

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 6th March, 2013
Pronounced on: 20th March, 2013

+ **CRL. M.C. 2335/2010**

NARCOTICS CONTROL BUREAU Appellant

Through: Mr. Satish Aggarwal, Advocate

versus

SAJESH SHARMA Respondent

Through: Mr. Yogesh Saxena, Adv.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Petitioner Narcotics Control Bureau (NCB) invokes inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (the Code) for setting aside of the order dated 17.04.2010 passed by the learned Special Judge-NDPS whereby the Respondent's prayer for alteration of the charge and for remitting the case to the Court for trial of the case for the offences under the Drugs and Cosmetics Act, 1940 (D&C Act) was allowed.
2. As per the allegations of the prosecution an information was received from the Delhi Zonal Unit at NCB that huge quantity of bunogesic injections were being supplied by M/s. Rusan Health Care Ltd. to their stockists at Delhi. In pursuance of the information and on receipt of list of stockists, summons were issued to various firms including M/s. International Drugs, Bhagirath Place having licence No.DL.26(1163)20B and 21B which was the Proprietorship Firm of Respondent Sajesh

Sharma. In pursuance of the summons Respondent appeared before the officers of NCB who recorded his statement. Statement made by the Respondent led to filing of chargesheet against him for an offence punishable under Section 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The relevant part of the impugned order which led to the framing of the charge under Section 22 (c) of the Act is extracted hereunder:-

“2. Pursuant to the information, summons were issued to Sajesh Sharma who tendered his statement that their firm was mainly selling bunogesic injections, etc. after purchasing it from M/s. Belsons/ Distributor of M/s. Rusan Health Care. A person by the name of Bhardwaj had come at his shop to purchase 25000 to 30000 injections for supply them to a hospital in Patna and paid ₹15,000/- as advance. After paying the balance amount, he had taken delivery of 30000 injections on invoice from M/s. Belsons on cash payment and sold it to the said person i.e. Shakeel. He was not aware whether Shakeel was having drug licence or not. He stated that whatever consignment had had purchased from M/s. Belsons, he had sold it to Shakeel after taking advance payment on a good margin without bill. He stated that so far as he has sold 250000 injections to Shakeel without bill and Form 6 however, he had purchased all the stock on invoice and Form 6.

In the absence of complete information about Shakeel, no further action could be taken. Accused Sajesh Sharma was arrested. After investigation he was sent for trial for offence punishable u/s. 22 (c) NDPS Act.

3. Ld. Predecessor of this Court made out prima facie case against the accused and framed the charge u/s. 22 (c) NDPS Act.”

3. While the case was at the stage of evidence, a prayer was made on behalf of the Respondent for transfer of the case on the file of the Metropolitan Magistrate (‘MM’) as possession of the bunogesic injections was not covered under the NDPS Act but was covered only under the D&C Act which was exclusively triable by the Court of ‘MM’.

4. The Respondent's contention found favour with the learned Special Judge who opined that bunogesic injection which contained Buprenorphine Hydrochloride was a Schedule 'H' drug under the D&C Act and though it was a psychotropic substance under the NDPS Act but since it was not included in Schedule I to the Narcotic Drugs and Psychotropic Substances Rules, 1985 (NDPS Rules), its possession, sale, etc. is not completely prohibited under the NDPS Act. The learned Special Judge relied on a judgment of the learned Single Judge of this Court in *Rajinder Gupta v. State* 123 (2005) DLT 55 which was relied on by the Supreme Court in *State of Uttaranchal v. Rajesh Kumar Gupta* (2007) 1 SCC 355 and opined that on the basis of the allegations levelled, the Respondent cannot be said to have committed an offence punishable under Section 22 (c) of the NDPS Act. The learned Special Judge held that since Buprenorphine Hydrochloride was a Schedule 'H' drug, the violation if any, for possession and sale of bunogesic injections could be of the D&C Act and the D&C Rules framed thereunder. The case was accordingly remitted to the learned Chief Metropolitan Magistrate to deal with the same in accordance with law or to assign the same to any other Court of 'MM'.
5. The learned Special Public Prosecutor for the Petitioner urges that the decisions in *Rajinder Gupta* and *Rajesh Kumar Gupta* were rendered while considering the bail applications filed by the accused persons. Thus, ratio in the earlier said cases would not be applicable to consider whether being in possession of bunogesic injections, which admittedly contained Buprenorphine Hydrochloride, which is a Psychotropic substance as per item No.92 of the Schedule (under Section 2 (xxiii)) to the NDPS Act, the Respondent could not have been discharged for the

offence punishable under Section 22 (C) of the NDPS Act and the case could not have been remitted to the learned CMM for its trial for violation of the provision of the D&C Act and Rules framed thereunder.

