

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

Pronounced on: 11th April, 2017

+ W.P.(C) 11416/2015

VISHAL PURI

.....Petitioner

Through: Mr. Anand Grover, Sr. Adv.
with Mr.Saurabh Chauhan, Mr.Varun Jain
and Ms.Tripati Tandon, Advocates

Versus

UNION OF INDIA

...Respondent

Through: Mr. Sanjeev Narula, CGSC
with Mr.Anshuman Upadhyay, Mr.Ajay
Kalra, Mr.Abhishek Ghai, Advts.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

J U D G M E N T

: **MS. G. ROHINI, CHIEF JUSTICE**

1. The petitioner who is facing trial before the Court of Additional Special Judge for NDPS cases, Sessions Court, Jalgaon District in DRIF. No.DRI/MZu/C/Inv-12/2013-14 has filed the present writ petition challenging the inclusion of 'Ketamine' in the list of Psychotropic Substances specified in the Schedule to the Narcotic Drugs and Psychotropic Substances Act, 1985 vide Notification dated 10.02.2011 of the Ministry of Finance, Government of India. The petition also seeks to challenge the consequential Notification dated 21.06.2011 specifying the 'small' and 'commercial' quantity of Ketamine as '10 gms' and '500 gms' respectively for the purpose of penal provisions under the Act.

2. The prayer in the writ petition reads as under:

"(a) Declare that the Notification S.O. 311, dated 10th February 2011 has been issued ultra vires the Narcotic Drugs and Psychotropic Substances Act, 1985 and has no force in law;

(b) Issue an appropriate writ or order or direction to quash and set aside the Notification S.O. 311, dated 10th February, 2011 and entry No.238E in the notification S.O. 1430(E) dated 21st June, 2011.

(c) Grant cost of this petition in favour of the Petitioner."

3. It is pleaded that in relation to the seizure of 1195.2kg of 'Ketamine Hydrochloride', summons under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') were issued to the petitioner by the Department of Revenue Intelligence. On 22.04.2014, he was produced before the Additional Chief Magistrate, Mumbai and was remanded to custody in District Jail, Jalgaon. Since then, the petitioner has been in custody.

4. It is further pleaded that the allegations in the complaint related to commission of offences under NDPS Act in relation to a psychotropic substance, i.e. 'Ketamine' which was included in the list of psychotropic substances vide Notification dated 10.02.2011 issued by the respondent. The said Notification is sought to be challenged in the present petition primarily on the ground that it has been issued without complying with the mandatory statutory requirements set out under Section 3 of the NDPS Act.

5. Before going to the grounds of challenge, the impugned Notification dated 10.02.2011 whereby 'Ketamine' has been included in the list of psychotropic substances and the consequential Notification dated 21.06.2011 specifying the 'small' and 'commercial' quantities of 'Ketamine'

for the purpose of penal provisions under the Act may be extracted hereunder:

**"MINISTRY OF FINANCE
(Department of Revenue)
NOTIFICATION
New Delhi, the 10th February, 2011**

S.O. 311(E). - Whereas the Central Government is satisfied, on the basis of information and evidence which has become available to it with respect to the nature and effect of, or the scope of abuse or, any substance (natural or synthetic) or natural material or any salt or preparation of such substance or material, that it is necessary or expedient to add the following substance or natural material or salt or preparation of such substance or material in the list of psychotropic substances specified in the Schedule to the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) Act;

Now, therefore, in exercise of the powers conferred by Section 3 of the said Act, the Central Government hereby makes the following addition in the list of psychotropic substances specified in the Schedule of the said Act, namely:-

In the Schedule to the said Act, after serial number 110 and the entries relating thereto, the following serial number and the entries shall be inserted, namely:-

Sl.No.	International non-proprietary names	Other non-proprietary names	Chemical name
"110A	Ketamine		2-(2-cholorphenyl)-2-(methyl amino) cyclohexanone"

[F.No. N/11012/4/2010-NC-II]
Satyan Narayan Dash, Under Secy.

