

Delhi High Court

Rajesh Sharma vs Union Of India & Others on 6 May, 2009

Author: Badar Durrez Ahmed

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.05.2009

+ WP (CRL) 326/2009

RAJESH SHARMA ... Petitioner

- Versus -

UNION OF INDIA & OTHERS ... Respondents

AND + WP (CRL) 384/2009 NAFE SINGH ... Petitioner

- Versus -

UNION OF INDIA & OTHERS ... Respondents

Advocates who appeared in this case:-

For the Petitioners : Mr K.T.S. Tulsi, Sr Advocate with Mr Sanjiv Kumar,

Mr S.S. Dass, Mr S.K. Santoshi, Mr Sumit Arora and Mr Rohit Aggarwal For the Respondent No.1 :
Mr P.P. Malhotra, ASG with Mr Satish Aggarwal, Mr Shirish Aggarwal, Mr Shankar Chabra For the
Respondent No.2. : Ms Meera Bhatia CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED HON'BLE MR JUSTICE P.K. BHASIN

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES BADAR DURREZ AHMED, J

1. These petitions seeking the issuance of a writ of habeas corpus are directed against the detention orders passed against the petitioners in each of the petitions by the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi in purported exercise of powers conferred under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as the PIT-NDPS Act). The detention order in the case of the petitioner Rajesh Sharma in WP (CRL) 326/2009 was made on 27.02.2009, whereas the detention order in respect of the petitioner Nafe Singh in WP (CRL) 384/2009 was

made on 13.03.2009.

2. Both Rajesh Sharma and Nafe Singh were arrested with other co-accused Diwakar Gupta and Amit Kohli on 06.05.2008 on the allegation that they had indulged in illegal trading of diazepam, lorazepam, alprazolam, clonazepam and phenobarbitone. These are all drugs specified in Schedule H' to the Drugs and Cosmetics Rules, 1945. It is also an admitted position that they are psychotropic substances and are specified in the Schedule to the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act'). However, these substances are not mentioned in Schedule-I to the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as the NDPS Rules').

3. Both Rajesh Sharma and Nafe Singh applied for bail. Their bail applications were rejected by the learned Special Judge, NDPS, New Delhi on 31.10.2008. Thereafter, two of the co-accused, namely, Diwakar Gupta and Amit Kohli filed bail applications before this court. However, the same were sought to be withdrawn on the submission that there was a change of circumstances, namely, that the investigation had been completed and that the learned Special Judge had not considered the decisions of the Supreme Court and of this court in State of Uttaranchal v. Rajesh Kumar Gupta: 2007 (1) SCC 355 and Rajender Gupta v. The State: 2005 III AD (Cr.) DHC 606, respectively, in the proper perspective. Consequently, liberty was granted to the said co-accused to move a fresh bail application before the learned Special Judge who was directed to deal with the aforesaid judgments in the correct perspective. The said order was of a learned Single Judge of this court on 01.12.2008. Thereafter, the learned Special Judge, after considering the aforesaid decisions, granted bail to the co-accused Diwakar Gupta and Amit Kohli on 24.12.2008. This was followed by the grant of bail to the petitioners in these writ petitions, namely, Rajesh Sharma and Nafe Singh on 07.01.2009. On 09.02.2009, both Rajesh Sharma and Nafe Singh alongwith other co-accused persons entered appearance through their counsel in the applications filed by the respondent No.2 (Narcotics Control Bureau) for cancellation of the bail granted to the said persons. While the cancellation of bail applications were pending before this court, the aforesaid detention orders have been passed on the dates indicated above and both Rajesh Sharma and Nafe Singh were taken into custody and sent to jail where they are presently detained.

4. Mr K.T.S. Tulsi, the learned senior advocate, appearing on behalf of the petitioners, made a three-fold submission. First of all, according to him, the impugned orders of detention reflect total non-application of mind inasmuch as the order granting bail to the petitioners has not been considered in the proper perspective. He submitted that there was non-application of mind on the part of the detaining authority to the reasons contained in the orders granting bail to the petitioners, wherein the judgment of the Supreme Court in the case of Rajesh Kumar Gupta (supra) was considered. Secondly, it was contended by Mr Tulsi that there is no basis for arriving at the satisfaction that export of the medicines / drugs referred to above would constitute illicit trafficking within the meaning of Section 2(e) of the PIT-NDPS Act when the said substances were clearly covered by the exception to Section 8 of the NDPS Act. Lastly, Mr Tulsi submitted that personal liberty is so sacrosanct and so high in the scale of the constitutional values that it places an obligation on the detaining authority to show that the order of detention meticulously accords with the procedure established by law. He submitted that what the petitioners are alleged to be doing was

not an offence under the NDPS Act and, therefore, would not be covered by the expression illicit trafficking. Thus, according to him, the detention orders could not have been made when the alleged act was itself not an offence. He submitted, in the context of the seriousness of the problem of illicit trafficking in drugs and psychotropic substances, that when it comes to infringement of fundamental rights, the High Court, irrespective of the severity and gravity of the evil, has to intervene as the gravity of evil cannot furnish sufficient reasons for invading the personal liberty of citizens except for and in accordance with the procedure established by law. Elaborating on these submissions, Mr Tulsi contended that the non-application of mind by the detaining authority is writ large on the detention order itself when, according to the detaining authority, mere inclusion of the substances in question in the Schedule to the NDPS Act was sufficient for making the detention order. This is apparent from the opening paragraph of the grounds of detention which reads as under:-

