

**Binu Vs. Union of India, Represented by the Secretary, New Delhi and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/947540](http://sooperkanoon.com/947540)

**Court :** Kerala

**Decided On :** Jun-09-2011

**Judge :** V. Ramkumar

**Appeal No. :** W.P.(C).No.12918 of 2011(L)

**Appellant :** Binu

**Respondent :** Union of India, Represented by the Secretary, New Delhi and Others

**Judgement :**

“CR”

1. In this Writ Petition filed under Article 226 of the Constitution of India, the petitioner who is the first accused in Crime No. 140 of 2011 of Panangad Police Station for an offence punishable under Sec. 22 ( c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the N.D.P.S. Act for short) read with Sec. 34 I.P.C. challenges Ext.P3 notification dated 18-11-2009 as per which a "note" has been added with effect from 18-11-2009 as "Note - 4" to the notification published as S.O. 1055 (E) dated 19-10-2001. The said Note 4 reads as follows:-

"4. The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs,

including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content".

(F.No.662/33/2008-NC-1)

VIMALA BHAKSHI, Under Secretary".

### THE POLICE VERSION

2. The case of the prosecution as revealed by the final report in the above crime is as follows:-

On 24-01-2011 at about 7.20 p.m. the petitioner (A1) was found in possession of 842 ampules of buprenorphine injunction, 140 ampules of diazepam and 107 ampules of promethazine in an air bag kept beneath the cot in one of the bedrooms of a rented house belonging to one Sherif at Kaithavalappil in Nettoor where the petitioner is residing. The petitioner was arrested then and there. The case was detected by the 3rd respondent Sub Inspector of Police, Panangad on getting credible information before the detection. One Harshan (A2) and one Sibil (A3) who were allegedly found in the vicinity of the said house each carrying 25 ampules of diazepam for sale were also arrested. Each of the three accused persons were carrying mobile phones. A2 and A3 had cash worth Rs. 4000/- and Rs. 400/- respectively on their person. The contraband psychotropic substances, mobile phones and cash were seized under a search list.

3. The petitioner along with A2 and A3 (Harshan and Sibil) were produced before the Sessions Court, Ernakulam and were remanded to judicial custody. Applications for bail filed by the petitioner as CrI.M.C. 190 and 306 of 2011 before the Sessions Court Ernakulam were dismissed by that Court holding inter alia that the buprenorphine seized was of commercial quantity attracting Section 37 of the N.D.P.S. Act. Exts. P1 and P2 are the orders dismissing the bail applications. Subsequently the petitioner moved this Court seeking bail as per B.A. 1916 of 2011. The said application was dismissed by this Court also on 16-3-2011 holding inter alia that the psychotropic substances seized from the possession of the petitioner "attracted commercial quantity" which in turn attracted the rigour of Sec.

PETITIONER'S CASE

4. One ampule of buprenorphine injection contains only 0.6 mg. of buprenorphine in 2ml. of distilled water. The small quantity for buprenorphine as prescribed against Sl. No. 169 of the Notification dated 19-10-2001 is below 1 gram (i.e. below 1000 mg.) and its commercial quantity is above 20 grms. (i.e. above 20,000 mgs.) Going by the weight of buprenorphine content in the ampules, upto 1,666 ampules it will be small quantity only. Here, the total number of ampules of buprenorphine injection allegedly seized from the petitioner is only 842 which contain only 505.2 mgs. of buprenorphine which is below the small quantity of one gram. In order to get 20 gms. (i.e. 20000 mg.) of buprenorphine above which is the commercial quantity, there should be 33340 ampules. Likewise, the small quantity for diazepam which occurs at Sl. No. 194 of the Notification dated 19-10-2001 is below 20 grams (i.e. below 20000 mgs.) and its commercial quantity is above 500 grams. (i.e. above 500000 mgs.) 1 ml. of diazepam injection contains 5 mg of diazepam and one ampule of diazepam injection contains two ml. of the solution. This means that one ampule of diazepam injection contains 10 mg of diazepam. Therefore, even to constitute 20 grams (i.e. 20000 mgs.) of diazepam below which is the small quantity, there has to be 2000 ampules of diazepam injection. The total number of ampules of diazepam injection allegedly seized from the petitioner is only 140 which contain only 1400 mg. of diazepam which is far below the small quantity. In order to get 500 gms (i.e. 500000 mgs.) of diazepam above which is the commercial quantity, there has to be 50000000 ampules. 2ml. of buprenorphine injection weighs 2.18 grms. If Note 4 to the notification dated 19-10-2001 as inserted by Ext.P3 amendment is interpreted to mean that the entire weight of the contents of one ampule is to be reckoned for deciding the small quantity or commercial quantity, then even one ampule containing 2ml.of buprenorphine injection which is the minimum quantity of the injection available in the market would be above the small quantity. In other words, there will not be any small quantity for buprenorphine injection. Likewise, going by the Current Index of Medical Specialties (CIMS) which is a handbook published for the use of doctors, pharmacists, druggists and chemists, 1 ml. of diazepam injuncion contains 5 mg.