6. Relying on the decisions in *Sanjay Kumar Kedia v. Narcotics Control Bureau & Anr.* 2008 (1) JCC (Narcotics) 9; and *D. Ramkrishnan v. Intelligence Officer, Narcotic Control Bureau*, AIR 2009 SC 2404, the learned Special P.P. for the Petitioner urges that the decisions in *Rajinder Gupta* and *Rajesh Kumar Gupta* were impliedly overruled by the Supreme Court. It is contended that in *D. Ramkrishnan*, the Supreme Court held that the provisions of Section 80 of the NDPS Act provided that the provisions of NDPS Act or the Rules made thereunder are in addition to, and not in derogation of the D&C Act or the Rules made thereunder. Thus, the Supreme Court declined to interfere with the prosecution of the accused under Section 23 of the NDPS Act.

7. In *Rajinder Gupta*, the learned Single Judge of this Court posed the following questions for consideration:-

‘(i) Whether Buprenorphine Hydrochloride is a “psychotropic substance” within the meaning of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act)?

(ii) If yes, whether Buprenorphine Hydrochloride is a “psychotropic substance” to which Chapter VII of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as the NDPS Rules) apply? To what effect?’

8. After referring to the opinion of the Chemical Examiner and Joint Director, Central Revenue Control Laboratory, Hill Side Road, Pusa, New Delhi, the learned Single Judge opined that the Buprenorphine Hydrochloride would be a psychotropic substance under the NDPS Act.

While dealing with the second question, the learned Single Judge went into the scheme of NDPS Act and the NDPS Rules and held that the Section 8 (c) prohibits production, manufacture, possess, sale, etc. etc. of any narcotic drug and psychotropic substance except for medicinal or scientific purposes. Since Buprenorphine was not a prohibited psychotropic substance it being absent in Schedule I to the NDPS Rules, its possession by itself cannot be considered to be an offence under Section 22 of the NDPS Act simply because it is included as a psychotropic substance in Schedule (under Section 2 (xxiii)) to the NDPS Act. The learned Single Judge held that as per Rule 65 (1) manufacture of any psychotropic substance other than those specified in Schedule I of the NDPS Rules shall be in accordance with the condition of licence granted under the D&C Rules and D&C Act. The relevant observations in *Rajinder Gupta* are extracted hereunder:-

“Section 8(c), which is relevant for our purpose as it deals with psychotropic substances, prohibits the manufacture, possession, sale, use etc., of any psychotropic substance “except for medical or scientific purposes and in the manner and to the extent” provided by the provisions of the NDPS Act or NDPS Rules or orders made thereunder. This means that while there is a general prohibition against the manufacture, possession, sale, use etc., of a psychotropic substance, if the same is a medicine and is to be used for a medical purpose then the manner and extent of its manufacture, possession, sale, use shall be as provided in the NDPS Act or NDPS Rules or orders made thereunder. We must remember that buprenorphine hydrochloride I.P. is a Schedule H drug within the meaning of the D&C Act and Rules. Its manufacture, sale etc., is regulated by the D&C Act and D&C Rules. Coming back to the NDPS Act, I find that in the case of a medication, which also happens to be a psychotropic substance within the meaning of the NDPS Act, its “extent and manner” of

use etc., would be governed by the other provisions of the NDPS Act or NDPS Rules.

All. Section 9 of the NDPS Act empowers the Central Government to permit, control and regulate, inter alia, the manufacture, possession, sale, transportation of psychotropic substances. The NDPS Rules have been formulated by the Central Government in exercise of that power. Chapter VII of the NDPS Rules deals with “Psychotropic Substances”. Rules 64 to 67 fall under this Chapter VII. Rule 64 prescribes the general prohibition. It provides that – “No person shall manufacture, possess, transport, import inter-state, export inter-state, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I.” It is to be noted that this “Schedule I” is different to the Schedule to the NDPS Act. This Schedule I is appended to the NDPS Rules and is in two parts --(I) Narcotic Drugs and (II) Psychotropic Substances. We are concerned with psychotropic substances. There is a list of 33 specific psychotropic substances with entry no. 34 being “Salts and preparations of above”. It is significant to note that neither buprenorphine hydrochloride nor buprenorphine find mention in this list. This clearly means that Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules and therefore the general prohibition contained in Rule 64 of the NDPS Rules does not apply to it.