The Narcotics Control Bureau, Delhi Zonal Unit, hereafter referred to as NCB, received information on 5.5.2008 from an Informer about a group of persons dealing in illicit smuggling of prescription drugs listed in the schedule of the Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act). The names of the persons intimated were (i) Shri Rajesh Sharma of Shakarpur, Delhi (ii) Shri Diwakar Gupta (iii) Shri Amit Kohli of Krishna Nagar, Delhi (iv) Shri Ashish Nagpal (v) Shri Nafe Singh. It was intimated that the above mentioned persons were extracting orders of medicines from US based clients over Internet and these orders were being executed through courier parcels. (underlining added) It is also apparent from the following paragraph of the grounds for detention which reads as under:-

On 20.06.2008, the samples of drugs seized were sent to Central Forensic Science Laboratory, Hyderabad for chemical analysis. In their report dated 25.08.2008 the Laboratory reported that Clonazepam, Lorazepam, Alprazolam, Diazepam and Phenobarbitone were detected in some of the exhibits. These medicines are listed amongst the psychotropic substances in the Schedule to NDPS Act, 1985. (underlining added)

5. Mr Tulsi placed strong reliance on the decision of the Supreme Court in the case of Rajesh Kumar Gupta (supra) to contend that mere mention of the substances in the Schedule to the NDPS Act would not be sufficient and, to make the activity of import and export of the said psychotropic substances illegal, it would be necessary that the said substances also find mention in Schedule-I to the NDPS Rules, 1985.

According to him, the Supreme Court made it clear in Rajesh Kumar Gupta (supra) that unless the drugs / psychotropic substances find place in Schedule-I to the NDPS Rules, the provisions of Section 8 of the NDPS Act, which contains the prohibition, would have no application whatsoever. Consequently, mere inclusion of the said substances in the Schedule to the NDPS Act, would by itself not be sufficient to lead to the conclusion that import and export in them is prohibited, particularly when it is the admitted position that they were allopathic drugs which find mention in Schedule H' of the Drugs and Cosmetics Rules, 1945. Consequently, it was submitted that there was

no violation of the provisions of the NDPS Act and, therefore, the activity allegedly indulged in by the petitioners could not be regarded as illicit traffic' within the meaning of Section 2 (e) of the PIT-NDPS Act.

6. Mr P.P. Malhotra, the learned Additional Solicitor General of India, appearing on behalf of the respondents, submitted that the decision of the Supreme Court in the case of Rajesh Kumar Gupta (supra) did not have any application to the facts of the present petitions for various reasons. First of all, according to him, the said judgment did not decide the merits of the matter as to whether the NDPS Act was applicable or not in the case of export out of India of the psychotropic substances mentioned in the Schedule to the NDPS Act. He also contended that the said decision did not deal with Sections 8 and 22 of the NDPS Act nor with Rule 58 of the NDPS Rules. Furthermore, he submitted that the said decision arose in the context of a bail application, under Section 37 of the NDPS Act and was not a decision on merits. He said that from the said judgment itself, it is clear that the Supreme Court was taking a prima facie view of the matter and, in any event, in that case, the Supreme Court felt that because of the fact that the accused had already been in custody for a period of more than two years, it was not a fit case where they should exercise their discretionary jurisdiction under Article 136 of the Constitution. Consequently, he submitted that in Rajesh Kumar Gupta (supra), the Supreme Court did not decide any question on merits and refused to exercise its extraordinary jurisdiction under Article 136 of the Constitution of India and, therefore, the said decision cannot be considered as having settled the law.

7. With regard to interpreting various provisions of the Act and the Rules, he submitted that it would be necessary to refer to Sections 8, 22 and 80 of the NDPS Act and Rules 53 and 58 of the NDPS Rules for the purposes of deciding this case. The relevant portions of the said provisions are as under:-

NDPS Act "8. Prohibition of certain operations.--No person shall--

- (a) xxxxx xxxxx xxxxx xxxxx; or
- (b) xxxxx xxxxx xxxxx xxxxx; or
- (c) produce, manufacture, possess, sell, purchase,

transport, warehouse, use, consume, import inter- State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation: xxxxx xxxxx xxxxx xxxxx xxxxx 22. Punishment for contravention in relation to psychotropic substances.--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufacturers, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees. 80. Application of the Drugs and Cosmetics Act, 1940 not barred.-- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder. NDPS Rules CHAPTER VI IMPORT EXPORT AND TRANSHIPMENT OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

53. General prohibition.--Subject to the other provisions of this Chapter, the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I is prohibited:

Provided that nothing in this rule shall apply in case the drug substance is imported into or exported out of India subject to an import certificate or export authorisation issued under the provision of this Chapter and for the purposes mentioned in Chapter VII-A.

53-A.Prohibition on export.--(1) Subject to the provisions of sub-rule (2), no person shall export any of the narcotic drug or psychotropic substance or preparation containing any of such narcotic drug or psychotropic substance specified in Schedule II to the countries or to the region of such country specified therein.

(2) Notwithstanding anything contained in sub-rule (1) above, the Narcotics Commissioner may authorize export of specified quantities of such narcotic drug or psychotropic substance or preparation containing such narcotic drug or psychotropic substance on the basis of special import licence issued by the Competent Authority of the country mentioned in Schedule II which intends such import by way of issuance of special import licence. The shipment of the consignment so allowed shall be accompanied by a copy of such special import licence duly endorsed by the Narcotics Commissioner. xxxxx xxxxx xxxxx xxxxx xxxxx "58. Application for export authorisation.--(1) Subject to rule 53 and rule 53-A, no narcotic drugs, or

psychotropic substances specified in the Schedule of the Act, shall be exported out of India without an export authorisation in respect of the consignment issued by the issuing authority in Form No.5 appended to these rules.