of the drug. If so, the total drug content in 140 ampules will be 1.40 grams ( $140 \times 2 \times 5 = 1400$  mgs.) which is small quantity, it being below 5 gms. *Shaji v. Kerala State* -ILR 2004 (2) Kerala 600 is the only decision in which a Division Bench of this Court held that buprenorphine dissolved in water, being a solution is a "preparation of psychotropic substance" within the meaning of Sec. 2 (xxiii) of the N.D.P.S. Act and, therefore, the weight of the entire contents of all the ampules has to be taken into account for deciding whether the seized material is small quantity or commercial quantity. The said decision was not followed by another Division Bench of this Court in *Siyad v. State of Kerala* - 2005 (4) KLT 590 wherein the decisions in *Ouseph v. State of Kerala* - (2004) 4 SCC 446, *Sajan Abraham v. State of Kerala* - 2004 (2) KLT 122 (SC) and *Hussain v. State of Kerala* (2000) 8 SCC 139 and entry No. 239 of the Notification dated 19-10-2001 were relied on to hold that the pure drug content of the seized material alone was to be reckoned for deciding whether what was seized was small quantity or commercial quantity . To the same effect is the decision of the Supreme Court in *Michel Raj v. Intelligence Officer* - 2008 (2) KLT SC and *State of N.C. T. of Delhi v. Ashif Khan* - (2009) 4 SCC 42. The Delhi High Court also has taken a similar view in *Mohd. Sayed v. Customs* - 2002 (4) Crimes 497 and *Ansar Ahmed etc. v. State (Govt of NCT of Delhi* -2005 (4) Crimes 598. Ext.P3 amendment inserting Note - 4 to the Notification dated 19-10-2001 has been brought about with a view to render the decision of the Apex Court in *Michel Raj's* case ineffective without removing, altering or neutralizing the legal basis of the judgment. It is not permissible since it amounts to legislative overruling of a binding judicial verdict.

(See *State of Maharashtra and Others v. Kumari Tanuja* -AIR (1999) SC 791). If the weight of the entire contents of the ampules is to be taken into account for deciding whether it is small quantity or commercial quantity then Entry No. 239 in the Notification dated 19-10-2001 will be rendered unworkable. The very purpose behind the Parliament coming out with a drastic amendment of the N.D.P.S. Act in the year 2001 was to give effect to the reformatory approach towards drug addicts so as to minimize their misery by reducing the rigour of the strict bail provisions and rationalising the sentence structure so as to ensure that drug addicts and those who commit less serious offences are not denied bail and are eventually sentenced to less severe punishment. All the decisions referred to above and

taking the same view have been rendered with the above legislative policy in mind . Apart from the fact that Ext.P3 notification is bad in law since it purports to defeat the interpretation given by the Supreme Court, it is also ultra vires the Constitution. Hence, this Court may issue a writ of certiorari quashing Ext.P3 notification dated 18-11-2009. STAND TAKEN BY THE UNION OF INDIA

5. A statement has been filed on behalf of the first respondent Union of India to the following effect:-

Under the N.D.P.S. Act, any mixture of one or more drugs in whatever physical state qualifies to be called a "preparation" as defined under Sec. 2 (xx) of the Act. The penalties under the N.D.P.S. Act appl not only to the pure drugs but also to their preparations. Hence, if a drug, say, heroin is mixed with, say, Bournvita or Milk Powder, such a mixture is a preparation under the N.D.P.S. Act and the person who possesses, sells etc. such preparation is also liable for punishment like a person possessing pure heroin. Subsequently, it was felt that a distinction need to be made between major traffickers on the one hand and petty offenders and drug addicts on the other and, therefore, a system of graded punishment was introduced through an amendment of the N.D.P.S. Act in the year 2001. The terms "small quantity" and "commercial quantity" have been defined under Sec. 2 (xxiii a ) and Sec. 2 (vii a) . The rigor of Sec. 37 has been extended only to offences involving commercial quantity. The Central Government has been given the full power to decide what quantity should be fixed as small quantity and commercial quantity for each of the drugs. The limits fixed by the Central Government can also be changed through notification without any formal amendment of the Act. The small and commercial quantities will vary with the nature of the drug since all drugs are not equipotent. While fixing the limits of various drugs the Central Government had the option to decide the quantity in terms of the pure drug content or in terms of the weight of the seized substance which contains the specified drug as a preparation. After taking into account all aspects of the matter the Government decided to notify the limits of various drugs not in terms of the pure drug content but in terms of the weight of the seized substance containing the specified drug as a preparation . There were two reasons for this. The first reason was that the drugs are never sold in their pure form . They are always used in

mixture (preparation). For instance, the street level purity of heroin is only about 5 to 10 percent. Secondly, most of the Forensic Laboratories have only the facility to test the presence or otherwise (qualitative test) of the drug in the form of preparation and do not have the equipments and the capability to test the purity i.e. the quality (qualitative test) of the drug in such form. If small and commercial quantities were to be notified in the form of pure drug content, then it would have become absolutely necessary to determine the purity of the seized drug which only a few laboratories in the country could do. If all the samples of drugs seized from the length and breadth of the country were to be sent to these laboratories, then it would clog them rendering their task difficult and time consuming. A practical way was to define small quantity and commercial quantity in terms of the total quantity of the preparations containing the specified drug. The threshold levels of small and commercial quantities under the notification dated 19-10-2001 have been kept fairly high.