MINISTRY OF FINANCE
(Department of Revenue)
NOTIFICATION
New Delhi, the 21st June, 2011

S.O.1430(E). - In exercise of the powers conferred by clauses (viia) and (xxiia) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby makes the following amendment to the notification of the Government of India, Ministry of Finance, Department of Revenue, published in the Gazette of India Extraordinary, Part II, Section 3, Sub-section (ii), vide number S.O.1055(E), dated the 19th October, 2001, namely:-

In the said notification, in the Table, after serial number 238 and the entries relating thereto, the following serial numbers and the entries shall be inserted, namely:-

S.No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name)	Other non-proprietary name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
(1)	(2)	(3)	(4)	(5)	(6)
"238A	Dihydroetorphine		7,8-dihydro-7a-[1-(R)-hydroxy-1-methylbuty 1]-6,14- <i>endo</i> -ethanotetrapydrooripavine	0.01	0.05 gm.
238B	Oripavine			2	100 gm.
238C	Remifentanyl		1-(2-methoxy carbonyl ethyl)-4-(phenylpropionylamino) piperidine-4-carboxylic acid methyl ester	0.004	0.2 gm.
238D	Amineptine		(7-[10,11-dihydro-5H-dibenzo [a,d] cyclohepten-5-yl) amino] heptanoic acid	20	1 kg.
238E	Ketamine		2-(2-chlorophenyl)-2-(methylamino) cyclohexanone	10	500 gm."

[F.No. N-11012/2/2011-NC-II]
SATYANARAYANA DASH, Under Secy."

6. We have heard Shri Anand Grover, the learned Senior Counsel appearing for the petitioner and Shri Sanjeev Narula, the learned Central Government Standing Counsel appearing for the respondent/UOI.

7. The submissions made on behalf of the petitioner challenging the impugned Notification dated 10.02.2011 may be summarised as under:

- (i) The impugned Notification has been issued without following the procedure established under Section 3 of the NDPS Act and therefore on that ground itself, the impugned notification is liable to be struck down.
- (ii) 'Ketamine' is not a psychotropic substance under the Convention on Psychotropic Substances, 1971 whereas all other entries in the Schedule are substances included in the Convention on Psychotropic Substance, 1971. Hence, the same should not have been included in the list of psychotropic substances under the impugned Notification.
- (iii) As per Section 3 of the NDPS Act, the Central Government is empowered to add to, by issuance of a notification in the Official Gazette, the list of psychotropic substances specified in the Schedule only on being satisfied that it is necessary or expedient so to do on the basis of (a) the information and evidence which has become available to it with respect to the nature and effects of, and the abuse or the scope for abuse of, any substance (natural or synthetic) or natural material or any salt or preparation of such substance or material; and (b) the modifications or provisions (if any) which have been made to, or in any International Convention with respect to such substance,

natural material or salt or preparation of such substance or material. However, the second condition i.e. changes in the provisions of any international convention with regard to Ketamine has not been satisfied.

- (iv) The conditions set out in Clauses (a) and (b) of Section 3 of the NDPS Act are conjunctive and not disjunctive. The impugned Notification is in the nature of a delegated legislative activity and must necessarily comply with the statutory conditions prescribed in Section 3 of the NDPS Act. In other words, Clause (a) and Clause (b) must both be satisfied before issuing a notification under Section 3.

8. In support of the above submissions, the learned Senior Counsel appearing for the petitioner relied upon the decisions of the Apex Court in *Pooran Singh vs. State of Madhya Pradesh*, **AIR 1965 SC 1583**, *Municipal Corporation of Delhi vs. Tek Chand Bhatia*, **(1980) 1 SCC 158**, *Sri Nasiruddin vs. State Transport Appellate Tribunal*, **(1975) 2 SCC 671**, *Competition Commission of India vs. Steel Authority of India Ltd. & Anr.*, **(2010) 10 SCC 744** and *M. Satyanarayana vs. State of Karnataka & Anr.*, **(1986) 2 SCC 512**.