(2) The exporter applying for an export authorisation under sub-rule (1) shall submit,--

(a) where the export authorisation relates to narcotic drug, alongwith his application the original or an autnenticated copy of the excise permit issued by the concerned State Government; and

(b) the import certificate in original, issued by the Government of the importing country certifying the official approval of the concerned Government.

(3) The application for the export authorisation shall state such details as may be specified by the Narcotics Commissioner. xxxxx xxxxx xxxxx xxxxx xxxxx "63. Prohibition of import and export of consignments through a post office box, etc.--The import or export of consignments of any narcotic drug or psychotropic substance through a post office box or through a bank is prohibited.

8. Mr Malhotra submitted that on a plain reading of Section 8 of the NDPS Act, it is clear that no person can export from India any narcotic drug or psychotropic substance except for medical or scientific purposes and that, too, in the manner and extent provided under the NDPS Act or the NDPS Rules. He submitted that the manner and extent indicated under the said Act and the Rules impose a requirement by way of licence, permit or authorisation. Rule 58 deals with application for export authorisation. According to him, Rule 53 deals with psychotropic substances specified in Schedule-I to the NDPS Rules. However, Rule 58 deals with psychotropic substances specified in the Schedule to the NDPS Act. He submitted that no word of an Act or the Rules could be said to be redundant. The legislature is deemed to be aware of the language used by it in the Act. The Central Government, in framing the NDPS Rules, is also deemed to be aware of the distinction between the Schedule to the Act and Schedule-I to the NDPS Rules. He submitted that the different language employed in Rule 58 compared with that employed in Rule 53 clearly demonstrates that Rule 58 is applicable to all the psychotropic substances mentioned in the Schedule to the NDPS Act. Since the substances in question are admittedly covered under the Schedule to the NDPS Act, they cannot be exported without export authorisation granted in terms of Rule 58 of the NDPS Rules.

9. Mr Malhotra submitted that the words of a statute have to be given their natural meaning. If the plain and natural meaning is given to the rules, according to him, it is clear that Rule 58 deals with the Schedule to the NDPS Act and Rule 53 deals with Schedule-I to the NDPS Rules. According to him, they are independent of each other and consequently, it cannot be said that the petitioners have not committed any offence under the Act. Mr Malhotra placed reliance on the decision of the Supreme Court in the case of Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.: 2002 (3) SCC 533, wherein the Supreme Court made the following observations with regard to interpretation of a statute:-

12. The rival pleas regarding re-writing of statute and casus omissus need careful consideration. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage*: 218 FR

547). The view was re-iterated in *Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama*: 1990 (1) SCC 277.

13. In *Dr. R. Venkatchalam and Ors. etc. v. Dv. Transport Commissioner and Ors. etc.*: 1977 (2) SCC 273 it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. [See *Rishabh Agro Industries Ltd. v. P.N.B Capital Services Ltd.*: 2000 (5) SCC 515]. The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in *Narasimhaiah case*: 1996 (3) SCC

88. In *Nanjudaiah case*: 1996 (10) SCC 619, the period was further stretched to have the time period run from date of service of High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only Clauses (i) and/or (ii) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent.

10. It was further contended by Mr Malhotra that the petitioners have acted in violation of Section 8 of the NDPS Act inasmuch as they have indulged in the export of psychotropic substances in contravention of the manner and to the extent prescribed under the NDPS Act and the NDPS Rules. Consequently, the petitioners have made themselves liable for punishment under Section 22 of the NDPS Act read with Section 8 of the NDPS Act and Rule 58 of the NDPS Rules.

11. It was also contended by Mr Malhotra that the fact that the substances in question are also mentioned in Schedule H' to the Drugs and Cosmetics Rules, 1945 would not make any difference to the case at hand. He submitted that Section 80 of the NDPS Act made it clear that the provisions of

the NDPS Act or the NDPS Rules would be in addition to and not in derogation of the Drugs and Cosmetics Act, 1940 or the Rules made thereunder. Similarly, Section 2 of the Drugs and Cosmetics Act, 1940 made it clear that the provisions of that Act would be in addition to and not in derogation of the dangerous Drugs Act, 1930 and any other law for the time being in force. Consequently, Mr Malhotra submitted that the Drugs and Cosmetics Act, 1940 and the NDPS Act are independent statutes and operate in different fields. Finally, he submitted that the Supreme Court in the case of Sanjay Kumar Kedia v. Narcotics Control Bureau and Another: 2008 (1) JCC (Narcotics) 9 held that phentermine and butalbital were psychotropic substances and, therefore, they fell within the prohibition contained in Section 8 of the NDPS Act. According to Mr Malhotra, this decision clearly overrides the judgment of the Supreme Court in the case of Rajesh Kumar Gupta (supra) inasmuch as it unequivocally holds that if a substance is a psychotropic substance, it is covered under Section 8 of the NDPS Act. He also made a reference to a decision of the Supreme Court in the case of Customs, New Delhi v. Ahmadaliev Nodira: 2004 (3) SCC 549, which, according to him, was a decision of a Bench comprising of three Hon'ble Judges of the Supreme Court and would prevail over the decision in the case of Rajesh Kumar Gupta (supra). In Ahmadaliev Nodira (supra), the recovery was in respect of the psychotropic substance known as diazepam which was held to be covered under the NDPS Act. Mr Malhotra also placed reliance on the decision of the Supreme Court in the case of Ravindran @ John v. Supdt. of Customs: 2007 (6) SCC 410. Consequently, Mr Malhotra submitted that the present petitions ought to be rejected.

