

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : Narcotic Drugs and Psychotropic Substance Act, 1985

CRL.REV.P. 494/2007

Decided on: 13th July, 2011

DIRECTORATE OF REVENUE INTELLIGENCE Petitioner

Through Mr. S.C. Aggarwala, Advocate

versus

RAJ KUMAR ARORA AND ANR Respondents

Through Mr. K.K. Sud, Sr. Advocate with Mr. Dinesh Monga, Advocate for R-2. Mr. Neeraj Jain, Advocate for R-3.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. A complaint was filed by the Petitioner against the Respondents for offence punishable under Section 22 and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short 'the NDPS Act') inter alia praying to take cognizance of the offences, summon the accused, try and punish them in accordance with law. The Special Court constituted under the NDPS Act took cognizance of the offences and summoned the Respondents. Vide order dated 3rd February, 2005 charges were framed against the Respondents for offences

punishable under Sections 22 (c) and 29 of the NDPS Act. In the meanwhile Rajkumar Arora Respondent No. 1 in the present case filed a bail application before this Court being Bail Application No. 205/2005. Besides the bail application of Rajkumar Arora, number of other applications were considered wherein the allegations against the accused persons were for possession of ampoules containing injectable contents of Buprenorphine. This Court heard all these petitions together and vide its judgment dated 22nd August, 2005 held that the possession, sale and transportation of Buprenorphine Hydrochloride injections was not an offence punishable under Section 22 of the NDPS Act and thus, granted bail to the applicants in the said batch matters including Respondent No. 1 herein.

2. Against the said order the petitioner filed the Special Leave Petition. The Hon'ble Supreme Court vide its order dated 31st March, 2006 observed that this being the order passed in the bail application it will not have any persuasive effect, when the matter is finally considered before the Special Judge on merits. Thereafter an application was filed by the Respondent No. 3 seeking exercise of its jurisdiction under Section 216 Cr.P.C. and to pass suitable orders to secure the ends of justice. Before filing the application, the Respondent No. 3 filed a Criminal Revision Petition in this Court being Criminal Revision No. 204/2005 challenging the orders dated 3rd February, 2005 and 8th February, 2005 directing and framing the charges. When the revision petition came up for hearing on 1st August, 2006 this Court was pleased to pass the following order:

“Crl. Rev. P. 204.2005 & Crl. M. No. 9944/2005

This revision petition is directed against the order on charge dated 03.02.2005 as well as the formal charge framed on 08.02.2005 against the petitioner under Section 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985. Mr. Sud, the learned Senior Counsel for the petitioner has pointed out that the main issue involved in the present case is whether BUPRENORPHINE HYDROCHLORIDE I.P. would be a psychotropic substance covered under the NDPS Act and Rules. According to Mr. Sud, this matter has been considered by this court in the case of R. Gupta Vs. State: 123 (2005) DLT 55. This decision came after the order which is impugned in the present proceedings was passed. Mr. Sud, also submitted that

he had moved an application under Section 216 of Code of Criminal Procedure 1973 for amendment/ alteration of the charge. That application, I have been told is pending before the learned Additional Sessions Judge.

In these circumstances it would be appropriate if the application under Section 216 of the Code of Criminal Procedure which has been filed by the petitioner is disposed of taking into account, inter-alia, the said decision of this Court. While disposing of the application under section 216 Code of Criminal Procedure, the learned Sessions Court shall not be influenced by what has been held in the impugned order and shall consider the entire issue afresh. The learned Sessions Court shall decide the application under Section 216 Code of Criminal Procedure first before proceedings further with the matter. It, of course, goes without saying that not only the counsel for the petitioner but the counsel for the State shall also be heard on all submissions. In view of above terms, this revision petition stands disposed of.”

3. In view of this order of the Delhi High Court the application of the Petitioner was heard at length and the impugned order dated 30.11.2006 was passed. The learned Trial Court allowed the application of the Respondent No. 3 under Section 216 Cr.P.C. and held that the charges framed by his learned predecessor dated 8th February, 2005 are not made out. The offences under Sections 29 and 22(c) of the NDPC Act are not made out and it was a case under the Drugs and Cosmetics Act, 1999 which was triable by the learned Metropolitan Magistrate and thus sent the file to the learned ACMM for further proceedings in accordance with law. This order dated 30th November, 2006 passed by the learned Special Judge discharging the Respondents for offences punishable under Section 29 and 22 (c) of the NDPS Act is the order impugned in the present petition.

