SUPREME COURT OF INDIA

Hira Singh

Vs.

Union of India

Crl.A.No.722 of 2017

(Dipak Misra and A.M.Khanwilkar,JJ.,)

03.07.2017

JUDGMENT

A.M.Khanwilkar,J.,

SLP(Crl.)No.6092 of 2014

1. The conundrum in these matters is to quash or not to quash the notification issued by the Central Government bearing No. S.O.2941(E) dated 18.11.2009, amending Notification No.)d.1055(E) dated 19.10.2001 and thereby inserting Note 4 (four) the table at the end of Note 3 (three). The appeals forming part of this batch of matters have arisen from the judgment and order of the High Court of Delhi and of the High Court of Punjab and Haryana respectively, rejecting the challenge to the impugned notification being ultra vires. That notification is assailed on the ground that the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") does not confer any power upon the Central Government to vary the parameters of the quantification of the drugs. The offence defined in the Act is specific to narcotic drugs or the psychotropic substances. No punishment is provided for or can be given in respect of non narcotic drugs or the non psychotropic substances. If that cannot be done directly, it cannot be achieved indirectly muchless by issuance of a notification. Further, Note 4 (four) at best pertains to entry no. 239 dealing with the non-descript mixture or preparation with or without a natural material, of the specified drugs referred to in entries 1 to 238 of the notification specifying "small quantity" and "commercial quantity". That entry no. 239 by no means can be considered as the source of power to insert Note 4 (four). Furthermore, the effect of the notification is to undermine the decision of this Court in the case of *E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau*[1]. That cannot be countenanced. For, the effect of the decision of this Court cannot be diluted in any manner and that too by issuance of a statutory notification or an executive action. According to the appellants/petitioners, invocation of Note 4 (four) would have the inevitable effect of not only diluting the decision of this Court but would also defeat the legislative intent behind the amendment of 2001 - regarding rationalisation of sentencing policy so as to ensure that the drug traffickers who traffic in significant quantities of drugs are punished with deterrent

sentence but the addicts or those who commit less serious offences are sentenced by providing less severe punishment.

2. The respondents, on the other hand, contend that the Central Government is fully competent and in fact, empowered under Sections 76 and 77 of the Act to issue such notification for carrying out the purposes of the Act. The impugned notification has been issued in compliance with the prescribed procedure, to notify the limits of the various drugs not in terms of the pure drug content but the aggregate weight of the seized substance as a "preparation" if it contained the specified drug. This is so because the drug is almost never sold in its pure form. It is always used in a mixture (a 'preparation'). For instance, the street level purity of heroin (Diacetylmorphine) is only about 5-10 percent. If "small" and "commercial" quantity were to be ascertained on the basis of pure drug content of the samples of the seized substance, it would become necessary to determine the purity of the seized drug, which, only a few State Forensic Laboratories in the country are capable of doing it. It will clog them with undue amount of work. According to the respondents, a pragmatic approach was adopted by the Central Government to define the "small" and "commercial" quantity in terms of the total quantity of preparation containing the specified drug. For that reason, the threshold of "small" and "commercial" quantities as per the notification dated 19.10.2001 have been kept at a fairly high level. It is then contended that entry no. 239 specified in the notification dated 19.10.2001, is essentially in the nature of a residuary clause/entry which refers to any mixture or preparation that of with/without a natural material, of any of the drugs noted in entries 1 to 238. The natural meaning of such an entry is that even if any of the specified drugs are mixed with any other drug or with any other material, the aggregate quantity thereof ought to be reckoned by applying the following parameters:

> "a) Lesser of the small quantities given against the respective narcotic drugs or psychotropic substances mentioned above (entry nos. 1 to 238) forming part of the mixture.
>
> b) Lesser of the commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above (entry nos. 1 to 238) forming part of the mixture."