For instance, small quantity of heroin is 5 gms. which if taken as only the pure drug content, will translate into 100 gms. of street level heroin. At the rate of 0.25 grams of street level heroin mixture the said 100gms of street level heroin can yield about 400 doses of heroin. It is not the intention of the Government to send a person who possesses or sells heroin equivalent to 400 doses to a mere six months imprisonment. Anyone selling 400 doses of street level heroin deserves not just a minor punishment of six months but at least 10 years. It was since the weight of the small and commercial quantities of the drugs had been linked to the preparations and not the pure drug content that in the notification dated 19-10-2001 Note - 2 was appended. The said note reads as follows:

"The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of Note - 1 above".

Thus it is evident that the same threshold levels apply not only to drugs but also to their preparations. Unfortunately, Note-2 to the above notification does not appear to have been brought to the notice of the Hon'ble Supreme Court in the case of Micheal Raj v. N.C.B. As a result, the Hon'ble Supreme Court held that only the pure drug content should be considered to decide whether the quantity of the drug

seized is small or commercial quantity. Applying the ratio in the above Judgment if 100 grams of street level heroin (400 doses) is seized from a person and if a sample therefrom is found to be only 5% pure, then it should be reckoned as 5 grams and not 100 gms and consequently it would be treated as small quantity in which case the punishment awarded cannot exceed six months. Results of quantitative test which will determine the exact quantity of the pure drug in the seized substance will take several months. Applying the ratio laid down by Supreme Court it cannot be said whether the quantity of the drug is small quantity or commercial quantity without completing the qualitative test. Taking advantage of the delay in completing the qualitative test, the accused persons in commercial quantity seizures are now arguing that the special provisions in Sec. 36 A (4) and Sec. 37 of the N.D.P.S. Act do not apply to them. In fact, those special provisions are themselves illustrative of the fact that the Government's intention while issuing the notification was not to link the quantity to the pure drug content but to the quantity of the seized substance which contains the drug. After the judgment of the Hon'ble Supreme Court in Michael Raj, the Government had two options. The first was to accept that only the pure drug content should be reckoned and accordingly revise the entire notification fixing lower threshold limits both for small and commercial quantities. The other alternative was to make it abundantly clear that the quantity referred to in the notification relates to the quantity of the seized preparations containing the drugs and not the pure drug content. The Government chose the second alternative by adding Note-4 through Ext. P3 notification. This notification only clarifies what was already indicated in the existing Note - 2 to the said notification. In view of this legal position, the challenge against Ext.P3 notification cannot succeed. This Writ Petition, may, therefore, be dismissed with costs.

#### STAND TAKEN BY THE STATE GOVERNMENT

6. The petitioner and accused Nos. 2 and 3 are not drug addicts but were possessing the psychotropic substances for the purpose of sale. Besides clarifying that the small quantity and commercial quantity applies to the preparations and not merely the pure drug content, the Central Government had the power under Sec. 4 of the N.D.P.S. Act to issue Ext.P3 notification for preventing and combating the

abuse of and illicit traffic in such noxious substances.

7. I heard Advocate Sri. T.D. Robin, the learned counsel appearing for the petitioner, Adv. Sri. P. Parameswaran Nair, Assistant Solicitor General of India appearing for the Union of India and Adv. Sri. C.S. Hrithwik, the learned Public Prosecutor who defended the State. All the above advocates made their submissions before me in support of the respective stand taken by them as above.

### **JUDICIAL EVALUATION**

8. After giving my anxious consideration to all the aspects of the matter, I am afraid that I find myself unable to agree with the arguments addressed on behalf of the petitioner. On the contrary, I am inclined to fully accept the contentions urged on behalf of the respondents, particularly, the Union of India.

9. Both diazepam and buprenorphine which were allegedly seized from the petitioner are psychotropic substances. The words "Psychotropic Substances" are defined under Sec. 2 (xxiii) of the N.D.P.S. Act as follows:-

*"Psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;"*

Thus, not only the psychotropic substances by themselves but also their salts and preparations if included in the list of psychotropic substances specified in the Schedule to the N.D.P.S. Act, will be psychotropic substances. Diazepam is Sl. No. 43 and Buprenorphine is Sl. No. 92 in the Schedule to the Act. Sl. No. 110 in the Schedule is " Salts and preparations of above". This means, salts and preparations of all the psychotropic substances specified as items 1 to 109 in the Schedule are also psychotropic substances. The expression "preparation" has been defined under Sec. 2 (xx) as follows:-

*""preparation" in relation to a narcotic drug or psychotropic substance, means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;"*

Thus, a preparation includes one or more narcotic drug or psychotropic substance either in dosage form or in any solution or mixture. But when we come to the definition of "narcotic drug" under Sec. 2 (xiv) of the N.D.P.S. Act, it reads as follows:-

*"Narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;"*

Unlike the definition of "psychotropic substance" the definition of "narcotic drug" does not by itself take in salts or preparations of any of the 5 drugs enumerated therein, namely:-

- i) Coca leaf
- ii) Cannabis (hemp)
- iii) Opium
- iv) Poppy straw
- v) Manufactured drug

But each of the above 5 drugs are separately defined under the Act. The definitions of some of the aforesaid drugs each of which is a narcotic drug, include either their salts or preparations or mixtures. (See for instance Sec. 2 (iii) (a) ; Sec. 2 (iii)(c); 2 (vi) (b); Sec. 2 (v) (d) ; Sec.2(xi)(b); Sec. 2 (xv) (b) and 2 (xvi)(e). Under 2 (xi) of the Act the Central Government is given the power to declare by notification in the Official Gazette any other narcotic substance or preparation to be a manufactured drug. The following break-up chart will properly illustrate the concept of narcotic drug and psychotropic substance under the N.D.P.S. Act.