12. The detention orders, which are in question in the present writ petitions, have purportedly been made under Section 3(1) of the PIT- NDPS Act. The said provision reads as under:-

3. Power to make orders detaining certain persons.-- (1) The Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained. It is apparent that a detention order is made with a view to preventing a person from engaging in illicit traffic in narcotic drugs and psychotropic substances. Section 2(e) of the PIT-NDPS Act defines illicit traffic in the following manner, to the extent relevant:-

2. Definitions.--In this Act, unless the context otherwise requires, --

- | | | | |
|----------|------|------|------|
| (a) xxxx | xxxx | xxxx | xxxx |
| (b) xxxx | xxxx | xxxx | xxxx |
| (c) xxxx | xxxx | xxxx | xxxx |
| (d) xxxx | xxxx | xxxx | xxxx |

(e) illicit traffic, in relation to narcotic drugs and psychotropic substances, means--

(i) Cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-

State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those provided in sub-clauses (i) to (iii); or

(v) handling or letting any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv), other than those permitted under the Narcotic Drugs and psychotropic Substances Act, 1985 (61 of 1985), or any rule or other made, or any condition of any licence, term or authorisation issued, thereunder and includes --

(1) Financing, directly or indirectly, any of the aforementioned activities;

(2) Abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and xxxxxx xxxxxx xxxxxx xxxxxx

13. Since the alleged activity of the petitioners concerns the export of the psychotropic substances from India on receiving orders on the internet, it would be Section 2 (e) (iii) which would be relevant. What is also of significance is that illicit traffic' excludes export from India of, inter alia, psychotropic substances which are permitted under the NDPS Act or the NDPS Rules or any order made or any condition of any, licence or authorisation thereunder.

14. It is also relevant to note Section 2(h) of the PIT-NDPS Act which specifically provides that words and expressions used in the PIT-

NDPS Act, but not defined, and which have been defined in the NDPS Act, would have the meanings respectively assigned to them in that Act (i.e., the NDPS Act).

15. From the above, it is clear that if a person exports any psychotropic substance from India other than what has been permitted under the NDPS Act or the NDPS Rules, then he could be said to be engaging in illicit traffic in psychotropic substances and would thus fall within the purview of the PIT-NDPS Act. The expression psychotropic substances has not been defined in the PIT-NDPS Act. Consequently, in view of Section 2 (h) of the PIT-NDPS Act, the meaning ascribed to that expression under the NDPS Act would have to be taken. Psychotropic substances' has been defined in Section 2 (xxiii) as under:-

2. Definitions.--In this Act, unless the context otherwise requires, --

xxxxx xxxxxx xxxxxx xxxxxx xxxxxx (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.

16. In the present petitions, there is no dispute that the substances in question are psychotropic substances within the meaning of a psychotropic substance under Section 2 (xxiii) of the NDPS Act. All of them find mention in the Schedule to the NDPS Act. Alprazolam is mentioned at S.No. 30, clonazepam is mentioned at S.No.38, diazepam is mentioned at S.No.43, lorazepam is mentioned at S.No.56 and phenobarbitol is mentioned at S.No.69 of the Schedule to the NDPS Act. However, these psychotropic substances do not find mention in Schedule-I to the NDPS Rules.

17. As already pointed out, there is no dispute that the substances in question, in which the petitioners are allegedly said to be involved in the trade of export from India, are psychotropic substances as understood under the NDPS Act. Consequently, they would also be psychotropic substances within the PIT-NDPS Act in view of the above mentioned provisions of Section 2 (h) of the PIT-NDPS Act.

18. Now, Section 8(c) of the NDPS Act stipulates that no person shall, inter alia, export from India any psychotropic substance. This is, however, subject to an exception which indicates that the above general prohibition would apply except where the export from India of the psychotropic substance is for medical or scientific purposes and in the manner and to the extent provided by the NDPS Act or the NDPS Rules or orders made thereunder. In case any such provision imposes any requirement by way of a licence, permit or authorisation, the export has also to be in accordance with the terms and conditions of the licence, permit or authorisation. A plain reading of this provision indicates that there is a general prohibition of exporting any psychotropic substance from India. However, that general prohibition is subject to the exception indicated above. The whole issue that comes up for consideration in these petitions is whether the allegations against the petitioners, even if taken to be true, fall within this exception or not. According to the petitioners, their case is clearly covered under the exception, but according to the respondents, it is not so covered.

