

Sr. No.269

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-35080-2018

Date of decision: 21.08.2018

Rajvir Singh @ Raju

..... Petitioner

versus

State of Punjab

..... Respondent

Coram : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. B.S.Khehar, Advocate for the petitioner.

Mr. Hitten Nehra, Addl. AG, Punjab.

RAJBIR SEHRAWAT, J.

The question which this court is called upon to consider and decide in this application for bail pending trial is; whether it is the quantity of narcotic drugs and psychotropic substance only or whether it is the total quantity of mixture of narcotic drug and psychotropic substance mixed with any non-psychotropic substance, neutral or otherwise, which is to be taken into consideration for seeing the commercial quantity of the recovered material, as required under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short – the NDPS Act)

This is an application for grant of bail during trial in case

FIR No.38 dated 25.05.2017 registered under Section 22 of the NDPS Act registered at Police Station Sadar Banga District SBS Nagar.

The above said FIR was registered against the petitioner with the allegations that ASI Satnam Singh, of Police Station Sadar Banga, sent an information to the police station for registration of the FIR mentioning the name of the petitioner; alleging therein that the above said ASI along with police party were going towards village Karnana from Banga; on a private vehicle for the purpose of patrolling. When the said ASI along with police officials reached just ahead of T-point; village Bharo Majra; then from the front side, the petitioner was seen coming by the police party. On seeing the police party in uniform, the petitioner, who was holding a bag in his left hand, suddenly turned back and started moving quickly. He went down in the fields. With the help of the accompanying police personnel, the said ASI apprehended the petitioner and inquired about his name and address, which was told by the petitioner as given in the FIR. As per further allegation, the said ASI introduced himself to the petitioner and told that he had a suspicion that there was some intoxicant material in the stringed carry bag held by the petitioner in his hand; and that the petitioner had got a right to get the said stringed bag held by him in his hand searched in the presence of some Magistrate or the Gazetted Officer; for which the said ASI could make the arrangement. However, the petitioner disclosed

that there were psychotropic injection in the bag and that he had full faith in the said ASI, and further that he could continue with the search of the petitioner and the gunny bag held by the petitioner in his hand. Thereupon the consent statement of the petitioner was prepared and was signed by the petitioner in English. The said ASI tried to join some public witnesses with the police party. However, every one expressed his inability. Hence, the said ASI, in the presence of accompanying police personnel, got released down the bag from the hands of the petitioner and conducted search of the bag, as per the procedure. During the search, the bag was found containing 60 injections, each measuring 10ml, of make Avil, and 60 injections measuring 2ml each, of Buprenorphine. Accordingly the injections were recovered. Thereafter separate parcels of intoxicant injections of Avil total 60 bottles and another parcel containing 60 injections of Bupronorphine were prepared. The recovered intoxicant injections of Avil and Bupronorphine, along with stringed gunny bag, were taken into possession through separate memos. These memos were signed by the witnesses, who were the accompanying in the police party and, allegedly, by the petitioner. Petitioner failed to produce any licence or permit for keeping the intoxicant injections. Therefore, the ASI came to the conclusion that the petitioner had committed offence punishable under Section 22 of the NDPS Act. Hence, the information was sent to the police station for registration of the

case. The said ASI continued with the investigation on the spot, and the State counsel has informed the Court that he was the person who conducted the entire investigation of this Case.

The petitioner filed application for bail pending trial before the trial Court, pleading that he was arrested on 25.5.2017 and he has been in custody since then. It was contended that the allegations against the petitioners are false and concocted. However, his application for bail pending trial was dismissed by the said Special Court vide order dated 11.05.2018. Aggrieved against that order, the petitioner has filed the present application for bail pending trial.

It has been pleaded in the application and argued by the counsel for the petitioner that out of the two types of injection, allegedly recovered from the petitioner, Avil is not found containing any material prohibited under NDPS Act. As per FSL report, the injections of Avil have been found containing 22.61mg/ml of pheniramine maleate. This chemical is not a narcotic drugs or psychotropic substance under the NDPS Act. Hence the alleged recovery of injection of Avil is not relevant for the purpose of prosecution of the petitioner.

So far as the second injection of Buprenorphine is concerned, the FSL Ludhiana has found that it contained 0.25mg/ml of Buprenorphine Hydrochloride. Although Buprenorphine Hydrochloride is a substance

prohibited under NDPS Act, however, the quantity ; even if admitted to be recovered ; for the sake of argument, is less than even the small quantity.

It is contended that Buprenorphine is mentioned at entry No.169 of the table issued by the Government through the Notification dated 19.10.2001.