4. Thus the issues that call for determination in the present case are; firstly, whether an offence committed under Section 29 and 22 (c) of the NDPS Act in relation to a psychotropic substance which though mentioned in the Schedule to the Act but not in Schedule I to the NDPS Rule is made out or not; Secondly, whether the learned Special Court was within its jurisdiction to have discharged the

Respondent No.3 on an application under Section 216 Cr.P.C. after an order of charge was framed against him.

5. Learned counsel for the petitioner states that in the present case there was recovery of 40001 injections of Buprenorphine which is a psychotropic substance mentioned in the Schedule and draws attention of this Court to Section 8 of the NDPS Act and Rule 53A, 55, 57 and 58 of the NDPS Rules. Learned counsel contends that this court in *Rajinder Gupta v. The State*, 123 (2005) DLT 55 held that the scheme of the NDPS Rules show that Rule 53 and Rule 64 relate to psychotropic substance. The first related to inter country import, export and transshipment whereas the later to manufacture, possession, transport and selling. It is stated that the finding of the learned Single Judge that Rule 64 being a general provision will qualify the previous provisions in Chapter-VI is incorrect. Wherever the legislature so required it has used the words, "the schedule" which means the schedule to the NDPS Act and Schedule-I, Schedule-II which are the Schedules to the NDPS Rules. Rules 65, 66 and 67 are not controlled by Rule 64. Section 54 of the Act raises a presumption that under the Act it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under the Act in respect of any Narcotic drug or psychotropic substance or controlled substance; for the possession of which he fails to account satisfactorily. Section 8 (c) of the Act provides that no person shall 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 & conditions of such licence, permit or authorisation. Further reliance is placed on Section 105 of the Evidence Act to contend that the Court has to presume the absence of such circumstance unless the accused proves to the contrary. Section 80 of the Act provides that 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 (hereinafter referred to as the D&C Act) or the Rules made thereunder. Since the two Acts are not in derogation but in addition to each other the Special Court erred in holding that since the drug in question was governed by

the D&C Act, NDPS Act was not applicable. Moreover, Section 2 of the D & C Act also does not bar the application of other laws. Since the Respondents have contravened Section 8 (c) and Rule 67A of the NDPS Act and Rules they are liable to be charged for offences punishable under Section 29 and 22 (c) of the Act and in case the Respondents claim to be falling in the explanation of medical and scientific purpose under Section 8 (c), the onus is on them to prove as per Section 105 of the Indian Evidence Act and till that onus is discharged, the Court has to presume the commission of offences.

6. Learned counsel for the Petitioner states that the observation of this court in *Rajinder Gupta (Supra)* is per incuriam. Firstly, as in the said case this Court did not examine the provisions of Chapter VI of the Rules and confined itself to Chapter VII of the Rules which only deal with inter-state import, export, possession, transport, manufacture etc. As per the complaint, the Respondents have also committed offence punishable under Section 23 of the Act and hence the provisions of Chapter VI of the rules are applicable. It is contended that in case this order is not set aside the Petitioner would have no chance to get a charge under Section 23 of the NDPS Act framed against the respondents. It is contended that the case at hand is not only of possession or trading inter-State but of export and import outside the country and thus, the provisions to Chapter VI of the Rules apply. Rule 53 of Chapter VI is a general prohibition wherein export and import of Narcotic and psychotropic substance specified in Schedule I is prohibited subject to other provisions of this chapter. A conjoint reading of Rules 53, 53A, 55 and 58 shows that the Rules apply not only to the psychotropic substances mentioned in Schedule I of the Rules but also to psychotropic substances mentioned in the Schedule to the Act. According to him the psychotropic substances enlisted in the Schedule I of the Rules are totally prohibited from being exported or imported, however, substances mentioned in the Schedule to the Act excluding those mentioned in Schedule-I to the Rules can be imported, exported, subject to Chapter VI of the Rules. A perusal of various Rules would show that they are subject to Rule 53. In terms of Rule 66 (2) violation of provisions of D & C Act can be an offence under the NDPS Act. Reliance is placed on *Hussain vs. State of Kerala*, 2000 (8) SCC 139 and *Oushe @ Thankachan vs. State of Kerala*, 2001 (2) JT Suppl. 345 to contend that Buprenorphine Hydrochloride is a psychotropic substance trafficking of which attracts punishment under the NDPS Act. Since the