2. Consequently, rules 65 to 67, which also have reference to psychotropic substances specified in the said Schedule I, would also not be applicable in respect of Buprenorphine Hydrochloride. In this connection, it is pertinent to point out that there are several psychotropic substances which find place both in the schedule to the NDPS Act and in Schedule I to the NDPS Rules. For example: Methaqualone, Delorazepam, Ketazolam, Loprazolam, Pipradrol, Tetrazepam. At the same time, there are others like Buprenorphine, Amphetamine, Bromazepam, Lorazepam, Phenobarbital and Pemoline which, though specified in the Schedule to the NDPS Act, do not find mention in Schedule I to the NDPS Rules. Clearly, by

conscious design, all psychotropic substances mentioned in the schedule to the NDPS Act have not been listed in Schedule I to the Rules. The prohibition contained in Rule 64 of the NDPS Rules applies only to those psychotropic substances which are specified in Schedule I to the NDPS Rules. In other words, the prohibition of Rule 64 of the NDPS Rules is not applicable to those psychotropic substances, which, although they are listed in the Schedule to the NDPS Act, are not part of the listed psychotropic substances in Schedule I to the NDPS Rules. It may be mentioned here that the Supreme Court, in the afore-mentioned decisions, was not called upon to examine this aspect of the matter, namely, whether Rule 66 of the NDPS Rules applied to all psychotropic substances or only those specified in Schedule I to the NDPS Rules. It is, therefore, open to this Court to consider and decide this aspect of the matter.

Rule 65(1), inter alia, provides that the manufacture of any psychotropic substance other than those specified in Schedule I shall be in accordance with the conditions of licence granted under the D&C Rules and D&C Act. In other words, insofar as the psychotropic substances not mentioned in Schedule I to the NDPS Rules but mentioned in the Schedule to the NDPS Act are concerned, their manufacture shall be governed by the DandC Act and Rules and not by the NDPS Act or NDPS Rules. Rule 66 relates to possession etc., of psychotropic substances. Sub-Rule (1) thereof provides that no person shall possess “any psychotropic substance” for any of the purposes covered by the D&C Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under the NDPS Rules. The expression “any psychotropic substance” obviously has reference to those listed in Schedule I to the NDPS Rules. Rule 64 is the governing rule in Chapter VII of the NDPS Rules. When a psychotropic substance does not find mention in Schedule I to the NDPS Rules, the prohibition qua possession contained in Rule 64 does not apply. That being the case, in respect of such a psychotropic substance, Rule 66 would also not apply as it has reference to only those psychotropic substances which are included in Schedule I to the

NDPS Rules. Rule 67 of the NDPS Rules relates to transport of psychotropic substances. It is expressly subject to the provisions of Rule 64 and clearly has reference to the transport, import inter-state or export inter-state of those psychotropic substances which are included in Schedule I to the NDPS Rules. The rule would have no applicability in respect of those psychotropic substances which are not to be found in Schedule I to the NDPS Rule. Clearly, then, inasmuch as Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules, its manufacture, possession, sale, transport would neither be prohibited nor regulated by the NDPS Rules and consequently by the NDPS Act.” (emphasis supplied).

9. In *Rajesh Kumar Gupta* the Respondent was found in possession of large quantity of drugs which were included in Schedule H of the D&C Rules as also in entry 36 and 69 of the Schedule to the NDPS Act. The Hon’ble Supreme Court held that since the drugs were mentioned in Schedule D & H of the D&C Rules and were being used for medicinal purposes, the Respondent would not be guilty of violation of Section 8 of the NDPS Act. Paras 21 to 24 of the report are extracted hereunder:-

21. The respondent admittedly possesses an Ayurveda Shastri degree. It is stated that by reason of a notification issued by the State of Uttar Pradesh dated 24-2-2003, the practitioners of ayurvedic system of medicines are authorised to prescribe allopathic medicines also. The respondent runs a clinic commonly known as “Neeraj Clinic”. He is said to be assisted by eight other medical practitioners being allopathic and ayurvedic doctors. It is also not in dispute that only seven medicines were seized and they are mentioned in Schedules G and H of the Drugs and Cosmetics Rules. In this regard, we may notice the following chart:

<i>Sl. No.</i>	<i>Medicine seized</i>	<i>Schedule H, the Drugs and Cosmetics Rules</i>	<i>The Schedule, the 1985 Act</i>	<i>Schedule I, the 1985 Rules</i>
<i>1.</i>	<i>Epilan C.</i>	<i>Yes</i>	<i>Entry 69</i>	<i>-</i>