## **NARCOTIC DRUG- Section 2 (xiv)**

**means:**

### P E N A L

### P R O V I S I O N:(1)

Section 16 Coca leaf - Sec. 2(vi) means

a) leaf of the coca plant (any species of the gen other ecgonine alkaloids have not been remove

b) any mixture thereof, with or without any neutr containing 0.1 % or less of cocaine

(2)

Cannabis (Hemp) - Sec. 2(iii) means:

Section 20(b) (ii) ..... a) Charas i.e. separated resin in any form from cannabis plant and includes hashish oil or liquid hashish

Section 20 (b)(ii) ..... b) Ganja i.e. flowering or fruiting tops of cannabis plant (seeds and leaves exclude)

Section 20 (b) (ii) ..... c) any mixture of (a) or (b) above with or without any neutral material or any drink prepared therefrom

(3)

Section 18 Opium-Section 2(xv) means:

a) coagulated juice of opium poppy (plant of the phenanthrene alkaloid can be extracted.

b) any mixture of (a) with or without any neutral containing 0.2% or less of morphine.

(4)

Section 15 Poppy Straw-Section 2 (xviii) means:

all parts (except the seeds ) of opium poppy

(5)

Section 21 Manufactured drug-Section 2 (xi) means

a) i) All coca derivatives - means:

Section 2(v) a) crude cocaine

b) ecgonine and its derivatives

c) cocaine and its salts

ii) Medicinal Cannabis-

or

Medicinal hemp-Sec.(xii) means:

any extract or tincture of cannabis (hemp)

iii) Opium derivatives - Section 2 (xvi) means:

1) Medicinal opium i.e. opium adapted for medical use as per Indian pharmacopoeia in powder, granulated, mixed or other forms

(Section 17) ..... 2) Prepared opium i.e. extract suitable for smoking and the dross of other residue after opium is smoked

3) Phenanthrene alkaloi i.e. morphin, codeine, thebaine and their salts

4) Diacetylmorphine i.e. diamorphine (BROWN SUGAR), heroine and its salts

5) All preparations containing discetylmorphine or containing more than 0.2% of morphine.

Section 21 b) Any other narcotic substance or preparation which the Central Government by notification declare to be a manufactured drug.

Section 16 **COCA PLANT** - Sec. 2 (vii) means the plant of any species of the genus Erythroxylon

Sec. 20(a) (i) **CANNABIS PLANT** - Sec. 2 (iv) means any plant of the genus Cannabis

Sec. 18 **OPIUM POPPY** - Sec. 2 (Xvii) means the plant of species Papaver

Sec. 22 **PSYCHOTROPIC SUBSTANCE** -Sec. 2 (xxiii) means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substance specified in the Schedule.

Strictly speaking, coca plant, cannabis plant and opium poppy do not come under the definition of "narcotic drug" under Sec. 2 (xiv). But Sec.8 of the Act prohibits the cultivation of these plants and Secs. 16, 20(a)(i) and (xviii) provides for the punishment for cultivating coca plant, cannabis plant and opium poppy respectively. After it came into force on 14-11-1985, the N.D.P.S. Act underwent drastic amendment in the year 1989 as per Central Act 2 of 1989 with effect from 29-5-1989. Except in the case of small quantity of narcotic drugs and psychotropic substances all other offences such as cultivation of coca plant, cannabis plant, opium poppy and production, manufacture, possession, sale, purchase, transport, warehousing, user, consumption, import inter-state, export inter-state, import into India, export from India or transshipment of any narcotic drug or psychotropic substance in contravention of the prohibition contained under Sec. 8 of the N.D.P.S. Act was sought to be tried by Special Courts and was sought to be punished with stringent penalty of not less than 10 years of rigorous imprisonment and fine of not less than Rs. 1 lakh. However, the provisions of the N.D.P.S. Act were further amended with effect from 2-10-2001 by Amending Act 9 of 2011 which rationalised the structure of punishment under the Act by providing graded sentences linked to the quantity of narcotic drug or psychotropic substances in relation to which the offences are committed. The application of the strict bail provisions was also restricted to those offenders who are accused of offences punishable under Sections 19, 24, 27 A and also for offences involving commercial quantity. The expressions "small quantity" and "commercial quantity" were separately defined. Under the rationalised sentencing structure the punishment would vary depending on whether the quantity of the offending material was small

quantity or commercial quantity or something in between (See Basheer @ N.P. Basheer v. State of Kerala - (2004) 3 SCC 609). The graded sentence structure linked to the quantity of the narcotic drugs and psychotropic substances is given below in tabular form:-