Respondents have acted in violation of Rules 57, 58, 58 (a), 63 of the NDPS Rules they are liable to be punished and the learned Trial Court erred in discharging them for the for the offences under the NDPS Act.

7. Referring to State of Uttaranchal vs. Rajesh Kumar Gupta, 2007 (1) SCC 355 it is contended that the said decision is not applicable to the facts of the present case as the said decision does not deal with Rule 58. The Court was dealing with bail application only and ultimately it was held in the said decision that “he may ultimately be found guilty even for commission of a offence under the 1985 Act, but in a case of this nature when prima facie the provisions of the said act are not found applicable particularly in view of the fact that he has been in custody for a period of more than 2 years now, in our opinion, it was not a fit case for exercise of discretionary jurisdiction under Article 136 of the Constitution of India”. Relying on Sanjay Kedia vs. NCB, (2008) 2 SCC 294 wherein it was held that Phentermine and Butalbital are psychotropic substance and fall within the proviso contained in Section 8 of the Act. It is contended that the views expressed in State of Uttaranchal vs. Rajesh Kumar Gupta and Rajindra Gupta vs. State (Supra) have been clearly overwritten. Relying on Customs vs. Ahmadaliev Nodira, 2004 (3) Scale 211 it is contended that the judgment rendered in State of Uttaranchal (Supra) by a bench comprising of two Hon’ble judges would not prevail.

8. The other contention of the learned counsel for the Petitioner is that the learned Trial Court could not have discharged the Respondents after the order of charge had been framed while considering an application under Section 216 of the Cr. P.C. wherein only alternation or addition of the charge is permissible. Reliance is placed on Sohan Lal vs. State of Rajasthan 1990 Cri.LJ 2302 (SC), Adalat Prasad vs. Rooplal Jindal, (2004) 7 SC 338, State of Maharashtra vs. B.K. Subbarao, 1993, Cri.L.J. 2984 (Bombay), Tapati Bag vs. Patitpaban Ghosh, 1993 Cri.L.J 3932 (Calcutta) and Vibuthi Narayan Chaudbey vs. State of U.P. 2003 Cri. L.J. 116 (Allahabad). Thus, it is prayed that the impugned order be set aside.

9. Learned counsel for the Respondents contends that there is no illegality in the impugned order. During the pendency of the revision challenging the order on charge before this Court, Respondent No. 3 had moved an application dated 10th February, 2006 for amendment of charge under Section 216 Cr.P.C. In the order dated 1st August, 2006 passed by this Court in Criminal Revision Petition 204 of

2005 filed by Respondent No. 3 it was held that in the circumstances, it would be appropriate if the application under 216 Cr.P.C which has been filed by the Petitioner therein is disposed of taking into account interalia, the said decision of the Court. It was further directed that while deciding the said application under section 216 Cr.P.C. the learned Special Court shall not be influenced by what has been held in the impugned order and shall consider the entire issue afresh. The learned Sessions Court was further directed to first decide the application under Section 216 Cr.P.C. before proceeding further in the matter and after hearing not only counsel for the Respondent no. 3 but also the counsel for the State on all submissions. Thus the order on charge dated 3rd February, 2005 and the formal charge on 8th February, 2005 were in principle set-aside and the matter was remanded back for fresh hearing. The bar that an accused cannot be discharged after an order of charge has been framed is not applicable in the present case.