9. Placing reliance upon the observations made by the Supreme Court in para 7 in *Union of India vs. Sanjeev Deshpande*, **(2014) 13 SCC 01**, wherein the primacy and weight accorded to International Conventions in framing the NDPS Act was noticed by the Supreme Court, it is submitted by the learned Senior Counsel for the petitioner that the various provisions and the overall scheme of the NDPS Act shows that to delegate the power to the executive including the power to undertake measures and make statutory

rules, the legislature intended that the executive be guided by International Conventions on narcotic drugs and psychotropic substances.

10. It is also submitted by the learned Senior Counsel appearing for the petitioner that the compliance with sub-section (a) of Section 3 of the NDPS Act is also not fulfilled since the abuse of 'Ketamine' in India is not too much as is evident from the information furnished on an application under the RTI Act by the Ministry of Social Justice and Empowerment, Government which is a nodal Ministry and National Drug Dependence Treatment Centre, AIIMS, Ghaziabad, the Nodal Agency.

11. Moreover, Clause (a) of Section 3 of the NDPS Act requires the respondent to have 'information and evidence' with respect to the 'abuse or the scope of abuse' of Ketamine in the country and no such information was available with the respondent at the time of issuing the impugned Notification. Thus, the Notification dated 10.02.2011 has been issued without complying with the provisions of sub sections (a) and (b) of Section 3 of the NDPS Act. In support of the said contention, the learned Senior Counsel for the petitioner has placed reliance on the decisions of the Supreme Court in *Lachmi Narain & Ors. vs. Union of India & Ors.*, **(1976) 2 SCC 953**, *Union of India & Anr. vs. Cynamide India Ltd. & Anr.*, **(1987) 2 SCC 720**, *State of Uttar Pradesh vs. Renusagar Power Company & Ors.*, **(1988) 4 SCC 59**, *J.N. Ganatra vs. Morvi Municipality, Morvi*, **(1996) 9 SCC 495**, *ITC Bhadrachalam Paperboards & Anr. vs. Mandal Revenue Officer, AP & Ors.*, **(1996) 6 SCC 634** and *Hussein Ghadially vs. State of Gujarat*, **(2014) 8 SCC 425**, wherein the settled principle of law that when a statute provides a particular thing to be done in a particular manner, then it

must be done in that manner alone and no other has been reiterated by the Supreme Court.

12. In the counter affidavit filed on behalf of the Respondent, it is pleaded that the Commission on Narcotic Drugs and International Narcotics Control Board are the two designated organisations which established under the United Nation's framework of drug control, to oversee the implementation of the drug related conventions. Both these organisations while addressing the problems relating to Ketamine abuse and diversion to illicit channel have emphasised to put in place an appropriate control measure. It is also stated that in the year 1946, the Economic and Social Council had established the Commission on Narcotic Drugs (for short 'Commission') to assist it in supervising the application of the international drug control treaties. The Commission has important normative functions under the international drug control conventions and it is *inter alia* authorised to consider all matters pertaining to the aims of the Conventions and see to their implementation. The Commission also reviews and analyses the global drug control situations considering the interrelated issues of prevention of drug abuse, rehabilitation of drug addict etc. The said Commission in its 49th Session, while recognising the emerging problem of widespread abuse of Ketamine and being deeply concerned by the threat being posed to the well being of people and society by the diversion of Ketamine for illicit use and by rise in the abuse of and trafficking in that substance, had resolved to call upon Member States to pay particular attention to the emerging problem of widespread abuse and trafficking in Ketamine, in particular in East and South-East Asia which also affects States in other regions and to consider

controlling the use of Ketamine by placing it on the list of substances controlled under their National legislation where the domestic situation so requires. Subsequently, in its 50th Session also, the Commission had adopted another resolution similar to the one adopted in the 49th Session.