| Sl.No | NARCOTIC DRUG                             | PUNISHMENT                                                            |                                                                    |                                                                                                                                |
|-------|-------------------------------------------|-----------------------------------------------------------------------|--------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|
|       |                                           | Small quantity (a)                                                    | Intermediate quantity(b)<br>(More than (a) and less than (c)       | Commercial quantity                                                                                                            |
| 1     | Poppy straw - S. 2 (xviii)                | R.I. upto 6 months and /or fine upto Rs. 10,000/- Sec. 15 (a)         | R.I. upto 10 years AND fine upto Rs. One lakh Sec. 15 (b)          | R.I. for not less than 10 years but up to 20 years and fine not less than Rs.two lakhx or more S. 15 (a)                       |
| 2     | Prepared opinion S.2 (xvi) (b)            | R.I. upto six months and/ or fine up to Rs. 10,000/- S. 17 (a)        | R.I. up to 10 years AND for up to Rs. One lakh Sec. 17 (b)         | R.I. for not less than 10 years but up ot 20 years AND fine not less than Rs. One lakh but up to Rs.2 lakhs or moreS. 17 (a)   |
| 3     | Opium (S.2(xv) and opium poppy (S.2(xvii) | -do-Sec. 18 (a)                                                       | -do-Sec. 18                                                        | -do-Sec 18 (b)                                                                                                                 |
| 4     | Cannabis (Hemp) - Sec.2 (iii)             | R.I. up to 6 months and/or fine up to Rs. 10,000/-Sec. 20 (b) (ii)(A) | R.I. up to 10 years AND fine up to Rs.one lakhSec. 20 (b) (ii) (B) | r.I.not less than 10 years but up to 20 years AND fine not less than Rs. 1 lakh but up to Rs. 2 lakhs or moreSec. 20(b)(ii)(C) |

|    |                                                                     |                                                                                                                                       |                                                           |                                                                                                               |
|----|---------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|---------------------------------------------------------------------------------------------------------------|
| 5  | Manufactured drugs and preparation Sec. 2 (xi) read with Sec. 2(xx) | -do-Sec. 21(a)                                                                                                                        | -do-Sec. 21 (b)                                           | -do-Sec. 21                                                                                                   |
| 6  | Coca plant and leaves S. 2 (iv)                                     | <b>R.I. up to 10 years and/or fine up to Rs. One lakh - Sec. 16</b>                                                                   |                                                           |                                                                                                               |
| 7  | Embezzlement of opium by cultivator                                 | <b>R.I. for not less than 10 years but up to 20 years AND fine not less than Rs. One lakh but up to Rs. 2 lakhs or more - Sec. 19</b> |                                                           |                                                                                                               |
| 8  | Cannabis plant S.2 (iv)                                             | <b>R.I. Up To 10 Years AND fine up to Rs. One lakh Sec. 20(a(i))</b>                                                                  |                                                           |                                                                                                               |
|    | <b>PSYCHOTROPIC SUBSTANCE</b>                                       | <b>SMALL QUANTITY</b>                                                                                                                 | <b>INTERMEDIATE QUANTITY</b>                              | <b>COMMERCIAL QUANTITY</b>                                                                                    |
| 9  | PSYCHOTROPIC SUBSTANCE                                              | R.I. Up to 6 months and/or fine up to rs. 10,000/- (a)-Sec. 22(a)                                                                     | R.I. up to 10 years AND fine up-to Rs.one lakhSec. 22 (b) | <b>R.I. for not less than 10 years AND fine not less than Rs. 1 lakh but up to Rs. 2 lakhs or moreSec. 22</b> |
|    | <b>COMMON TO BOTH</b>                                               |                                                                                                                                       |                                                           |                                                                                                               |
| 10 | Illegal import or export of narcotic drug or psychotropic substance | -do-Sec. 23 (a)                                                                                                                       | -do-Sec. 23 (b)                                           | -do-Sec. 23                                                                                                   |
| 11 | External dealings in contravention of Sec. 12                       | <b>R.I. for not less than 10 years but up to 20 years and fine not less than Rs. One lakh but up to Rs. 2 lakhs or more- sec. 24</b>  |                                                           |                                                                                                               |

|           |                                                                                                                                            |                                                                                                                           |
|-----------|--------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| <b>12</b> | Allowing premises, animal or conveyance for commission of an offence                                                                       | <b>Same punishment as that prescribed for the offence - Sec. 25</b>                                                       |
| <b>13</b> | For contravention of an order under Sec. 9 A                                                                                               | <b>R.I. up to 10 years AND fine up to Rs. Onelakh or more - Sec. 26</b>                                                   |
| <b>14</b> | For consumption of cocaine, morphine, dicetyl morphine or any other narcotic drug or psychotropic substance notified by Central Government | <b>R.I. up to one year and/or finr up to Rs. 20,000/- Sec. 27 (b)</b>                                                     |
| <b>15</b> | For consumption of a narcotic drug or psychotropic substances other than those specified above                                             | Imprisonment up to 6 months and/or fine up to Rs. 10,000/- Sec. 27 (b)                                                    |
| <b>16</b> | For financing illicit traffic and harbouring offenders                                                                                     | R.I. for not less than 10 years but up to 20 years AND fine not less than Rs. One lakh but up to 2 lakhs or more Sec.27 A |
| <b>17</b> | For attempts to commit offences                                                                                                            | Same punishment as is provided for the offence Sec. 28                                                                    |
| <b>18</b> | For abetment and Criminal conspiracy                                                                                                       | -do- Sec. 29                                                                                                              |