19. To find an answer to this question, two things have to be determined. First of all, it has to be determined as to whether the export would be for medical or scientific purposes. The second thing which needs to be determined is whether such an export would be in the manner and to the extent provided by the NDPS Act and the NDPS Rules made thereunder. It is apparent that the manner and to the extent is also provided in the NDPS Rules. Since we are concerned with the export of psychotropic substances, it is Chapter VI of the NDPS Rules, which deals with import, export and transshipment of the narcotic drugs and psychotropic substances, which would be applicable. Rule 53, which we have already extracted above, contains the general prohibition that subject to the other provisions of Chapter VI, import into and export out of India of narcotic drugs and psychotropic substances specified in Schedule-I is prohibited provided that the said rule would not apply in case the narcotic drug and psychotropic substance, which is to be imported into or exported out of India,

is subject to an import certificate or export authorisation issued under the provisions of Chapter VI and for the purposes mentioned in Chapter VII-A. It is, therefore, clear that Rule 53 relates only to those psychotropic substances which are specified in Schedule-I to the NDPS Rules. The prohibition does not extend to all psychotropic substances mentioned in the Schedule to the NDPS Act, but only to those which are specified in Schedule-I to the NDPS Rules. The proviso to Rule 53 would only apply to the psychotropic substances specified in Schedule-I and, therefore, the provisions of Chapter VII-A would only be triggered if the psychotropic substances which are sought to be imported into or exported out of India find place in Schedule-I to the NDPS Rules.

20. Much reliance was placed by Mr Malhotra on the provisions of Rule 58 of the NDPS Rules to submit that since this rule only mentions psychotropic substances specified in the Schedule to the Act, no psychotropic substance, whether mentioned in Schedule-I to the NDPS Rules or not, could be exported out of India without an export authorisation in respect of the consignment issued by the issuing authority in Form No.5 appended to the NDPS Rules. It was his contention that any psychotropic substance mentioned in the Schedule to the Act would require export authorisation before it is exported out of India. He submitted that the petitioners have not taken any such authorisation and, therefore, Section 8 of the NDPS Act would be attracted and the activity indulged in by the petitioners would clearly fall within the zone of prohibited activities and consequently within the four corners of illicit traffic in psychotropic substances as understood under the PIT-NDPS Act. We cannot agree with the submission made by Mr Malhotra. There are several reasons for this. The first reason is that Rule 58 of the NDPS Rules begins with the words subject to Rule 53 ... Of course, the matter is somewhat complicated by the use of the expression subject to the other provisions of this Chapter appearing in Rule 53 itself. But this can be easily answered by referring to the other rules appearing in Chapter VI of the NDPS Rules. While Rule 58 has been specifically made subject to Rule 53, there are other rules which have not been so subjected to the supremacy of Rule 53, such as Rule 53-A, Rule 54 and Rule 63. Moreover, an expression of the nature - A subject to B only signifies that where there is a conflict between A and B, A, being subject to B, would have to yield to B. [See: *South India Corp. (P) Ltd v. Secy, Board of Revenue*: AIR 1964 SC 207 = (1964) 4 SCR 280]. The expression subject to' may also have the meaning conditional upon' as in *KRCS Balakrishna Chetty & Sons v. State of Madras*: AIR 1961 SC 1152 = (1961) 2 SCR 736. Now, in the case of Rule 53 vis-à-vis Rule 58, there is an added complication. While Rule 53 has to yield to' the other provisions of Chapter VI, which includes Rule 58, the latter rule itself has been specifically made subject to' Rule 53. In other words, the general prescription that Rule 53 has to yield to the other provisions of Chapter VI has been set at naught insofar as Rule 58 is concerned inasmuch as Rule 58, because of the use of the expression subject to Rule 53 ..., has specifically been made sub-servient to Rule 53. It is clear that the prohibition contained in Rule 53 would also apply to Rule

58. But that prohibition only extends to the psychotropic substances mentioned in Schedule-I to the NDPS Rules and not to all psychotropic substances mentioned in the schedule to the NDPS Act.

21. Another reason for not agreeing with the submissions made by Mr Malhotra is that if it is accepted that any psychotropic substance specified in the Schedule to the NDPS Act would require export authorisation before it could be exported out of India, then it would mean that the general

prohibition contained in Rule 53 would be rendered redundant. It is obvious that all psychotropic substances mentioned in Schedule-I to the NDPS Rules are also included in the Schedule to the NDPS Act, but not the other way round. This is so because the list of psychotropic substances provided under Schedule-I to the NDPS Rules is a sub-set of the larger list of the psychotropic substances specified in the Schedule to the NDPS Act. If Rule 58 were to be read in the manner suggested by Mr Malhotra, then irrespective of the general prohibition contained in Rule 53, even those psychotropic substances which find mention in Schedule-I to the NDPS Rules, would be permitted to be exported out of India, of course, after an export authorisation. But that is not the intent and meaning of the provisions of the NDPS Act or the NDPS Rules. Rule 53 clearly prohibits export out of India of only psychotropic substances specified in Schedule-I. Rule 58 has been made subject to Rule 53 and would, therefore, be sub-servient to it. Consequently, Rule 58 cannot permit something which has been prohibited by Rule 53. It is, therefore, clear that Rule 58 would only apply to those psychotropic substances specified in the Schedule to the NDPS Act which do not find mention in Schedule-I to the NDPS Rules. In other words, Rule 58 only applies to those psychotropic substances, the export of which has not been banned or prohibited under Rule 53 of the NDPS Rules. The next thing which requires consideration is whether the substances in question can be regarded as being used for medical or scientific purposes. It is clear that these substances are covered in Schedule H' to the Drugs and Cosmetics Rules, 1945 and consequently, they are used for medical purposes. As pointed out in Rajesh Kumar Gupta (supra), once the drugs are said to be used for medicinal purposes, it cannot be denied that they are acknowledged to be drugs which would come within the purview of the expression medicinal purposes.

