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MANIPULATING THE MANDATE: EXECUTIVE INFLUENCE ON NDPS LAW AND ITS FALLOUT

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ABSTRACT

Narcotic drugs and Psychotropic Substances Act, 1985 is the prime statute that regulates the law in India relating to drug use, drug abuse, possession, procedures, punishments, etc. Since its inception, it has remained a stringent special statute with the only major amendment that as made to it in 2001 vide the Narcotic Drugs and Psychotropic Substances Act (Amendment) Act, 2001. The amendment was brought with a view to rationalize the sentence structure in the Act with the introduction of concepts of small and commercial quantity in relation to Narcotic Drugs and Psychotropic Substances (NDPS). Narcotic Drugs and Psychotropic Substances (NDPS) This amendment was a constructive step of the legislature to ensure deterrent punishment for drug traffickers and comparatively less severe punishment for drug addicts using or possessing for personal use, thus trying to facilitate rehabilitation and reduce the burden on jails and courts eventually. While the courts were deciding cases by interpreting the object and reasons of this Amendment Act, the Central Government by a notification in 2009, meddled by adding an 'explanatory note' to the 2001 notification of the Act specifying that the weight of the entire narcotic drug or psychotropic substance along, with neutral substance, will have to be taken into consideration for determining the sentence of the accused. The current paper will discuss the validity of this notification and the confusion created by it in the adjudication of matters.

Keywords: Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, NDPS Amendment Act 9 Of 2001, Rationalised Sentence Structure, E. Micheal Raj V. Intelligence Officer, Narcotic Control Bureau, Weight, Purity, Neutral Substance, Central Government Notification, Hira Singh V. Union of India, Small Quantity, Commercial Quantity

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1. INTRODUCTION

India had ratified the Single Convention on Narcotic Drugs of 1961 and the Convention on Psychotropic Substances of 1971 and was therefore, under the obligation to legislate a robust statute to curb the drug menace. A time frame of twenty-five years was specified to India to legislate after the 1961 Convention. However, India didn't attempt earnestly until 1977 when an Expert Committee was formed by the Government of India to review the drug abuse sitch in the country. The committee thoroughly assessed the studies conducted on the subject[1] and recommended restructuring

[1] Channabasavanna, SM, "Epidemiology of Drug Abuse in India - an Overview", in R Ray and RW Pickens (eds.), *In Proceedings of the Indo-Us Symposium on Alcohol Drug Abuse* 43-56 (1989) and Mohan, D, HS Sethi, *et.al.* (eds.), I *: Current Research in Drug Abuse in India,* (Gemini Printers, New Delhi, 1981).

legal and penal provisions to thwart, control and curb substance use besides stressing remodelling rehabilitation measures, preventive education, treatment, and social action[2].

Although the report was submitted in 1977, the government dragged its heels to legislate until in August 1985 when it tabled the NDPS Bill before the Lok Sabha. The Bill was an amalgamation of the three Drug Laws operative in the country since colonial rule - The Opium Act, 1857 (13 of 1857), the Opium Act, 1878 (1 of 1878), and the Dangerous Drugs Act, 1930 (2 of 1930). These three laws were disaggregated and had limitations vis a vis the latest types of drugs and trafficking techniques and deterrent effects on defaulters, smugglers and drug abusers. Much deliberations and debates were conducted on the issue of punishment whether stringent or lenient, lack of government's mandatory obligation to rehabilitate and treat drug addicts, as to why there was no provision for treating children addicted to drugs, and no provision for death penalty or life imprisonment for those found guilty of financing the Golden Triangle (Thailand, Laos, and Myanmar) and of the Golden Crescent (Afghanistan, Iran, and Pakistan), neither was there any penalty for corrupt public officials nor was any distinction made between users of opium and those who dealt in it and so on[3]. Recommendations were also given to refer the Bill to a select Committee for exhaustive contemplation. However, since time was running out, it was not referred to a select Committee and hastily passed by Lok Sabha in September 1985 and with same haste the President gave assent to the Bill and in this way the NDPS Bill became an Act which came into force on November 14,1985 repealing all three previous drug laws on India.