|           |                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                        |  |  |  |  |
|-----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|--|
| <b>19</b> | For preparation to commit an offence by means of omission or commission                                                                                                                                                                                                             | Not less than one half of the minimum mandatory punishment for the offence, but up to one half of the maximum punishment for the offence - Sec. 30                                                                     |  |  |  |  |
| <b>20</b> | For subsequent offences                                                                                                                                                                                                                                                             | R.I. for not less than one half of the mandatory minimum, if any 6 but up to one half of the maximum AND fine not less than one half of the mandatory minimum, if any but up to one half of the maximum or moreSec. 31 |  |  |  |  |
| <b>21</b> | For subsequent conviction for specified quantity or narcotic drugs/psychotropic substances for a person who has been earlier convicted for an offence pertaining to Secs. 19, 24 and 27 A or for offences involving commercial quantity of any narcotic drug/psychotropic substance | Death penaltySec. 31 A                                                                                                                                                                                                 |  |  |  |  |
| <b>22</b> | For offences for which no punishment is provided                                                                                                                                                                                                                                    | Imprisonment up to six months and/or with fine Sec. 32                                                                                                                                                                 |  |  |  |  |
|           |                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                        |  |  |  |  |

Factors to be taken into account by the Court while imposing a punishment higher than the minimum sentence of imprisonment or fine.

Sec. 32 B of the Act reads as follows:

"32 B - Factors to be taken into account for imposing higher than the minimum punishment - Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the Court may, in addition to such factors as it may deem fit, take into account the following factors imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely;-

- a) the use or threat of use of violence or arms by the offender
- b) the fact that the offender holds a public office and that he has taken advantage of that in committing the offence;
- c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence
- d) the fact that the offence is committed in an educational institution or social service of or in the immediate vicinity of such institution or faculty or in other place to which is children and students resort for educational sports and social activities.
- e) the fact that the offender is involved in other illegal activities facilitated by commission offence.

The Central Government thereafter issued a notification as S.O. 1055 (E), dated 19-10-2001 and published in the Gazette of India dated 19-10-2001 fixing the small quantity and commercial quantity of narcotic drugs and psychotropic substances. The small and commercial quantities of certain narcotic and psychotropic substances as notified above are given below:-

**SMALL AND COMMERCIAL QUANTITIES OF CERTAIN NARCOTIC AND PSYCHOTROPIC SUBSTANCES**

| SI. NO. | NARCOTIC DRUG                                               | SMALL QUANTITY      | COMMERCIAL QUANTITY | ITEM NO. IN THE NOTIFICATION DATED 19-10-2001 |
|---------|-------------------------------------------------------------|---------------------|---------------------|-----------------------------------------------|
| 1       | Ganja                                                       | Less than 1000 gms. | more than 20 Kgs.   | 55                                            |
| 2       | Gannabis other than ganja (Cannabis resin, Charas, Hashish) | -do- 100 gms.       | -do- 1 kg.          | 23                                            |
| 3       | Coca Leaf                                                   | -do- 100 gms        | -do- 2 kgs.         | 26                                            |
| 4       | Opium and any preparation containing opium                  | -do- 25 gms         | -do- 2.5 kgs.       | 92                                            |
| 5       | Poppy Straw                                                 | -do- 1000 gms.      | -do- 50 kgs.        | 110                                           |
| 6       | Manufactured drug                                           |                     |                     |                                               |
|         | a) Cocaine                                                  | -do 2gms.           | -do- 100gms.        | 27                                            |
|         | b) ecgonine and its derivatives                             | -do- 2gms.          | -do- 50 gms.        | 47                                            |
|         | c) extracts and tinctures of cannabis                       | -do- 100 gms.       | -do- 1 kg.          | 23                                            |
|         | d) opium derivatives other than heroin, morphine            | -do- 5 gms          | -do- 250gms         | 93                                            |
|         | e) Heroin                                                   | -do- 5 gms          | -do- 250gms         | 56                                            |
|         | f) morphine                                                 | -do- 5 gms          | -do- 250gms         | 77                                            |