22. We are now left to consider the decisions cited by the counsel for the parties. The first and most important decision which needs consideration is that of Rajesh Kumar Gupta (supra). In that decision, the accused was an Ayurvedacharya and the allegation against him was that in the medicines supplied by him, he had been using unlabelled tablets containing psychotropic substances and thereby making the unsuspecting patients addicted to drugs. His clinic and premises were raided and about 70 kgs of pure phenobarbitone was recovered. The accused therein was allegedly despatching the said drugs by post also. Charges had been framed against him under Sections 8 and 22 of the NDPS Act. His application for bail before the Special Judge was dismissed. However, the High Court granted him bail and it was against the said grant of bail that the State of Uttaranchal preferred the Special Leave Petition before the Supreme Court. The High Court, in that case, was of the opinion that the substance in question, i.e., phenobarbitone was not listed in Schedule-I to the NDPS Rules and, therefore, the accused could not be said to have committed any offence under Section 8 read with Section 22 of the NDPS Act. In this connection, the Supreme Court analysed various provisions of the NDPS Act and the NDPS Rules, including Sections 8 and 22 of the NDPS Act and Rule 53 of the NDPS Rules. While construing the prohibition contained in Section 8 of the NDPS Act, the Supreme Court observed as under:-

... The said provision contains an exception which takes within its fold all the classes of cases preceding thereto. Use of the contraband for medical or scientific purposes is, therefore, excluded from the purview of the operation thereof. However, such exception carved out under the 1985 Act specifically refers to the manner and to the extent provided by the provisions of the 1985 Act or the rules or orders made

thereunder.

23. The Supreme Court specifically observed that it had not been brought to their notice that the NDPS Act provided for the manner and extent of the possession of the contraband. The NDPS Rules, however, provided for both the manner and the extent, inter alia, of production, manufacture, possession, sale, purchase, transport, import, export, etc. of the contraband. In this connection, the Supreme Court considered the provisions of Chapters VI and VII of the NDPS Rules in the following manner:-

... Chapter VI of the 1985 Rules provides for import, export and transshipment of narcotic drugs and psychotropic substances. Rule 53 contains general prohibition in terms whereof the import and export out of India of the narcotic drugs and psychotropic substances specified in Schedule-I appended thereto is prohibited.

Such prohibitions, however, is subject to the other provisions of the said Chapter. Rule 63 to which our attention has been drawn specifically prohibits import and export of consignments through a post office box but keeping in view the general provisions contained in Rule 53 the same must be held to apply only to those drugs and psychotropic substances which are mentioned in Schedule-I of the Rules and not under the 1985 Act. Similarly, Chapter VII provides for psychotropic substances. Rule 64 provides for general prohibition. Rules 53 and 64, thus, contain a genus and other provisions following the same under the said Chapter are species thereof. This we say in view of the fact that whereas Rule 64 provides for general prohibition in respect of sale, purchase, consume or use of the psychotropic substances specified in Schedule-I, Rule 65 prohibits manufacture of psychotropic substances; whereas Rule 66 prohibits possession, etc. of psychotropic substances and Rule 67 prohibits transport thereof. Rule 67-A provides for special provisions for medical and scientific purposes. ... (underlining added) Importantly, the Supreme Court, after a survey of the relevant provisions of the NDPS Rules, observed:-

The general provisions contained in both Rules 53 and 64, therefore, refer only to the drugs and psychotropic substances specified in Schedule-I. It is neither in doubt nor in dispute that whereas the Schedule appended to the 1985 Act contains the names of a large number of psychotropic substances, Schedule-I of the Rules prescribes only 35 drugs and psychotropic substances.

24. Referring to the facts of the case, the Supreme Court noted that it was not in dispute that the medicines seized from the clinic of the accused therein fell within the purview of Schedules G' and H' of the Drugs and Cosmetics Act. It was also not in dispute that the same were mentioned in the Schedule to the NDPS Act, but did not find place in Schedule-I appended to the NDPS Rules. In this context, the Supreme Court made a categorical observation as under:-

... 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. The Supreme Court further observed that:-

In view of the fact that all the drugs being Item No. 1, 2, 3, 4, 6 & 7 being allopathic drugs mentioned in Schedules G and H of the Drugs and Cosmetics Act 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".

Consequently, the Supreme Court was of the view that inasmuch as the NDPS Act would in itself not apply, Section 37 thereof would, prima facie have no application in view of the exception contained in Section 8 thereof read with the NDPS Rules. Resultantly, the Supreme Court declined to interfere with the order of the High Court granting bail.