3. The real grievance of the respondents, however, is that the decision in E. Micheal Raj (supra) has omitted to consider the interplay between different provisions of the Act. It has focused only on the interpretation of Section 21 of the Act, without giving effect to the purport of the said provision. In that, Section 21 refers to any "manufactured drug" or any "preparation" containing any manufactured drug. The expression "manufactured drug" has been defined in Section (2) (xi) which in turn spells out drugs which are separately defined such as - coca derivatives [Section 2 (v)], medicinal cannabis [Section 2 (xii)], opium derivatives [Section 2 (xvi)] and poppy straw concentrate [Section 2 (xix)]. Similarly, the expression "preparation" has been defined in Section 2 (xx) which in turn refers to narcotic drugs [Section 2 (xiv)] or psychotropic substance [Section 2 (xxiii)]. The expression "mixture" has not been defined in the Act. So also, the expressions "heroin" and "natural

material" or for that matter "neutral material" does not find place in the definition provision of the Act. The expression "neutral substance" has been, for the first time, used in the case of E. Micheal Raj (supra) by this Court. According to the respondents, the expression "preparation" as also "psychotropic substance" has been articulated on the lines of the provisions of the UN Conventions on drug matters, namely, the UN Single Convention on Narcotic Drugs, 1961 and the UN Convention on Psychotropic Substances, 1971, to which India is a signatory. The notification issued by the Central Government is to fulfill the obligations cast on the signatory countries to the said conventions. The comity of countries thereto are wedded to eradicate the menace of drugs across the globe.

4. It is further submitted that the intention of framers of the impugned notification is that even if the specified drugs are sold in a form of mixture, i.e., it is mixed with any other drug/materials, the determination for the purposes of punishment would be the aggregate quantity of the mixture. In other words, the presence of any of the specified drug in whatever quantity or so to say percentage in the preparation or mixture form would be enough to constitute the specified crime (of possession, sale, consumption etc.).

5. According to the respondents, the decision of this Court in E. Micheal Raj (supra) is per incuriam - because it has failed to notice entry no. 239 in the notification and also Note 2 (two) which intend to achieve the same purpose as in the impugned notification. It is submitted that Note 4 (four) inserted by the impugned notification is essentially a clarificatory one. It does not alter the paradigm of the provisions constituting an offence or the sentencing policy as such.

6. Alternatively, it is submitted that the efficacy of Note 4 (four) inserted by the impugned notification must be gauged and determined on its own merit keeping in mind the purpose and object for which the same has been inserted and without reference to the decision of this Court in E. Micheal Raj (supra). Reliance is then placed on the decision of this Court in the case of *Directorate of Enforcement Vs. Deepak Mahajan*[2] to contend that the Court should not adopt a pedantic approach. In that, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislation inane. Further, it is permissible for the courts to have functional approach and look into the legislative intention and sometimes it may even be necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

7. It is submitted that the Act nowhere uses the term "pure content" of the drug or substance. That has been evolved by this Court in E. Micheal Raj' (supra). Further, the notification dated 19.10.2001 does not make any distinction between "pure drug content" and the preparation or mixture. Because, what is commercially sold is a dosage, solution or mixture. Instances have been given by the respondents as to how the exposition of this Court in E. Micheal Raj (supra) has resulted in giving undue benefit to the drug traffickers. For instance, a "small quantity" of heroin is 5 gram, which if taken as only the pure drug content will

translate into 100 grams of street level heroin. At the rate of 0.25 gram heroin the mixture of 100 grams of heroin can yield about 400 doses of heroin. It can never nor could have been the intention of the legislature or for that matter of the Government to send the person who possesses or sells heroin equivalent to 400 doses to a mere six months imprisonment. It is contended that the test applied in the case of E. Micheal Raj (supra) of percentage or actual content of weight of the narcotic drug has the facet of relativity theory - by comparison with the entire quantity of the offending drugs seized and recovered from the offender. The offenders will get double benefit because, the notification dated 19.10.2001 has already provided for a higher level of bench mark to constitute "small", "intermediary" or "commercial" quantity.

8. We have heard Shri Manoj Swarup, Shri R.K. Kapoor, Shri Sangram S. Saron and Shri R.B. Singhal for the appellants/petitioners and Shri Ranjit Kumar Solicitor General assisted by Ms. Binu Tamta for the respondents - Union of India. Before we embark upon the course to be adopted, we deem it apposite to advert to the relevant portion of the exposition of this Court in E. Micheal Raj (supra). This is a decision of two Judges Bench. In paragraph 15 of the reported judgment, the Court observed thus:

> "15. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument ad.vanced on behalf of the respond.ent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable und.er Section 21 (c) of the NDPS Act, because the intention of the legislature a.s it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consid.eration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment."
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> (emphasis supplied)

The principle stated in this decision is that the rate of purity of the drug is decisive for determining the quantum of sentence - for "small", "intermediary" or "commercial" quantity. The punishment must be based on the volume or content of the offending drug in the mixture and not on the aggregate weight of the mixture as such. In other words, the quantity of the neutral substance is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug, which is relevant for the purpose of determining the quantity with reference to the quantum of punishment.