As the Statute was passed in haste without considering each and every aspect of the law, many major and minor provisions remained ambiguous. Some of them were corrected by way of subsequent amendments and for some the central Government was given the delegated power to legislate and on some from time to time judiciary has clarified the provisions. This paper analyses the executive's power to legislate and the effect of such delegated legislation on the rationality of the judicial decisions.

2. THE GENESIS OF THE PROBLEM - WEIGHT V. PURITY

The principles of Natural Justice hold that the accused is presumed innocent until proven guilty. However, the NDPS Act, 1985 follows the principle of reverse onus i.e. the accused is presumed to be guilty until he proves himself innocent. The stringent sentencing structure lands the accused in jail for a major chunk of his life mostly waiting for the trial to commence or to be decided, let alone serving the sentence.

One of the intents of the Legislature in bringing the Amendment to the NDPS Act in 2001 was to relax the punitive provisions of the Act in cases of small quantities of drugs or where the drugs have been found in possession for personal use or personal consumption. This is clear from the Statement of Objects and Reasons of the Amendment Act, 2001.[4]

The application of the provisions of the Amendment Act, 2001 was flecked in the case of *Ouseph alias Thankachan v. State of Kerala*[5], where the petitioner was found in possession of 110 ampules of Buprenorphine which is a psychotropic substance and as per the notification[6] of the Central Government, its small quantity is 1 gram. The Court held that since each ampule contained only 2 ml and each ml contains only .3 mg, therefore, the total quantity found in the possession of the petitioner was only 66 mg which is less than 1/10th of the specified small quantity. Thus, the Court intentionally

[2] Government of India, "Drug Abuse in India, Report of the Committee" (Ministry of Health and Family Welfare, 1977)

[3] Lok Sabha Debates on the NDPS Act, 1985 (Parliament Secretariat) 23 August 1985.

[4] "Statement of Objects and Reasons - Amendment Act 9 of 2001- Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

[5] *Ouseph alias Thankachan v. State of Kerala* (2004) 4 SCC 446

[6] Notification specifying small quantity and commercial quantity vide S.O.1055 (E) dated 19th October, 2001 published in Gazette of India, dated 19th October, 2001

excluded the neutral substance from the psychotropic substance found in the mixture for the purpose of determining the quantum of sentence.

The NDPS (Amendment) Act, 2001 was again floor tested in 2008 in the case of *E. Micheal Raj* v. *Intelligence Officer, Narcotic Control Bureau*[7]. Though the Court was dealing with a case of 4 kgs of heroine, it thoroughly considered the question that while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s) and held that only the actual weight of the offending drug in a mixture will matter under the NDPS Act, and that the weight of the neutral substances can be excluded. The Special Judge for trial of cases found that the substance found in possession of the accused was an opium derivative[8] and its preparation[9], and since the recovered contraband article contained 1.4% and 1.6% heroin, it is an opium derivative and is punishable under Section 21 of the NDPS Act. As this manufactured drug[10] weighed 4.07 kg., which is a commercial quantity, it would be covered under Section 21(c). However, the accused being just a carrier was awarded the minimum sentence of 10 years rigorous imprisonment and a fine of rupees one lakh, in default of payment of fine rigorous imprisonment for one more year. On an appeal being preferred, the High Court found the accused guilty and, upholding the conviction and sentence awarded by the Special Judge, further reasoned that the contraband seized from the accused was a manufactured drug and the offence can be in respect of manufactured drug or preparation[11] of a manufactured drug and any mixture of narcotic drug with other substances will also come within Section 21 of the NDPS Act. Thus, the rate of purity was immaterialised by the court and the whole quantity of mixture was made to be taken into consideration for imposing the punishment under Section 21 of the NDPS Act. Dissatisfied with the decision, appeal was preferred to the Supreme Court. The Supreme Court pointed out that it is undisputed that the contraband was an opium derivative and thus a manufactured drug and its possession is prohibited under Section 8 of the NDPS Act and thus punishable under Section 21. But the question of quantum of sentence on the basis of the quantity of the offending material was under dispute. The court held that the argument of the State that the rate of purity of the substance/ contraband is immaterial cannot be accepted. Given that the statute itself provides for the specific amounts of the substance in pure form, for instance, any preparation which is more than the commercial quantity of 250 grams and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, indicates that the 'weight' independently will not play the significant part but its rider, that is, 'the contents' are the game changer. Thus, even if the weight of the offending substance is 250 grams or more, but it contains less than 0.2% of heroin, it would not attract the provisions of Section 21(c) of the NDPS Act. This indicates that the legislature intended to impose punishment on the basis of the content of the offending drug in the mixture and not on the weight of the mixture as a whole.