|    |                                                                 |                       |                            |                                                      |
|----|-----------------------------------------------------------------|-----------------------|----------------------------|------------------------------------------------------|
|    | g) Pentavalent nitrogen morphine                                | -do- 2 gms            | -do- 50gms                 | 78                                                   |
|    | h) Codeine                                                      | -do- 2 gms            | -do- 1gms                  | 28                                                   |
|    | i) Cocaine                                                      | -do- 2 gms            | -do- 100gms                | 27                                                   |
|    | j) Ecgonine                                                     | -do- 2 gms            | -do- 50gms                 | 47                                                   |
|    | k) preparation made from the extract or tincture of Indian Hemp | -do- 5 gms            | -do- 100gms                | 111                                                  |
|    | <b>PSYCHOTROPIC SUBSTANCE</b>                                   | <b>SMALL QUANTITY</b> | <b>COMMERCIAL QUANTITY</b> | <b>ITEM NO. IN THE NOTIFICATION DATED 19-10-2001</b> |
| 1  | Amphetamine                                                     | -do- 2gms             | -do- 50 gms                | 152                                                  |
| 2  | Diazepam                                                        | -do- 20 gms.          | -do- 500 gms.              | 194                                                  |
| 3  | Flurazepam                                                      | -do- 5 gms.           | -do- 100 gms.              | 203                                                  |
| 4  | Haslzeepam                                                      | -do- 20 gms.          | -do- 500 gms.              | 205                                                  |
| 5  | Ketazolam                                                       | -do- 10 gms.          | -do- 250 gms.              | 207                                                  |
| 6  | Lefetamine                                                      | SPA -do- 10 gms.      | -do- 200 gms.              | 208                                                  |
| 7  | Loprazolam                                                      | -do- 5 gms.           | -do- 100 gms.              | 209                                                  |
| 8  | Lorazepam                                                       | -do- 10 gms.          | -do- 250 gms.              | 210                                                  |
| 9  | Phenobarbital                                                   | -do- 20 gms.          | -do- 500 gms.              | 227                                                  |
| 10 | Tidigesic (Buprenorphine)                                       | -do- 1 gm             | -do- 20 gms.               | 169                                                  |

Sl.No. 239 of the Notification dated 19-10-2001 reads as follows:-

| Sl.NO | Name of Narcotic Drug and Psychotropic Substance(International non- proprietary name (INN)        | Other non-proprietary name | Chemical Name | Small Quantity(in gm.)                                                                                                                                                  | Commercial Quantity (In gm./kg.)                                                                                                                                             |
|-------|---------------------------------------------------------------------------------------------------|----------------------------|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1     | 2                                                                                                 | 3                          | 4             | 5                                                                                                                                                                       | 6                                                                                                                                                                            |
| 239   | Any mixture or preparation that of with or without a natural material, of any of the above drugs. | .....                      | .....         | Lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture. | Lesser of the Commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture. |

Reliance placed by the petitioner on Serial No. 239 above to contend for the position that the said item will become illusory if the weight of the entire preparation is reckoned, overlooks the fact that Sl. No. 239 will be attracted only if the preparation contains at least two or more narcotic drugs or psychotropic substances. Otherwise there cannot be lesser of the quantities as indicated by columns 5 and 6 above. I am fortified in this view by the decision of the Delhi High Court in *Ansar Ahmed v. State (Govt. of NCT of Delhi)* - 2005 (4) Crimes 598 - Para7. The Division Bench of this Court in *Siyad v. State of Kerala* - 2005 (4) KLT 590 had overlooked the above aspect while refusing to follow the earlier Division

Bench decision in Shaji v. State of Kerala - 2004 (3) KLT 270. At the foot of the notification dated 19-10-2001 there were three Notes prior to Ext.P3 Notification as per which one more Note was added with effect from 18-11-2009. The three Notes which were already there read as follows:-

Note:-1. The small quantity and the commercial quantity given against the respective drugs listed above apply to isomers within specific chemical designation, the esters, ethers and salts of these drugs, including salts of esters, ethers and isomers; whenever existence of such substance is possible.

2. The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of note 1 above.

3. "Small Quantity" and "Commercial Quantity" with respect to cultivation of opium poppy is not specified separately as the offence in this regard is covered under clause (c) of Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

Note-2 above clearly states that the quantities shown against the respective drugs listed in the notification will also apply to the preparations. Even without the said Note, if we go by the definition of psychotropic substances as contained in Sec. 2 (xxiii) read with Sl.No. 110 of the Schedule to the N.D.P.S. Act, it will be crystal clear that preparations of psychotropic substances are also treated on par with the particular psychotropic substance. It was to clarify matters beyond any doubt that the Central Government came out with Note - 4 on 18-11-2009 to make it abundantly clear that the small and commercial quantities fixed under the earlier notification dated 19-10-2001 will apply not merely to the pure drug content but also to the entire preparation. Supposing the preparation is a homogeneous mixture of 4 gms of heroin (diacetylmorphine) and 300 gms of milk powder, Every pinch taken from such mixture will contain the proportionate quantity of heroin. Likewise, every drop of a preparation containing a homogeneous solution of 19 gms. of diazepam dissolved in one litre of distilled water weighing more than 500 gms. Will contain proportionate quantity of diazepam. If such preparations are to be treated as small quantities by looking into the pure drug content alone of the narcotic drug or psychotropic substance, as the case may be, then it will be doing