10. On merits learned counsels for the Respondents contends that the Petitioner cannot improve upon its complaint. The case of the Petitioner in the complaint was for offence punishable under Section 22 and 29 of the Act and the prayer made to the learned Special Court was to take cognizance of offences punishable under Sections 22 and 29 of the NDPS Act, summon the accused, try and punish them in accordance with law. Moreover, the charge framed against the Respondents vide order dated 3rd February, 2005 and formal charge dated 8th February, 2005 was for offences punishable under Sections 22 and 29 of the Act and no charge was framed for offence punishable under Section 23 of the Act. Thus, the reliance of the Petitioner now on Chapter VI of the NDPS Rules is wholly misconceived as the complaint is not for import into or export out of India but at best for possession of 40001 Ampoules and their inter-State import and export, possession, transport etc. and thus, only Chapter VI of the Rules would apply. The Petitioners have till date not challenged the order dated 3rd February, 2005 and thus, at this stage praying this Court to set aside the impugned order passed on an application under Section 216 Cr.P.C. so that the learned Special Court can also frame charges under Section 23 of the NDPS Act is wholly misconceived and untenable.

11. It is further contended that the distinction drawn by the learned counsel now from the order passed on bail by this Court in Bail Application No. 205/2005 wherein this Court prima facie held that as Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules its manufacture, possession, sale,

transport would neither be prohibited nor regulated by the NDPS Rules and consequently by the NDPS Act. It being a drug in schedule H would fall within the rigors of D&C Act and Rules. This Court in the said decision did not advert to Chapter VI of the Rules as neither the complaint nor the charge against the Respondents related to inter country import and export. It is stated that reference is made to a person who owns Win Drugs Limited and none of the Respondents herein have anything to do with Win Drugs Limited. In this regard statement of an employee of Win Drugs Limited is recorded which is retracted by him, the very next day. It is this statement of that employee which talks about inter-country import and export done by Win Drugs Limited which has not been prosecuted in the present complaint. The only action which now the Petitioner says is pending against them is a complaint for non-compliance of the summons. Reference is made to Section 8 (c) of the NDPS Act to state that it does not provide the manner and extent of use of a psychotropic substance. Moreover, the decision in the case of Rajinder Gupta (Supra) was further reiterated by this Court in Rajesh Sharma vs. Union of India and others, 159 (2009) DLT 559 (DB). While deciding the detention under The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988, the Division Bench held that the psychotropic substance 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 D & C Rules, 1945 and not being a psychotropic substance mentioned in Schedule I to the Rules would per se not amount to an activity prohibited under the NDPS Act read with the NDPS Rules. This judgment of the Division Bench was carried by the Respondents to the Hon'ble Supreme Court wherein vide order dated 06.11.2009 the Hon'ble Supreme Court dismissed the Special Leave Petition keeping the question of law open.

12. Since the decision of the Division Bench of this Court has not been set aside it is urged that the same being binding on this Court the present petition should be dismissed. Moreover, in Rajesh Sharma (supra) the Division Bench of this Court has also considered Chapter VI of the Rules and it has been held that the possession, transportation or inter country export of psychotropic substance mentioned in Schedule I to the Rules is not an offence under the NDPS Act and is at best punishable under D&C Act. Further as per the decision of the Hon'ble Supreme Court in State of Uttaranchal (Supra) wherein the Supreme Court

approves the decision of this Court in Rajinder Gupta's case, the same is binding on this Court.

13. Countering the submission of learned counsel for the Petitioner it is stated that the reliance of the learned counsel for the Petitioner on *D. Ramakrishnan vs. Intelligence Officer, Narcotic Control Bureau, AIR 2009 SC 2402* is misconceived as firstly, there is no discussion and secondly, that even in *D. Ramakrishnan (Supra)* the Hon'ble Supreme Court actually approved and reiterated its decision in *Rajesh Kumar Gupta (supra)* however, held that the said decision was not applicable to the facts of that case. Thus, the law laid down by the Hon'ble Supreme Court in *Rajesh Kumar Gupta* is binding on this Court. In view of the decision of the Hon'ble Supreme Court and the Division Bench of this Court reliance of the learned counsel for the Petitioner on *Kashmir Chand s/o Mathura Das and another vs. CBI, MANU/PH/0881/2010*, a decision rendered by a learned Single Judge of the Punjab and Haryana High Court, is fully misconceived.

