, no person could have been prosecuted thereunder due to absence of machinery under the Act as neither Section 31 authorised collections of samples nor Section 50 which dealt with offences triable by a Magistrate could have been pressed into service because offence under Section 57A is triable by a Court of Session. It is too plain to overlook that this Section was in force when samples were collected in 1993. We have held above that under unamended Section 31, on the basis of the samples collected from the shops of the appellants, the Excise Inspector could file report before the concerned Magistrate. It is true that Section 50 postulates trial by the Magistrate. But it must be borne in mind that Section 50 enjoins that upon receipt of a report from Excise Inspector the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if complaint had been made before him as prescribed in the Cr.P.C. On the report of the Excise Inspector in respect of the offence under Section 57A, the concerned Magistrate has to inquire into offence and commit the appellants to the Court of Session. On June 3, 1997, Sections 31 and 50 were amended and Section 50A was inserted in the Act, Section 31 as amended in 1997 is extracted hereunder : 31. Power to certain abkari and police officers to search houses, etc. without warrant:- whenever the Commissioner of Excise or any Abkari Officer not below such ranks may be specified by the Government in this behalf or 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.

From a compassion of unamended Section 31 and the amended Section 31, it is clear that under the unamended provision the power to enter and search any place, at any time by day or night, was confined to a case where any of the specified officers including the Excise Inspector had reason to

believe that any of the following offences had been committed - viz., Sections 8, 15C, 55, 58B, 56A, 57, 58, 58A and 58B which obviously did not include Section 57A. In any given case, whether the Excise Inspector had reason to believe that an offence was committed and that offence was one of the specified offences, are questions of facts which must be established in each case on evidence. Should the prosecution fail to prove these facts, the entry and search of any place per se would be illegal and so also the collection of samples by him and consequently the prosecution of the alleged offender will equally be illegal. But under the amended provision such a power extends to every case where the Excise Inspector has reason to believe that an offence under the Act has been committed. Even so on a valid entry and search of any place in exercise of power under unamended Section 31 of the Act, should an Excise Inspector find material suggestive of commission of an offence under the Act in addition to or instead of the specified offences, he can, on the basis of such material file a complaint/a report regarding commission of such an offence also in addition to or in lieu of the offences in respect of which search was made. It is, however, significant to note that under both the unamended provision as well as the amended provision of Section 31 conditions for exercising the powers of seizure and arrest remain unchanged -- the power to seize anything found therein is conditioned upon the specified officer including the inspector having reason to believe that it is liable to be confiscated under the Act. So also the power to arrest any person found in such place is conditional on his having reason to believe such person to be guilty of any offence under the Act. Thus, it is clear that the last limb of Section 31 was not controlled by the first limb of that section both before and after amendment of Section 31 of the Act. We have already referred to the substance of the unamended Section 50. The amended provision of Section 50 requires the Abkari Officer to forward to the concerned Magistrate a report as provided in Section 173(2) of Cr.P.C. on completing the investigation into the offence. Section 50A provides that the Magistrate shall inquire into such offence and commit to Court of Session if the offence is exclusively triable by a Court of Session or try the person accused thereof as if a case is instituted upon a police report as provided in Cr.P.C. The above examination of the relevant provisions demonstrates that before amendment of the aforesaid provision in 1997, the position was much the same except to the extent indicated above. The amendment of Sections 31 and 50 and insertion of Section 50A has not changed the law but has placed the matter beyond controversy. In this view of the matter the contentions that the offence under Section 57A could not have been tried before June 1997 for want of machinery under the Act and allowing the trial to proceed after the said date would amount to giving retrospective effect to Section 50A in the absence of specific provision to that effect, have to fail as being untenable. It is thus clear that, in the instant cases, on the basis of the samples of arrack collected while carrying out search under unamended Section 31, prosecution under Section 57A was rightly initiated by the Excise Inspector. Whether any ground in law existed to enter the shops and collect samples has to be established by the prosecution. In Roy V.D.s case (supra), the question we had considered, was: the effect of search and seizure conducted by an officer not empowered under the Narcotic Drugs and Psychotropic Substances Act, 1985. Therefore, the judgment in that case is of little assistance to the appellant as in these cases the point is different. From the above discussion, it follows that the question whether collection of samples of arrack by the Excise Inspector in these cases under unamended Section 31 was not unauthorised and was legal has to be established at the trial of the offence, therefore, it cannot be said that the High Court committed any illegality in not quashing the proceedings initiated in respect of the offence under Section 57A on the report of the Excise Inspector. The appeals are, accordingly, dismissed. Crl.A. No. .. of 2000[@ of S.L.P. (Crl.) NO.538/2000] This appeal is from the order of the Kerala High Court in Crl. M.C. No.497/2000 dated January 28, 2000 dismissing the said Criminal Miscellaneous Case following the order passed by the High Court impugned in the aforesaid appeals. It was contended that this appeal is different from the afore-mentioned appeals inasmuch as in the charge-sheet against the appellant only

Sections 57A and 56(b) of Abkari Act, 1077 are mentioned which are not among the provisions specified in the first limb of Section 31, therefore, the appeal has to be allowed. We are afraid, we cannot accede to the contention of the learned counsel. We have already held above that to authorise entry in and search of any place what is required to be shown is that the Excise Inspector had reason to believe that an offence under one of the Sections mentioned in the first limb of unamended Section 31 was committed to justify entry into the shops of the appellant, if on a valid entry samples were collected which indicate commission of any other offence in addition to or in lieu of the said specified offence, the Excise Inspector can file a report before the Magistrate in respect of the said offence. The prosecution has to make out a case under the first limb of Section 31, which can be determined only on examination of the Excise Inspector and decided on trial. In such a case if the proceedings are not quashed under Section 482 of the Code of Criminal Procedure by the High Court, it cannot be said that the High Court has committed any error in law. This appeal is also dismissed.