9. The respondents have rightly pointed out that the expression "neutral" substance has not been defined in the Act. That obviously has been coined by the Court to describe the other component of the mixture or preparation (other than the specified narcotic drug or psychotropic substance). We are also in agreement with the respondents that, the said decision nowhere makes reference to Note 2 (two) of the notification dated 19.10.2001 and that the same may have some bearing on the issue under consideration. This decision also does not refer to entry no. 239 and the interplay between the various provisions alluded to earlier while noting the argument of the respondents. That may have some bearing on the issue that has been finally answered. The judgment, however, after quoting the notification dated 19.10.2001 took note of the purpose for which Amendment Act of 2001 was brought into force and then proceeded to hold that to achieve the said purpose of rationalisation of the sentence structure, the purity of the narcotic drug from the recovery or seizure made from the offender would be a decisive factor. In other words, the actual content or weight of the narcotic drug or psychotropic substance alone should be reckoned. For taking that view support was drawn from the observations made in another two Judges Bench decision in the case of *Ouseph @ Thankachan Vs. State of Kerala*[3] which, however, has also not elaborately dealt with the issue finally answered in E. Micheal Raj (supra).

10. It was possible to examine the wider issues raised by the respondents upon accepting their argument that the decision in E. Micheal Raj (supra) is per incuriam. However, in our view, that decision has interpreted Section 21 of the Act. That interpretation would bind us. Moreover, that decision has been subsequently noted in other decisions of this Court in the case *of Harjit Singh Vs. State of Punjab*[4], *Kashmiri Lal Vs. State of Haryana*[5], *State Through Intelligence Officer, and Narcotics Control Bureau Vs. Mushtaq Ahmad and Others*[6]- followed or distinguished. In *Amarsingh Ramjibhai Barot vs. State of Gujarat*[7], quantity of entire mixture was reckoned and not limited to the pure drug content therein. Significantly, in none of these decisions, was the Court called upon to examine the issues now raised by the respondents. Further, all these decisions are of two Judges Bench.

11. Thus, considering the significance of the issues raised by the respondents and the grounds of challenge of the appellants/petitioners concerning the impugned notification, to observe judicial rectitude and in deference to the aforementioned decisions we direct that these matters be placed before atleast a three Judges Bench for an authoritative pronouncement on the matters in issue, which we think are of seminal public importance.

12. The three Judges Bench may have to consider, amongst others, the following questions:

"(a) Whether the decision of this Court in E. Micheal Raj (supra) requires reconsideration having omitted to take note of entry no.239 and Note 2 (two) of the notification dated 19.10.2001 as also the interplay of the other provisions of the Act with Section 21?

(b) Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?

(c) Does the Act permit the Central Government to resort to such dispensation?

(d)Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

(e) Whether Section 21 of the Act is a stand alone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug?

13. It will be open to the parties to persuade the larger Bench to reformulate the aforementioned questions or frame additional question(s), if they so desire.

14. In view of the above, we direct the registry to place the Matters before the Hon'ble Chief Justice of India for seeking appropriate directions to place the matters before a larger bench.

Judgment Referred.

[1]*(2008) 5 SCC 0161*
[2]*(1994) 3 SCC 0440*
[3]*(2004) 4 SCC 0446*
[4]*(2011) 4 SCC 0441*
[5]*(2013) 6 SCC 0595*
[6]*2015 INSC 0721*
[7]*(2005) 7 SCC 0550*

Hon'ble Mr. Justice A.M. Khanwilkar pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Dipak Misra and His Lordship.

In terms of the signed reportable judgment, the Registry is directed to place the matters before the Hon'ble Chief Justice of India for seeking appropriate directions to place the matters before a larger Bench.

(Chetan Kumar) (H.S. Parasher)
Court Master Court Master

(Signed reportable judgment is placed on the file)