The small prohibited quantity of this substance is 1 gram and 'commercial quantity' is 20grams. However, even by accepting the report of FSL,

Ludhiana, the total prohibited substance found in the 60 injections, allegedly recovered from the petitioner, comes only to be 30mg (.25mg x

2ml x 60 = 30mg.). Hence, the quantity of the psychotropic substance,

allegedly recovered from the petitioner, is far less than 'small quantity',

mentioned in the notification. Therefore, Section 37 of the NDPS Act

cannot stand in the way of the petitioner, so far as consideration of his

application for bail is concerned. It is further contended by the counsel for

the petitioner that Section 50 of the NDPS Act has not been complied with

by the arresting officer, since the petitioner was never produced before any

Magistrate or the Gazetted Officer nor was the search made before the

Magistrate or the Gazetted Officer. This has vitiated the process of alleged

recovery. Still further, it is contended that the arresting officer himself has

conducted the entire investigation, therefore the investigation stands

vitiated, having been conducted by the complainant himself.

It is also contended that no independent witnesses were

associated by the Investigating Officer at the time of arrest or seizure of the alleged banned material. Hence, there is a violation of Section 100 Cr.P.C. as well, which renders that the proceedings regarding search and seizure highly doubtful.

To support his contention that although 2 ml. solution was contained in one ampoule of injection of Buprenorphine, however, the actual quantity of only the prohibited substance, i.e. Buprenorphine is to be taken into consideration for determining the quantity and not the entire solution contained in the ampule, the counsel has relied upon the judgment of Hon'ble Supreme Court rendered in **2004 (4) SCC -446, Ouseph alias Thankchan vs. State of Kerala and another** and the judgment of the Hon'ble Supreme Court rendered in **2008 (5) SCC 161, E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau.** The counsel has also produced before the Court the judgment of the Hon'ble Supreme Court rendered in **2011 (4) SCC 441, Harjit Singh vs. State of Punjab and another** and the judgment of the Hon'ble Supreme Court rendered in **2016 (1) SCC 315, State through Intelligence Officer Narcotic Control Bureau vs. Mushtaq Ahmad Etc.** to show that the earlier judgment rendered by the Hon'ble Supreme Court in **E. Micheal Raj's case (Supra)**, though came for consideration before Hon'ble Supreme Court in these subsequent judgments, the same has not been overruled or differed

with on this aspect. Hence, the petitioner is entitled to the benefit of the principle of law laid down in the case of **E. Micheal Raj's case (Supra)**,

While opposing the proposition canvassed by the counsel for the petitioner, the learned State counsel has submitted that it is not the content of the drug only in a solution which is to be taken into consideration, rather it is the entire solution, which is to be taken into consideration for the purposes of seeing the quantity of the contraband recovered in the case. Hence, it is argued by him that since 60 ampules of injection, each measuring 2mls have been recovered, therefore, the total contraband recovered from the petitioner is 120 mls. This 120 mls of solution, when converted into grams comes to about 120 grams. For this conversion of Mls into grams, counsel for the State has applied the density of 'water' per ml, which was contained in the ampule of injection, to convert volume into weight of the recovered substance. It is further contended by the counsel that; the proposition that it is the entire mixture of solution, which is taken into consideration, is clarified by entry No.239 of the table attached to the Act by way of notification dated 19.10.2001. Since in this very notification Buprenorphine is mentioned as prohibited substance at entry 169, therefore, entry No.239 given in the table would apply to the solution recovered from the petitioner as well. Therefore, the entire mixture or preparation of Buprenorphine, as recovered from the

petitioner shall be the determining factor; to decide the quantity recovered from the petitioner. It is further contended by the counsel that to supplement this proposition the Government of India had issued another notification dated 18.11.2009, vide which Note 4 was added to the above said notification dated 19.10.2001. It is, therefore, contended that if at all earlier any doubt was left ; whether the entire mixture or solution is to be taken into consideration or not, the same was removed by Note 4 inserted vide above said notification dated 18.11.2009. To support his contentions, learned counsel for the respondent-State has relied upon the Division Bench of this Court rendered in **2014 (3) RCR (Criminal) 953 Inderjit Singh @ Laddi and others vs. State of Punjab**. Counsel has further relied upon the judgment of Single Bench of this Court rendered in **CRM-M-40371 of 2017 decided on 25.07.2018 Sarbjit Singh alias Sabbi vs. State of Punjab** to contend that the above said judgment of Division Bench was followed by the Single Bench and to further contend that Section 37 of the NDPS Act exclude the grant of bail to the accused unless the conditions mentioned in Section 37(i)(b)(ii) of the NDPS Act are fulfilled. The counsel has further relied upon this judgment to contend that the judgment of the Hon'ble Supreme Court rendered in **2004(4) SCC 441 Sajan Abraham vs. State of Kerala** has been distinguished by the Single Bench; on the ground that after the addition of the Note 4, vide notification dated

18.11.2009, the ratio of the above said judgment of the Supreme court pales into insignificance.