14. It is stated that the conflict in the decision in *Ahmadaliev Nodira (Supra)* and *State of Uttaranchal vs. R.K. Gupta, (Supra)* has already been referred by the Hon'ble Supreme Court to a larger bench and till the decision by the larger bench is rendered the law laid down by the Hon'ble Supreme Court in *State of Uttaranchal (supra)* and by the Division Bench of this Court in *Rajesh Sharma (supra)* is binding on this Court. It is further urged that criminal liability is strict liability and what has been urged by the Petitioner is that the Court should interpret the Rules and statute in a particular manner and then convict the Respondents for the said offence as a proposition of law is wholly untenable. No offence can be made out by interpreting a statute in a particular manner. Moreover, even if two interpretations are permissible then the one in favour of the subject has to be preferred.

15. I have heard learned counsel for the parties and perused the records. Before advertng to the relevant provisions of the NDPS Act and the NDPS Rules it would be appropriate to reproduce them:

“Section 8. Prohibition of certain operations. -No person shall

- (a) cultivate any coca plant or gather any portion of coca plant; or
- (b) cultivate the opium poppy or any cannabis plant; 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 authorization also in accordance with the terms and conditions of such licence, permit or authorization:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:”

(Provided further that nothing in this Section shall apply to the export of poppy straw for decorative purposes.)

Section 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, manufactures, 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.

Section 23. Punishment for illegal import in to India, export from India or transshipment of narcotic drugs and psychotropic substances. - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence or permit granted or certificate or authorization issued thereunder, imports into India or exports from India or transships any narcotic drug or 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.”

Section 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.

16. A perusal of Section 8 (d) shows that except for medical or scientific purpose and in the manner and to the extent provided by the provisions of the Act or Rules or Orders made therein and in a case where any such provision imposes any requirement by way of any licence, permit or authorization also in accordance with the terms and conditions of such license permit or authorization, produce, manufacture, possess, sell, purchase, transport warehouse, use, consume, inter-State export and import, import into India export from India or tranship any narcotic drug or any psychotropic substance. Thus the twin requirement of section 8 (d) is that no person shall produce manufacture possess etc. any narcotic drug or psychotropic substance except for any medicinal or scientific purpose and in a manner and to the extent provided by the Act Rules or Orders thereunder. Thus possession even for medical or scientific purpose has to be in the manner and to the

extent provided by the provisions of the Act. Section 22 of the Act prohibits the possession, manufacture, sale etc of psychotropic substance in contravention of any provision of the Act or any Rule or order made thereunder. Thus a plain reading of the two provisions show that the possession, manufacture etc. of a psychotropic substance is an offence except permitted by the provisions of the Act, Rules or orders made thereunder. However, in the case of medicinal and scientific purpose and in compliance of provisions of the NDPS Act the possession and manufacture, sale etc. is not an offence. Chapter VI of the Rules deal with import and export inter country and Chapter VII deals with manufacture, possession, transportation, import & export, inter country sale, purchase, consumption etc. Both these chapters start with the general prohibition mentioned in the Rule 53 and Rule 64 respectively, according to which sale, purchase inter country and intra country of psychotropic substance mentioned in Schedule I is prohibited. Thus both these general provisions relate to Schedule I of the NDPS Rules and not to the Schedule to the NDPS Act. Buprenorphine Hydrochloride is a psychotropic substance mentioned in the Schedule to the NDPS Act but not mentioned in the Schedule I to the NDPS Rules. Rule 53 states that subject to the provisions of this chapter import into and export out of India of the Narcotic and psychotropic substance specified in Schedule I are prohibited. Thus the import and export inter country of psychotropic substance specified in Schedule I is prohibited except if permitted by the other provisions of the chapter. The only Rule which mentions about the Schedule to the Act is Rule 55 which says subject to Rule 53 no narcotic drug or psychotropic substance specified in the Schedule of the Act shall be imported into India without an import certificate in respect of a consignment issued by the issuing authority. Rule 53 again relates to Schedule I and not to the Schedule to the Act. Again similar provision is in Rule 57 which is also subject to Rule 53.