	<i>Phenobarbital</i>			
2.	<i>Phensobar-50</i>	<i>Yes</i>	-	-
3.	<i>Chlordiazepoxide</i>	<i>Yes</i>	<i>Entry 36</i>	-
4.	<i>Carbin</i>	<i>Yes</i>	-	-
5.	<i>Wefere</i> <i>(ayurvedic)</i>	-	-	-
6.	<i>Phenso (Schedule-G)</i>	-	-	-
7.	<i>Epibar-30</i>	<i>Yes</i>	-	-

22. It is not in dispute that the medicines seized from the said clinic come within the purview of Schedules G and H of the Drugs and Cosmetics Rules. It is furthermore not in dispute that the medicines Epilan C. Phenobarbitone and Chlordiazepoxide are mentioned in Entries 69 and 36 of the 1985 Act respectively, whereas none of them finds place in Schedule I appended to the 1985 Rules. If the said drugs do not find place in Schedule I appended to the Rules, the provisions of Section 8 of the 1985 Act would have no application whatsoever. Section 8 of the 1985 Act contains a prohibitory clause, violation whereof leads to penal offences thereunder.

23. In view of the fact that all the drugs, Items 1, 2, 3, 4, 6 and 7 being allopathic drugs mentioned in Schedules G and H of the Drugs and Cosmetics Rules indisputably are used for medicinal purposes. Once the drugs are said to be used for medicinal purposes, it cannot be denied that they are acknowledged to be the drugs which would come within the purview of description of the expression “medicinal purposes”.

24. The exceptions contained in Section 8 of the 1985 Act must be judged on the touchstone of:

(i) whether drugs are used for medicinal purposes;

(ii) whether they come within the purview of the regulatory provisions contained in Chapters VI and VII of the 1985 Rules.”

10. The learned Special PP for the Petitioner argues that in the instant case also there was inter-state export of the psychotropic substance and, therefore, the Respondent would be guilty under the provisions of NDPS Act. Reliance is placed on *Sanjay Kumar Kedia and D. Ramkrishnan*.
11. In my view, the contention raised is devoid of any substance. Section 8 (c) of the NDPS Act prohibits manufacture, possession, transport, inter-state export and import of Narcotic Drugs and Psychotropic Substances except for medicinal or scientific purposes, whereas Section 24 of the NDPS Act makes the export or obtaining of any Narcotic Drugs and Psychotropic Substances in contravention of section 12 of the NDPS Act to be punishable. Thus, anybody dealing with a psychotropic substance for supplying to any person outside India even if it does not find mention in the NDPS Rules will be punished under the NDPS Act. The exception as provided under Section 8 for use of the psychotropic substance as mentioned in the Schedule (under Section 2(xxiii)) of the NDPS Act for medicinal purposes would not be applicable in case of trade or supply of the psychotropic substance outside India.
12. In *Sanjay Kumar Kedia* the Supreme Court was not dealing with the possession, manufacture or inter-state export or import of the psychotropic substance but with the supply of psychotropic substance by M/s. Xponse Technologies Ltd. and M/s. Xpose IT Services Pvt. Ltd. outside India which was punishable under Section 24 of the NDPS Act.
13. Similarly, in *D. Ramkrishnan* the Narcotic Drugs were being exported to the customers abroad through airmail and RMS post offices at Coimbatore which was punishable under Section 23 of the NDPS Act, 1985. Under Section 23 of the NDPS Act again the exemption for

possession, sale, purchase, inter-state import and export for medicinal or scientific purposes is not applicable in case of trade or supply of the narcotic drugs outside India. It was in these circumstances that the Supreme Court held that the ratio in *Rajesh Kumar Gupta* would not be applicable in that case.

14. It is true that in *Rajinder Gupta* the learned Single Judge had taken the view while dealing with the bail application. The reasoning, however, as stated by me earlier fully applies even while dealing with the question whether the person is guilty for the offence punishable under Section 22 of the NDPS Act.
15. In this view, I also find support from another judgment of the Coordinate Bench of this Court in *DRI v. Raj Kumar Arora & Anr.* where relying on *Rajinder Gupta* and *Rajesh Kumar Gupta*, the learned Single Judge of this Court held that a person found in possession of Buprenorphine Hydrochloride will not be guilty under Section 22 of the NDPS Act.
16. In view of the foregoing discussion, the Petition is devoid of any merit; the same is accordingly dismissed.
17. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

MARCH 20, 2013

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