The counsel for the respondent also relied upon the judgment of the Hon'ble Supreme Court in **Harjit Singh's case (supra)** to contend that the judgment of the Hon'ble Supreme Court rendered in **E. Micheal Raj's case (Supra)**, had not found favour with the subsequent Benches of the Supreme Court itself. Therefore, the petitioner cannot take the advantage of that judgment; to contend that only the actual quantity of the contraband is to be taken into consideration. To support his argument, learned counsel for the State has also relied upon the judgment of **Mushtaq Ahmad and others' case (supra)**. On the applicability of section 37 of NDPS Act, while considering the question of bail, in case of recovery of commercial quantity, the counsel for the State has also relied upon the judgment of the Supreme Court rendered in **2018 AIR SC-2011, Sat Pal Singh vs. State of Punjab.**

To counter the plea of the petitioner qua the non-compliance of Section 50 of the Act due to not calling of a Magistrate or Gazetted Officer at the time of alleged recovery, the counsel for the respondent has relied upon the judgment reported as **1999(8) SCC page 257 Kalema Tumba vs. State of Maharashtra** to contend that when contraband was found in baggage then the ingredients of section 50 of the NDPS Act are

not applicable. To buttress the same argument, the counsel for the respondent has also relied upon another judgment of the Supreme Court rendered in **2002 (8) SCC page 327 Bharatbhai Bhagwanjibhaiu vs. State of Gujarat** to contend that if the person is running away on seeing the police, the provisions of Section 50 of the NDPS Act are not required to be fulfilled. It is further contended by the counsel that it has been recorded in the FIR itself that on seeing the police, the petitioner tried to run away. Moreover, the petitioner himself had reposed faith in the arresting officer and had given his consent, therefore, Section 50 of the NDPS Act stands complied with.

However, the counsel for the State has not brought to the notice of this Court that there is any other case against the petitioner nor has brought any material on record qua that.

In reply to the arguments of the counsel for the State, the counsel for the petitioner has submitted that the judgment of **E. Micheal Raj's case (Supra)**, hold the field till today. Despite the entire proposition, being argued by the learned State counsel in the present proceedings having been brought to the notice of the Hon'ble Supreme Court, the coordinate Bench of the Supreme Court has held that said judgment in **E. Micheal Raj's case (Supra)**, holds the field and has observed that although this point is required to be reconsidered by the larger Bench, yet it is binding

upon even the Supreme Court till today. Therefore, in case of **CRIMINAL APPEAL No.722 OF 2017 -Hira Singh and Anr. vs. Union of India & Anr.**, the Hon'ble Supreme Court has referred the matter to the larger Bench. However, despite the matter having been referred to the larger Bench, the principle of law as laid down in **E. Micheal Raj's case (Supra)**, having been held to be binding, has to be applied by the High Court even now. The counsel has further contended that merely because a reference is pending before the larger Bench of the Supreme Court cannot be made a basis for not deciding the case in accordance with the existing law as laid down in case of **E. Micheal Raj's case (Supra)**. To support his this contention, the counsel has relied upon another judgment of this Court rendered in **FAO No. 7902 of 2016(O&M) - Bharti AXA General Insurance Company Ltd. Versus Jugni Devi and others decided on Decided on: 17.08.2017.**

Counsel for the petitioner has further contended that, firstly, the Central Government had no authority to prescribe the quantity of 'mixture' or 'solution' as the small or commercial quantity under Section 2 (viiia) and Section 2(xxiiia) of the NDPS Act. It is contended by the counsel that these two sections empowered the Central Government to specify the 'small' and 'commercial quantity' only of the 'narcotic drugs' and 'psychotropic substances', and not the substances which have never been

declared as psychotropic substance as per the procedure laid down in the Act. It is further contended that a substance which is not designated as narcotic and psychotropic substance cannot be declared as such arbitrarily. The Act has given ample guidance in this regard, as to how any substance is to be declared as a narcotic or psychotropic substance. In this regard the counsel has relied upon the provisions contained in Section 3 of the NDPS Act, which provides for criteria for including any substance in the list of psychotropic substances. The counsel contended that as required by Section 3 NDPS of the Act, no international convention or any research or study has so far shown that even a neutral material like water is harmful to human body, when taken in as small quantity as 2ml. So, the Government cannot declare the 2ml of water, which is used as solvent with Buprenorphine hydrochloride, to be a psychotropic substance, and thus add it to the quantity of Buprenorphine for calculation of 'commercial quantity'.