On this basis, the court held that since the narcotic drug found in possession of the appellant is 60 grams which is more than 5 grams, i.e. small quantity, but less than 250 grams, i.e. commercial quantity, the appellant would be punishable under Section 21(b)[12] instead of Section 21 (c) of the NDPS Act. This was evidently a just and fair decision of the division bench of the Supreme Court which upheld the true spirit of the statement of object and reasons of the NDPS Amendment Act of 2001.

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[7] *E. Micheal Raj* v. *Intelligence Officer, Narcotic Control Bureau* (2008) 5 SCC 161

[8] Section 2(xvi)"opium derivative" means—(a)medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials

[9] Section 2(xvi)(e) - all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine

[10] Section 2(xi)"manufactured drug" means—
(a)all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
(b)any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug;
but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.

[11] Section 2(xx)"preparation", in relation to a narcotic drug or psychotropic substance, means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;

[12] Section 21(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;

3. RECIPROCATION BY THE EXECUTIVE AND ITS IMPLICATIONS

While deciding the case of *E. Micheal Raj* v. *Intelligence Officer Narcotic Control Bureau*[13], the Supreme Court had kept in consideration the notification No. SO-1055 (E), dated 19.10.2001 (which tabularised the small and commercial quantity of the narcotic drug or psychotropic substance against its corresponding name and chemical name) and held that for the purpose of determining the quantum of sentence, the actual weight of the heroin (diacetylmorphine) will be taken into the account and not the entire mixture.

However in order to overthrow the effect of this judgment, Central government added note 4 to the above said table vide notification S.O.2941 (E) dated 18.11.2009 published in the official gazette.

Note 4 reads as follows:

"The quantities shown in columns 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Thus, under the term 'entire mixture' the central government notified that the quantity of neutral substances in a drug mixture shall also be added while calculating the weight of the drug or substance and not just the pure drug content which would eventually be the basis to determine the sentence of the accused.

It is understandable to apply this criteria and ignore the purity content if the mixture recovered from accused is a mixture or solution of one or more drug but if the pure drug is mixed with neutral and harmless substances like water, juice, sugar, etc, the purity of the drug shall matter the most.

The consequence of the issuance of the Note 4 vide the impugned notification is that the accused's sentence would be determined by considering the total quantity of the material found in his possession. Even though on chemical analysis it is found that the actual content of the narcotic drug or psychotropic substance is covered under the "small quantity", but by counting/ adding the weight of neutral material in the actual content, the sentence would be awarded for "commercial quantity".

For illustration, let's say that there are two offenders P and Q. P is found in possession of 4 grams heroin which is less than the "small quantity" (5 grams) and Q is found in possession of 1 gram of heroin, but has mixed it with 250 grams of sugar (a neutral substance) thus making 251 grams, more than the commercial quantity (250 grams). If Note 4 is put in practice the P is sentenced to a (maximum)1 year rigorous imprisonment and a fine of Rs 10,000 for possessing small quantity under section 18 (a). While Q is sentenced to a (maximum) 20 years of rigorous imprisonment and a fine of Rs 2 lakh for possessing commercial quantity under section 21 (c). This would imply that Q has been given extra 19 years of rigorous imprisonment for possessing 250 grams of sugar, a neutral material although possession of sugar, salt or water is otherwise not an offence under the NDPS Act, except wherein expressly provided. How are the courts going to justify such sentencing orders that basis of which is more the dilution, more the punishment? It is in complete conflict with the spirit of the 2001 amendment to the Act which intended that smaller quantities should result in lighter penalties, while the larger quantities should lead to harsher punishments.

The implications of this 2009 notification were so impactful that the rationality of the judicial decisions became debatable. By issuing the notification, the central government overstepped the limits of delegated legislative power, a principle governed by administrative law. Under administrative law, the executive's power to make rules and regulations is derived from the legislature's authority and must remain within the boundaries set by the enabling legislation. Therefore, the validity of notification was being challenged in number of cases.