17. I find merit in the contention of the learned counsels for the Respondents that in the complaint the allegation against the Respondents herein are in regard to the 40001 Ampoules. In the voluntary statement though Respondents have mentioned about their earlier transactions however the same does not speak of anything relatable to inter country import and export. The allegations of inter country export come in the statement of one Rajesh Mishra who has inter alia stated that Naresh Mittal was the director of Win Drug limited besides the other

directors and Win Drug used to sent medicines to Delhi. He has not stated anything concerning the Respondents to that of the import and export inter country. Respondent no. 3 in his statement under section 67 has stated that he is a partner of M/s Sarvoday Enterprises and that they import pharmaceuticals raw material in bulk drugs like Ketaminetici from China, Meth Egometine material Ergometine material, frat rate from Ivax Pharmaceuticals, Czech Republic through AN Cargo at Mumbai and Delhi. That the pharmaceuticals were imported for local sale in India on 8% profit; that besides they also brought raw materials from different pharmaceuticals manufacturer companies for the purpose of trading. They bought Buprenorphine in powder form from M/s Pioneer Agro Industries, Mumbai and were selling the same to finished formulation manufactures like M/s Crystal Pharmaceuticals, Ambala and M/s Win Drugs Ltd., Jind through M/s Mihal Pharmaceuticals, Mumbai.

18. Thus the facts relating to Buprenorphine powder relate to intra country supply. Moreover, it is further stated that so far they had not exported any pharmaceuticals so far, however, they were trying to export Buprenorphine injections to Dubai through Air Cargo, Delhi and that they had already sent their applications to Central Bureau of Narcotics, Gwalior for obtaining export permission but they had yet not received the permission. Even in view of this admission of Respondent No. 3, no case for applicability of Chapter VI of the NDPS Rules is made out. No charge was framed under Section 23 NDPS Act against the Respondents. The Petitioner has not challenged the same before this Court by a petition earlier. To now contend that if the Respondents are not charged for offences under the provisions of NDPS Act, the Petitioner will have no chance to get the charge under Section 23 NDPS Act framed against them. I am not in agreement with learned counsel for the Petitioner that by interpreting the Statute and the Rules, a penal offence be made out and the Respondents should be tried thereof. Thus, I am of the considered view that the possession and transportation intra country of Buprenorphine Hydrochloride would not be an offence under the Act and hence not punishable under Section 22 and 29 of the Act and the learned Trial Court had rightly remanded the matter to the learned Metropolitan Magistrate holding that no case for offence under the NDPS Act was made out and the learned MM would examine the same in the light of the provisions of D&C Act.

19. The Division Bench of this Court in Rajesh Sharma (supra) has earlier also taken this view. At this stage, it would be appropriate to reproduce the Division Bench decision in Rajesh Sharma (Supra) wherein the decision rendered in Rajesh Kumar Gupta (supra) of the Hon'ble Supreme Court has been followed and the decision cited by the learned counsel for the Petitioner duly considered and rejected. In Rajesh Sharma (supra) it was held:

“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....

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 Ors. v. M.R. Apparao and Anr.* : [2002]2SCR661 , 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 and Ors.* AIR2007SC1609 . 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* , 2006CriLJ2142 , 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.*, 1976CriLJ945 . 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.*, AIR2003SC4172.”

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).”

20. Till the matter is resolved by the larger bench of the Hon’ble Supreme Court this court is bound by the decision rendered in State of Uttaranchal (surpa) and Rajesh Sharma (supra). Thus I find no infirmity in the impugned order on this count.

21. I also do not find any merit in the contention of the learned counsel for the Petitioner that the Learned Trial Court erred in discharging the Respondents on an application under Section 216 Cr.P.C. Firstly the impugned order was not passed as an order in review but on an application under Section 216 Cr.P.C. duly permitted by this Court. Moreover the Respondents have not been discharged but the matter has been remanded to the Learned Metropolitan Magistrate to proceed in accordance with the provisions of D & C Act and Rules.

22. The petition is dismissed.

Sd/-

(MUKTA GUPTA)
JUDGE