25. There is no denying that the above decision was rendered in the context of an order granting bail and when the Supreme Court was considering as to whether it should exercise its jurisdiction under Article 136 of the Constitution of India to interfere with the order passed by the High Court. But that does not enable us to detract from the position that the Supreme Court, while considering the question, did examine the relevant provisions of the NDPS Act and the NDPS Rules and came to the conclusion that if the drugs did not find place in Schedule-I appended to the Rules, the provisions of Section 8 of the NDPS Act would have no application whatsoever. This, of course, was in the context of phenobarbitone which was also a Schedule H' drug under the Drugs and Cosmetics Rules, 1945. Mr Malhotra, as pointed out above, wanted us to ignore this decision because, according to him, it did not lay down the law or settle the issue inasmuch as the Supreme Court was only concerned with a bail order and consequently was required to take a prima facie view. We are not impressed by this argument advanced by Mr Malhotra. The aforementioned detailed narration concerning the said decision indicates that the Supreme Court had specifically gone into the issue and had interpreted the provisions of the NDPS Act as well as the NDPS Rules. Mr Malhotra, the learned ASG, is asking us to shut our eyes to the clear dictum of the Supreme Court which is before us in black and white. We cannot do that. The Constitutional scheme of things which sets out the judicial hierarchy does not permit us to do that. Mr Malhotra submitted that the observations in *Rajesh Kumar Gupta (supra)* are in the nature of obiter dicta and do not constitute the ratio of the said decision. As pointed out, we do not agree with this submission of Mr Malhotra. In *Director of Settlements A.P. and Others v. M.R. Apparao and Another: 2002 (4) SCC 638*, the Supreme Court pointed out that an obiter dictum as distinguished from the ratio decidendi is an observation by court on a legal question suggested in a case before it but not arising in such manner as to require a decision. In the present case, the Supreme Court made the observations with regard to a legal question as it was necessary for the Supreme Court to examine and to come to a conclusion. It is not as if these observations were made by the way. They were essential for ascertaining the true and correct legal position. Insofar as the law is concerned, the Supreme Court considered the same in *Rajesh Kumar Gupta (supra)* and gave its conclusive verdict thereon. The decision was prima facie not on a point of law, but on the question of facts.

26. In any event, an obiter dictum of the Supreme Court is normally considered to be binding on the High Courts in the absence of a direct pronouncement on that question elsewhere by the Supreme

Court. This is exactly what was held by the Supreme Court in *Oriental Insurance Company Limited v. Meena Variyal & Others*: 2007 (5) SCC 428. Furthermore, even if the observations were to be regarded as obiter dicta, as pointed out in *Commissioner of Income-tax, Hyderabad- deccan v. Vazir Sultan & Sons*: 1959 Supp (2) SCR 375, the obiter dicta of the Supreme Court are entitled to considerable weight. The same view is expressed by the Supreme Court in *Director of Settlements, A.P. v. M.R. Apparao* (supra) where the Supreme Court observed:-

Such an obiter may not have a binding precedent , but it cannot be denied that it is of considerable weight.

27. In *State of Haryana v. Ranbir @ Rana*: 2006 (5) SCC 167, the Supreme Court held:-

A decision, it is well-settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a view point or sentiments which has no binding effect. See *Additional District Magistrate, Jabalpur etc. v. Shivakant Shukla etc.* 1976 (2) SCC 521. It is also well-settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. [See *Division Controller, KSRTC v. Mahadeva Shetty and Anr.*: 2003 (7) SCC 197.

28. From these decisions, it is clear that, in the first place, the observations with regard to the provisions of the NDPS Act and the NDPS Rules in *Rajesh Kumar Gupta* (supra) cannot be construed as obiter dicta. This is so because the discussion and conclusion with regard to the said provisions as appearing in *Rajesh Kumar Gupta* (supra) cannot be regarded as unnecessary to the decision.

29. Secondly, even if we assume for the sake of argument that the observations are in the nature of obiter dicta, they are normally binding on the High Courts in the absence of any direct pronouncement on that question by the Supreme Court. There is no other direct pronouncement of the Supreme Court on this issue and, therefore, even if the observations are regarded as obiter dictum, they would be binding on this court.

30. Thirdly, apart from this, even if it is assumed that the observations of the Supreme Court in *Rajesh Kumar Gupta* (supra) are not binding on us, the said observations will, in the least, be required to be construed as having considerable weight and of great persuasive value. We are in full agreement with the observations of the Supreme Court and are indeed persuaded by the line of thought adopted in the said decision in *Rajesh Kumar Gupta* (supra). Thus, viewed from any angle, the submission of Mr Malhotra to ignore the decision of the Supreme Court in *Rajesh Kumar Gupta* (supra), deserves rejection.

31. It is true that the interplay between Rules 53 and 58 of the NDPS Rules was not considered in *Rajesh Kumar Gupta* (supra). However, the general principles indicated above would apply. In any event, we have already analysed the interplay between these provisions and have indicated that Rule

58 of the NDPS Rules is sub-servient to Rule 53. Consequently, Rule 58 would only come into play in respect of psychotropic substances which are listed in the Schedule to the NDPS Act but do not find mention in Schedule-I to the NDPS Rules. It is for this reason that Rule 58 only refers to the psychotropic substances mentioned in the Schedule to the Act because those psychotropic substances which find mention in Schedule-I to the NDPS Rules are clearly prohibited and for which no authorisation can be granted whatsoever.

32. As indicated above, Mr Malhotra had placed reliance on the decision of the Supreme Court in Ahmadalieva Nodira (supra) and had submitted that this decision being that of a Bench comprising of three Hon'ble Judges of the Supreme Court would override the decision in Rajesh Kumar Gupta (supra) which was rendered by a Bench comprising of only two Hon'ble Judges of the Supreme Court. First of all, there is nothing in this decision which contradicts what has been considered and settled in Rajesh Kumar Gupta (supra). In Ahmadalieva Nodira (supra), the provisions of the NDPS Rules were not even considered nor was the issue of Schedule-I to the NDPS Rules in contrast to the psychotropic substances mentioned in the Schedule to the NDPS Act discussed. Secondly, and in any event, the said decision in Ahmadalieva Nodira (supra) was noticed and considered in Rajesh Kumar Gupta (supra) and with regard to the said decision, the Supreme Court in Rajesh Kumar Gupta (supra) specifically observed that:-

This Court, however, in the said decision was not concerned with the construction of Section 8 of the 1985 Act. It does not and did not lay down a law that although the provisions of the 1985 Act shall prima facie not apply, no bail can be granted. These observations make it clear that there is nothing in the decision in Ahmadalieva Nodira (supra) which will enable us to detract from the clear observations of the Supreme Court in Rajesh Kumar Gupta (supra). Consequently, the decision in Ahmadalieva Nodira (supra) is of no use to the respondents.