4. RATIONALITY OF JUDICIAL DECISIONS

In *Abdul Mateen* v. *Union of India* [14], the power of the Central government to bring out such a notification was questioned. The Supreme Court, unnecessarily interpreted the word 'preparation', which is itself clearly defined by the statute. As per section 2(xx), 'preparation' mean any solution or mixture, in whatever physical state containing one or

[13] supra

[14] *Abdul Mateen* v. *Union of India* 2012 (194) DLT 425

more such narcotic drug or psychotropic substance, which clearly indicates that a preparation shall contain a solution or mixture of one or more such narcotic drug or psychotropic substance. However, the Supreme Court took it as obvious that if there is only one narcotic drug and we are referring to a mixture, then the other material must be a neutral material. In other words it qualified a mixture of a narcotic drug or psychotropic substance with a neutral material like water or sugar or salt as punishable under the Act. Regrettably, the Court very conveniently disregarded the express provisions of the Act and demonstrated judicial overreach by exceeding its interpretative role by effectively creating new meanings or policies through expansive readings. Through this departure from proper interpretative discipline, the Court affirmed the Central Government has been empower to specify the quantity of this 'preparation' or mixture of a narcotic drug and a neutral substance and thus set a fallacious precedent.

It is understandable that the case of a mixture of two drugs and combination of more than one drug and psychotropic substance has specifically been dealt with under Entry. No. 239 of the notification dated 19.10.2001, and there had been no provision for dealing with the situation where the mixture was of just one narcotic drug or psychotropic substance with neutral material, however, such matters have been coming up to the Courts on regular basis and have been beautifully dealt with by some Courts.

A similar question arose in case of *Mohd. Sayed* v. *Customs*[15], where the accused was found in possession of 3215 Tidigesic Injections (Buprenorphine) of 2 ml each. The question that was posed was whether the actual quantity of Buprenorphine (psychotropic substance) found to be present in the ampoules or the total quantity of these ampoules was to be taken into consideration for framing of the charge. The Single Bench of the court held that it could only be the actual quantity/ value of Buprenorphine as found present in each ampoule i.e. 0.18 ml and not the total quantity of 2 ml that may be taken for the purposes of framing of charge against the accused petitioner. So calculated, the aggregate Buprenorphine in 3215 ampoules would come to 0.578 gm which is a small quantity.'[16]

The judicial decisions like in case of *Masoom Ali @ Ashu* v. *State*[17] are of utmost importance while interpreting the ambiguous provisions of the statute. In this case, the petitioner had filed a revision petition against the order of the Additional Sessions Judge rejecting the petitioner's application, to have the sample re-examined by the Central Forensic Science Laboratory to determine the percentage of diacetylmorphine, on the ground that the percentage in the total quantity of recovery is immaterial for the purpose of determining the offence. The court held that where, a large quantity of powder is recovered and the percentage of the narcotic substance is very small, then proportionate reduction in the recovery would have to be made for ascertaining whether the offence falls within the categories mentioned in the NDPS Act.

In case of *Ansar Ahmed* v. *State*[18] , the Court heavily criticised the view taken in case of *Yogesh Tyagi* v. *State*[19] that held that the percentage mentioned in the CFSL reports whether by weight or potency is irrelevant for determining whether the quantity of drug recovered in each case is small quantity or commercial quantity. The Court reiterated that in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, it is only the actual content by weight of the narcotic drug or the psychotropic substance (as the case may be) which is relevant for determining whether a small quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered without adding the quantity of the neutral substance or substances.[20]

Relying on the above notification, in 2020, in *Hira Singh* v. *Union of India*[21], a three Judges Bench of the Supreme Court (in Reference) overruled the decisions in *E. Micheal Raj Case,* and held that the quantity of neutral substance in a mixture containing narcotic drugs or psychotropic substances must be taken into account along with the actual weight of the offending drug while determining small or commercial quantity under the NDPS Act. In this case, the accused was arrested for possessing a 270 grams of heroin. On chemical examination it was found to contain diacetylmorphine content as 1% which comes to 2.6 grams of pure heroin. The special Judge, considering the entire mixture, convicted the accused for possession commercial quantity under section 2 (viia) of the NDPS Act. Civit writ petition was filed in 2013