violence to the plain meaning of the expressions employed by the legislature and ignoring what is perceivably commercial quantity. The under-equipped lab facilities and the delay in getting the reports in thousands of cases highlighted by the first respondent also cannot be overlooked. In the case of brown sugar i.e. heroin which is diacetylmorphine, being an "opium derivative" defined under Sec. 2 (xvi) of the Act, it is a "manufactured drug", the possession of which is punishable under Sec. 21 of the Act. Eventhough the definition of "narcotic drug" does not take in preparations, as already mentioned, the definitions of some of the drugs constituting "narcotic drugs" take in preparations. Sec. 2 (xvi) (e) shows that all preparations containing diacetylmorphine will also fall under "opium derivative" which in turn is a "manufactured drug" which in turn is a "narcotic drug". Thus, any mixture or solution or dosage form containing heroin and answering the definition of "preparation" will also attract Sl. No. 110 of the Schedule to the Act and Note - 2 as well as Note-4 to the Notification dated 19-10-2001 as amended by Ext.P3 notification. 10. Hussain v. State of Kerala - (2000) 8 SCC 139; Ouseph v. State of Kerala - (2004) 4 SCC 446; Sajan Abraham v. State of Kerala - 2004 (2) KLT 122 (SC) ; Micheal Raj v. Intelligence Officer - 2008 (2) KLT 36 (SC) and State of N.C. T. of Delhi v. Ashif Khan @ Kalu - (2009) 4 SCC 42 were all decided without noticing the fact that as per the definition of psychotropic substance itself, any preparation containing the substance is also a psychotropic substance and without advertng to Sl. No. 110 of the Schedule to the Act and to Note - 2 of the Notification dated 19-10-2001. That apart, in Hussain and Sajan Abraham the quantities of buprenorphine were found to be meant for personal medical use and falling under the proviso to Rule 66 (2) of the Narcotic Drugs and Psychotropic Substances Rules, 1985. I am, therefore, of the considered view that any preparation weighing more than the quantity prescribed under column 6 of the Notification dated 19-10-2001 containing the relevant Narcotic Drug or Psychotropic substance of whatever potency it may be, will fall within the limits of commercial quantity attracting the rigour of Sec. 37 (i) (b) of the Act. I am fortified in this conclusion by the decision of the Delhi High Court in Yogesh Tyagi v. State - 111 (2004) DLT 759.

11. What now survives for consideration is the question as to whether Note - 4 inserted on 18-11-2009 to the notification dated 19-11-2001 amounts to legislative

overruling of Michael Raj and related rulings of the Apex Court. It is well settled that the Executive or the Legislature can render a judicial decision ineffective by removing or altering or neutralizing the legal basis of the judgment. Tanuja's case cited by the petitioner itself clarifies this position. The purpose of Note-4 introduced as per Ext.P3 notification is to remove, alter or neutralize the legal basis of the judgments. This aspect of the law has been further elucidated in S.S. Bhola v. B.D. Sardana (1997) 8 SCC 522 (para 102) and Virendar Singh Hooda v. State of Haryana - (2004 ) 12 SCC 588 paras 33,35,45,46,52 and 53.

12. The vices of drug abuse and drug trafficking have reached alarming proportions. Drug abuse is a social malady which eats into the vitals of the society. Drug trafficking on the other hand corrodes the economy of the country. The ill-gotten money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. Narcotic drugs have ruined several families. May be, it is the filthy lucre behind the dope trade which attracts people to indulge in drug peddling. But nobody has a right to expose the gullible population to the perils of drug abuse and push them into a condemned world of no return. The deleterious effects of these toxins on the human system have been scientifically proved. Narcotic drugs and psychotropic substances have a sure tendency to depersonalise those who consume them and reduce them to worthless freaks of nature. Some of these drugs are so potent that even the first doze produces addiction with a craving for excess. Adolescents constitute the first causality among the vulnerable sections.

13. The statutory control over narcotic drugs in India was exercised through various Central and State enactments. The principal Central enactments, namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted several years ago. These and other State enactments were found to be inadequate to effectively combat the disconcertingly increasing vice of drug abuse and drug trafficking both at the national as well as international levels. That is how the Parliament stepped in by enacting the N.D.P.S. Act which is a comprehensive legislation brought forth to curb this cancerous menace. As a Central statute having operation throughout the nation the purpose of this legislation was taken judicial notice of by the Supreme Court of India in Durand

Didier V.Chief Secretary, Union Territory of Goa reported in AIR 1989 S.C.1966. This is what the Apex Court observed in the above verdict:-

"With deep concern, we may point out that the organized activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole Parliament in its wisdom, has made effective provisions by introducing this Act 61 of 1985 specifying mandatory minimum imprisonment and fine".

14. Courts trying these offences have a social, moral and legal obligation to perform. They cannot be insensitive to the hard realities and interpret the law in cold print divorced from the legislative intent and the mischief sought to be remedied.

15. The result of the foregoing discussion is that the challenge against Ext.P3 notification cannot succeed and Note - 4 appended to the notification dated 19-10-2001 is fully in accord with the statutory scheme under the N.D.P.S. Act and removes all lingering doubts, if any, in the matter. I once again reiterate that any preparation weighing more than the quantity prescribed under column 6 of the Notification dated 19-10-2001 containing the relevant Narcotic Drug or Psychotropic substance of whatever potency, will fall within the limits of commercial quantity attracting the rigour of Sec. 37 (i) (b) of the N.D.P.S. Act.

In the result, this Writ Petition which is devoid of any merit is dismissed leaving the parties to bear their respective costs.

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