The counsel for the petitioner has further submitted that, secondly, even if the Government is to take into consideration the 'preparation' as defined under the Act, then that preparation also has to be restricted to a preparation of one or more than one prohibited drugs or psychotropic substance and cannot include any neutral material.

The counsel has contended that the question whether the neutral substance can also be included in preparation of psychotropic

substances, for the purpose of seeing the quantity of the recovered contraband, has to be considered keeping in view the provisions contained in Section 2(xv), 2(xvi) and Section 2(xvii) of the NDPS Act. It is contended that a bare perusal of these provisions would show that wherever the legislature has intended the neutral substance in a mixture or preparation of narcotic and psychotropic substance to be taken for calculation of the quantity, it has been specifically provided by the Legislature, as is in Section 2(xv) and (xvi) of the NDPS Act. Whereas it is not so provided for the purposes of the very next provision in Section 2(xvii) of the NDPS Act. Hence, it is clear that Legislature discretely applied its mind; to the question of making a mixture, containing even the neutral material, liable to be taken into consideration for determination of the quantity of the material recovered. Since except in case of opium and opium derivatives, the legislature has not made the mixture of neutral substance to be punishable, therefore, for other psychotropic substances mixtures of neutral substance cannot be taken as a criteria for punishing a person. It is contended by the counsel that it is settled law that when a Legislature has considered a particular point, and has legislated on that point qua some substances but has omitted to legislature qua other substances, then such an omission on the part of the legislature, has always to be deemed to be intentional. Therefore, it has to be taken that intention

of the Legislature has been not to include the mixture, including any neutral and non-psychotropic substance, for determining the commercial quantity of the psychotropic. By providing for commercial quantity, including the mixture of even neutral solution, the Executive has tried to make the possession of a neutral substance to be a punishable offence. This is beyond the scope of power of executive, since the prescription of the offence is the sole domain of the legislature.

The counsel for the petitioner has further argued that even if the entry as contained in entry No.239 of the Notification dated 19.01.2011 and the alleged Note 4, added to this notification vide the subsequent notification dated 18.11.2009, are read as it is, still these do not provide for counting the weigh of neutral material of a mixture for determination of the commercial quantity of psychotropic substances.

Regarding Note 4, the counsel has argued that this Note prescribes, at the best, that in a solution if the narcotic drug or psychotropic substance is present along with its isomers, esters, ethers and salts of such substances, then such psychotropic substance shall be added with these isomers, esters, ethers and its salts; for seeing the total quantity of that particular psychotropic substance and if the 'salts' of these esters, ethers and isomers of such psychotropic substance, can possibly exist independently, then the quantity of these 'salts' of ester, ethers or isomers

of that particular psychotropic substance shall also be taken to be a form of such psychotropic substance and would be counted towards commercial quantity of such substance. It is contended that even this Note nowhere says that even the neutral substance can be taken into consideration for the purposes of calculation of total quantity of contraband. It is further contended that the same is the situation qua entry No.239 of notification dated 19.10.2011.

Although the 'Neutral' substance, though used in the Act has not been defined under the Act, but so also, the esters, ethers, isomers and salt, used in the notification issued by the Government, are not defined by the Act. But all these terms are well defined in Chemistry. Since the Court is called upon to adjudicate qua the synthetic chemicals of intricate chemical details in this case, therefore, it would be appreciated to look into some of the basic chemical aspects of the terms used in the provisions relied upon by the respective counsels.

(a) Substance/Material : - A substance or a material is combination of 'Molecules' of one or more basic 'Elements' available in nature. A molecule is further made up of combination of 'Atoms' of an element. An atom is, further, made up of a 'Nucleus' and the electrically charged 'Electrons' orbiting around it, like the planets orbit around the Sun. It is this electric charge of the electrons which determines the 'combining capacity' and the 'nature' of the substance or the

material; depending upon the net 'electric charge' of that substance. After combination of atoms in its molecules, the nature of a substance is determined, chemically and physically. On the basis of this net electrical charge the substances are characterized as 'Acidic', 'Alkaline' or 'Neutral' substances. Acidity or Alkalinity is determined with reference to a scale of measurement called pH. This scale contains the range from 1 to 14, starting from 'Acidity' and ending at 'Alkalinity'

(b) Neutral Substances :- These are the substances which are neither acidic nor alkaline. In chemical terms their pH value is categorized at midpoint of range of pH values. Their pH. Value is 7. In physical terms their 'net electrical charge' is Zero. Therefore, these substances, per se, do not have reactive tendency, unless instigated by some other process. So, these substances are used as solvent in various chemical preparations. Water is one of such substances which is freely available and commonly used as solvent in these chemical preparations.