33. The decision in Sanjay Kumar Kedia (supra) will also not come to the aid of the respondents. While it is true that in that case, the accused were allegedly running an internet pharmacy and were dealing with prescription drugs like phentermine and butalbital, there is no discussion in the context of the exception contained in Section 8 of the NDPS Act and the provisions of the NDPS Rules. As such, that decision would not apply to the circumstances which arise before us in the present writ petitions.

34. Similar is the case with the decision of the Supreme Court in Ravindran @ John (supra). Merely because the said decision deals with the case of diazepam, it cannot be construed to lay down a law different from what had been set down in Rajesh Kumar Gupta (supra). This is so because none of the provisions of the NDPS Rules were considered in Ravindran @ John (supra). More importantly, the distinction between psychotropic substances mentioned in the Schedule to the NDPS Act and those mentioned in Schedule-I to the NDPS Rules was not before the Supreme Court in Ravindran @ John (supra).

35. From the aforesaid discussion, it is apparent that even if it is assumed that the petitioners were exporting the psychotropic substances in question, after receiving orders over the internet, it cannot

be said with any degree of definiteness that they were indulging in illicit traffic of psychotropic substances' as understood in the context of Section 3(1) of the PIT-NDPS Act. There are clear indications that the export of the psychotropic substances in question, not being part of Schedule-I to the NDPS Rules, would per se not amount to an activity prohibited under the NDPS Act read with the NDPS Rules. In the worst, from the standpoint of the petitioners, the question as to whether their alleged activity falls within the expression illicit traffic would be a debatable one. It is obvious that where it is a clear case that the alleged activity, even if taken to be established against the petitioners, does not amount to illicit traffic, there is no question of maintaining the detention orders. But, even if the issue is debatable as to whether the activities of the petitioners fall within the expression illicit traffic, we feel that a detention order would still not be a prophylactic which would be available to the executive under the Constitutional regime. The reason is obvious. Personal liberty is a hallowed right of any person. It cannot be taken away when the very act which is sought to be prevented cannot definitely be classified as an illegal or prohibited act falling within the expression illicit traffic in psychotropic substances. We, therefore, feel that the detention orders ought to be set aside.

36. We make it clear that we are not at all giving a stamp of approval to the activities allegedly undertaken by the petitioners. If it is established that the petitioners did indulge in such activities, in the least, they have violated the provisions of the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetic Rules, 1945. They shall have to suffer the consequences for that. They can even be prevented from continuing with the activities by the authorities under that Act. But that does not enable or empower the executive to invoke PIT-NDPS Act and take away the liberty of the individuals as a preventive measure. Preventive detention is not punitive detention. It is not by way of a punishment. Therefore, any such detention has to be viewed with great circumspection because the liberty of an individual is taken away even before he is found guilty of having committed an offence by a court of law. The safeguards are built into the Constitution as well as the enactments which deal with preventive detention. The courts of law have also laid down various principles dealing with preventive detention and the courts have always lent in favour of liberty and against the deprivation of liberty without good cause. The deprivation of liberty by way of preventive detention has only been permitted when the executive has made out a clear and undisputable case for it within the parameters prescribed by the Constitution of India. In this connection, it would be instructive to quote the observations of a Constitution Bench of the Supreme Court in *Kamlesh Kumar Ishwardas Patel v. Union of India and Others*: (1995) 4 SCC 51 as under:-

49. At this stage it becomes necessary to deal with the submission of the learned Additional Solicitor General that some of the detenues have been indulging in illicit smuggling of narcotic drugs and psychotropic substances on a large scale and are involved in other anti-national activities which are very harmful to the nature of the activities of the detenues the cases do not justify interference with the orders of detention made against them. We are not unmindful of the harmful consequences of the activities in which the detenues are alleged to be involved. But while discharging our constitutional obligation to enforce the fundamental rights of the people, more especially the right to personal liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of

procedural safeguards. The framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in Clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be "jealously watched and enforced by the Court". Their rigour cannot be modulated on the basis of the nature of the activities of a particular person. We would, in this context, reiterate what was said earlier by this court while rejecting a similar submission:

May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of Preventive Detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenues.

37. The following observations of the Supreme Court in *Kundanbhai Dulabhai Shaikh v. Distt Magistrate Ahemadabad and Others*: 1995 (3) SCC 194 are also apposite:-

25. Black marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicated in *Mahesh Kumar Chauhan alias Banti v. Union of India and Others*: 1990(3) SCC 148, in which it was observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by law particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial.

38. In view of the foregoing discussion, we allow the writ petitions and set aside the impugned detention order dated 27.02.2009 in the case of the petitioner Rajesh Sharma in WP(CRL) 326/2009 and the order dated 13.03.2009 in the case of the petitioner Nafe Singh in WP(CRL) 384/2009. The respondents are directed to release the petitioners forthwith. The writ petitions stand disposed of. There shall be no order as to costs.

BADAR DURREZ AHMED, J P.K. BHASIN, J May 06, 2009 dutt