[15] Mohd. Sayed v. Customs 2002 [2] JCC 1293
[16] supra
[17] Masoom Ali @ Ashu v. State (Crl Rev.P 195/2004)
[18] 123(2005) DLT563
[19] 2004CRILJ3907
[20] *Ansar Ahmed* v. *State (Govt. Of Nct Of Delhi)* 123(2005) DLT563
[21] (2020) SCC Online SC 382

in Punjab and Haryana High Court, challenging the validity of the Central Government notification[22] on the ground on non-compliance of the provisions and procedure prescribed under Section 77 of the Act and being violative of law laid by the Supreme Court in E. Michael Raj's case[23]. The only reason the Court could give for its contrary decision was that the mixture issue was not directly in question in *E. Micheal Raj Case*. Interestingly, the Division Bench in *E. Micheal Raj Case* deliberately dealt with this question stepping ahead from the direct question involved to settle the issue, and to a great extent, it has been successful in justifying its decision. All the issues in *Hira Singh Case* were already addressed by the Court in *E. Micheal Raj case*. The question as to the chemical composition of the drug, substance, derivatives, and mixtures was discussed and explicitly in the judgment/order and there was nothing beyond that what has been decided by the Court in the Hira Singh case, therefore, it was neither desirable to send the case in reference nor to entertain this reference. In order to answer to the issues involved in the case, the Court kept on referring to the original statute and disregarded the 2001 Amendment to the original Act that rationalised the sentencing structure when the legislature itself felt that the provisions of the original Act were too harsh on the accused of small crimes under the Act.

Perhaps different Benches have been applying different rules of interpretation of similar provisions under different Statutes and that's why they have been unable to reach a decision in solidarity. Judge Learned Hand rightly recognised that what is ideal in construing a statute is to look first to the words of the statute, not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[24]

5. CONCLUSION

The ruling in Hira Singh's Case underscores the ongoing challenge of interpreting and applying drug laws in a manner that is both fair and effective, calling for potential legislative clarifications to address the practical concerns. The addition of 'clarificatory' or explanatory' Note 4 by the government and approved by the Supreme Court adjusted the parameters of 'authorization' within law enforcement agencies and modified the penal framework concerning consumers or abusers. Consequently, this led to a surge in criminal cases, appeals, and references inundating the judicial system, ranging from Special Courts to the Supreme Court. The conflicting interpretations of the amended provisions in various Courts and benches contributed to the chaos.

Examining the interpretation of statutory provisions becomes a preliminary step in evaluating the objectivity of judicial decisions. Simultaneously, the unrestrained authority of the Central Government to modify statutes through notifications in the Official Gazette has left the Courts perplexed. Despite the controversies and criticisms, there is no substantial record of formal legislative objection or attempts to revoke or amend the 2009 notification. This lack of legislative response might indicate either a tacit approval or a lack of consensus or awareness within the legislative body to challenge the executive's expanded interpretation of the NDPS Act. Another concern is the lack of judicial discipline within our legal system and the subsequent challenges in establishing coherent legal principles. The legislature and the judiciary needs to scrutinize and fix these anomalies in the NDPS Act to prevent further exacerbation and must limit the power of executive to legislate in the name of delegated legislation.

The NDPS Act does not bestow any power on the Executive to prescribe the quantity of a mixture or solution as small or commercial quantity. The Government is empowered only to increase or decrease the quantity of narcotic drugs or psychotropic substances only and not the substances that are neutral or do not fall in the category of narcotic drugs or psychotropic substances under the NDPS Act. Section 3 of the NDPS Act guides that the central Government may add or omit any substance, natural material or salt or preparation of such substance or material from the list of psychotropic substances on the basis of the information and evidence which proves that such substance, etc. can be abused and if any modification regarding such substance has been made in any International Convention. Since none of the above two conditions apply to neutral substances, the Central Government has no power to add them in the schedule indirectly by adding note 4 through a Notification and thus Legislating and expanding the scope application of the Act beyond prescribed limits. The courts must check such ultra vires actions of the central government instead of validating them.

[22] S.O. 2941 (E) dated 18.11.2009
[23] 2008 (5) SCC 161
[24] Cabell v. Markham, 148 E2d 737, 739 (2d Cir. 1945), affd, 326 U.S. 404 (1945).