13. In accordance with the Single Convention on Narcotic Drugs, 1961, in the year 1968, the International Narcotics Control Board was established as an independent and quasi-judicial body to implement the United Nations International Drug conventions. In its annual report for the year 2008, the International Narcotics Control Board, while welcoming the adoption by the Commission on Narcotic Drugs of its resolutions in its 49th and 50th Sessions, called upon all Governments to implement them without delay.

14. As far as the challenge to the Notification dated 21.06.2011 is concerned, it is submitted by the respondents that Section 2(viia) and (xxiiia) of the NDPS Act empower the Central Government to notify the 'commercial quantity' and 'small quantity' and thus the NDPS Act follows a graded system of penalty depending upon the quantity of 'narcotic drug' and 'psychotropic substance' involved in an offence. In terms thereof, after notifying Ketamine as a psychotropic substance under the Notification dated 10.2.2011, the consequential Notification dated 21.6.2011 was rightly issued specifying the small and commercial quantity of Ketamine as 10 gm and 500 gm respectively for the purpose of application of the provisions of the NDPS Act to Ketamine.

15. Reiterating the stand taken in the counter affidavit, it is submitted by Shri Sanjeev Narula, the learned Standing Counsel for Central Government that the two clauses under Section 3 of the NDPS Act are distinctive and

they merely list down the nature and source of information on the basis of which the Central Government will satisfy itself to notify a substance as 'psychotropic substance'. It is thus contended that the requirement under Clause (b) of Section 3 of the NDPS Act is not a mandatory conjunction to Clause (a) and the two operate in isolation and independent to each other.

Consideration on merits:

16. We may at the outset extract Section 3 of the NDPS Act:

"3. Power to add to or omit from the list of psychotropic substances.- The Central Government may, if satisfied that it is necessary or expedient so to do on the basis of -

(a) the information and evidence which has become available to it with respect to the nature and effects of, and the abuse or the scope of abuse of, any substance (natural or synthetic) or natural material or any salt or preparation of such substance or material; and

(b) the modifications or provisions (if any) which have been made to, or in any International Convention with respect to such substance, natural material or salt or preparation of such substance or material.

by notification in the Official Gazette, add to, or, as the case may be, omit from, the list of psychotropic substances specified in the Schedule such substance or natural material or salt or preparation of such substance or material."

17. We may also refer to the definitions of 'psychotropic substance' under Section 2(xxiii), 'commercial quantity' under Section 2(viia) and 'small quantity' under Section 2(xxiiia).

(xxiii) "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."

(viia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;

(xxiia) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

18. It is no doubt true that the phrase "and" has been employed in between Clause (a) and Clause (b) of Section 3 of the NDPS Act, however, we do not find any substance in the contention on behalf of the petitioner that both Clause (a) and Clause (b) are conjunctive. It is relevant to note that Clause (b) of Section 3 expressly provides that the modifications or provisions (if any) which have been made to any International Convention with respect to such substance, natural material or salt or preparation of such substance or material. It appears to us that the phrase "if any" employed in Section 3(b) manifests the legislative intent that the said clause is not mandatory.

19. It is relevant to note that the NDPS Act has been enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

20. It is also relevant to note that prior to the enactment of the NDPS Act, 1985, the statutory control over narcotic drugs was being exercised under the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930. However, the provisions of these enactments were found to be inadequate because of the passage of time and developments in the field of illicit drug traffic and drug abuse at national and international level. Therefore, the NDPS Bill was introduced in the Parliament with the following statement of objects and reasons:-

"STATEMENT OF OBJECTS AND REASONS

The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, many deficiencies in the existing laws have come to notice, some of which are indicated below:-

- (i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well-organized gangs of smugglers. The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeats offences. Further, no minimum punishment is prescribed in the present laws, as a result of which the courts with nominal punishment have sometimes let off drug traffickers. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our

neighboring countries and destined mainly to Western countries.

- (ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc., with the power 'of investigation of offences under the said laws.
- (iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotics control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions , which entail several obligations which are not covered or are only partly covered by the present Acts.
- (iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national governments. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded.

2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drug abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to

narcotic drugs and psychotropic substances to which India has become a party."

21. Having considered the scope and object of the NDPS Act, it has been explained by a Constitution Bench of the Supreme Court in ***Karnail Singh v. State of Haryana; (2009) 8 SCC 539*** that the Statement of Objects and Reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent, to meet the challenge of well-organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national Governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded, consolidating and amending the then existing laws relating to narcotic drugs, strengthening the existing control over drug abuse, considerably enhancing the penalties, particularly for trafficking offences, making provisions for exercising effective control over psychotropic substances and making provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

22. We have also taken note of the fact that both the Commission on Narcotic Drugs (CND) which was established by the Economic and Social Council to assist the said Council in supervising the application of the

International Drug Control Treaties and the International Narcotics Control Board (INCB) which is an independent and quasi judicial monitoring body for implementation of the United Nations International Drug Control Conventions recommended to put in place appropriate control measures to address the growing problem of Ketamine abuse and diversion to illicit channel for non-medical use.

23. It is the specific case of the respondent that Ketamine which is a popular anaesthetic in veterinary medicine is subject to abuse and the same is gradually rising in India and that there were reports of abuse of Ketamine on a large scale in some South-East Asian countries and there had been persistent complaints from the said countries about the trafficking of Ketamine in India. It is also explained that Ketamine has a wide range of effects in human including analgesic, anaesthesia, hallucination, elevated blood pressure and bronchodilation.

24. It is also the specific case of the respondent that prior to the issuance of the Notification dated 10.02.2011, the only control over Ketamine was through a Notification issued by the Director of Foreign Trade, as per which, prior to the export of Ketamine from India, a 'No Objection Certificate' was required from Narcotics Commissioner. Although there were several seizures of consignments of Ketamine attempted to be smuggled out of India, in order to provide more deterrent measures against trafficking of Ketamine, it was felt necessary to notify it as a psychotropic substance under the NDPS Act also.

25. In the light of the legal position noticed above read with the object sought to be achieved by the Act, we are of the view that the word "and"

appearing in between clause (a) and clause (b) of Section 3 of NDPS Act should be read as "or" and the two clauses need to be given a disjunctive reading so as to give effect to the intention of the legislature lest sub-section 3(a) would be rendered otiose.

26. The law is well settled that while considering the validity of the delegated legislation, the scope of judicial review is limited. The interference would be warranted only if it is shown that the statutory authority failed to exercise the power conferred within the four corners of the specific provision contained in the relevant statute under which the power is conferred or where the power was exercised on grounds which were not germane or relevant to the policy and purpose of the Act or where it was made on grounds which were *mala fide*.

27. As explained in ***Maharashtra State Board of Secondary and Higher Secondary Education vs. Paritosh Bhupeshkumar Sheth***, **(1984) 4 SCC 27**:

"14.In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation — whether a rule or regulation or other type of statutory instrument — is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment

over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act...."

28. We have already held that the word "and" appearing in between clause (a) and clause (b) of Section 3 of NDPS Act should be read as "or" so as to give effect to the true intention of the legislature. We have also taken note of the fact that both CND and INCB recommended to put in place appropriate control measures to address the growing problem of Ketamine abuse and diversion to illicit channel for non-medical use. We are also satisfied that there is enough material before the Respondent with regard to trafficking of Ketamine. That being the case, Section 3(a) of the NDPS Act has been satisfied and the Respondent cannot be held to have exceeded the power conferred thereunder in issuing the impugned Notification dated 10.02.2011. Consequently, the challenge to the Notification dated 21.06.2011 which specifies the 'small' and 'commercial' quantity of 'Ketamine' for the purpose of penal provisions of the NDPS Act does not survive.

29. We, therefore, do not find substance in any of the contentions advanced on behalf of the petitioner. The writ petition is devoid of merit and is, accordingly, dismissed.

CHIEF JUSTICE

JAYANT NATH, J

APRIL 11, 2017/pk