(c) Mixtures and Solutions:-- A mixture is a broader term used for putting two substances together, where the molecules of two substances maintain their absolute and independent integrity. A solution is a more advanced type of a mixture. In a solution there is a basic substance which is called 'solvent' and the other substance, which is to be dissolved in this solvent, that is called 'solute'. In an advanced solution the molecules of 'solute' combine with the molecules of the solvent by atom 'bonding' but without directly 'reacting' to each other. So in a solution the two substances may change some of their chemical

and physical properties like boiling temperature etc., however, the two substances still retain the individual identity. They do not form a new substance as such. They can still be separated through appropriate means of separation, like evaporation, distillation, filtration or chromatographic techniques, involving no chemical reactions. However, if the molecules of the 'solute' and 'solvent' undergo or made to undergo a chemical reaction, they form a new 'substance' to be known by a separate and specific chemical name, and no more it remains a 'solution'. A different kind of material is born which may be variant of either of the two substances which were added to make the solution in the first instance. So the 'mixture' or 'solution' and the 'substance' are altogether two different things. These cannot be confused to be taken as the same thing.

(d) Isomers, Esters, Ethers or Salts of substances:-- In their natural form the substances occur only with their pre-defined combination and Architecture of Atoms and Molecules. However, the science has been able to create synthetic substances by fiddling with either the combination or the Architecture of the Atoms and Molecules of Substances. This has resulted in creation of the above said variants of different substances, which can be understood as under: -

(i) **Isomers**: In this forms of a substance, ,the number and combination of atoms and molecules remains the same, but their Architecture is altered by changing the position of and manner of attachment of atoms or molecules. (like, A-B-C-D to D-A-C-B)

(ii) **Esters** is a form of a substance where a group, of atoms of carbon attached with two atoms of oxygen and having bonding with two atoms of hydrogen in a specified manner (H-COO-H) is got created in the molecules of that substance.

(iii) **Ethers** is a form of a substance where a group of one oxygen and two hydrogen atoms having bonding in a specified manner (H-O-H) is got created in the molecules of that substance.

(iv) **Salts** Salt of a substance is a product of its chemical reaction with another substance to neutralize its net chemical charge. So if a substance is 'Acidic' then it is got reacted to an "Alkaline" material and if it is an 'Alkine' material then it is got reacted to an 'Acidic' material.

The above said variants of a substance may exist, independently in some cases, or can sustain only in the presence of the main substance. But the basic effectual characteristics of main substance are retained by these variants of that particular substance. So these variants of narcotic and psychotropic substances retain their intoxicating effect on human body. Therefore, despite not being the 'pure content' of such substance, these variants are made punishable. For example, in this case, material recovered is 'Buprenorphine Hydrochloride' which is not mentioned in the list of psychotropic substances; as given in the Table. Only 'pure

content' drug of this material, i.e. Buprenorphine is mentioned. But since 'Buprenorphine Hydrochloride is a 'Salt' of the pure drug 'Buprenorphine' and it has the same effect on human body as the pure drug, so Buprenorphine Hydrochloride is also taken as a prohibited substance being a 'Salt' of the pure drug content.

Having had the above basic appreciation of nature of substances and heard the learned counsel for the parties, the Court can proceed to appreciate the merits of the case.

The controversy involved in this case revolves around certain provisions of the NDPS Act, Notification dated 19.11.2001, Notification dated 18.11.2009; as well; as certain judgments of the Hon'ble Supreme Court and the judgments of this Court. Therefore, it would be appropriate to have reference to the relevant provisions, as contained in the NDPS Act and the Notifications. The relevant parts thereof are as reproduced hereinbelow : -

“2. Definitions. In this Act, unless the context otherwise requires, (viiia) **Commercial Quantity**, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specific by the Central Government by notification in the Official Gazette ;

(xv) opium means

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not

include any preparation containing not more than 0.2 per cent. of morphine:

(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;

(b) prepared opium, that is, any product of opium by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent. of morphine or containing any diacetylmorphine;

(xvii) opium poppy means

(a) the plant of the species *Papaver somniferum* L.;
poppy straw means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom;

(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;

(xxiii) **psychotropic substance** means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule; 5

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

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

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

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

by notification in the Official Gazette, add to, or, as the case may be, omit from, the list of psychotropic substances specified in the

Schedule such substance or natural material or salt or preparation of such substance of material.”

The relevant part of the **Notification** involved in the case are mentioned below :-

' MINISTRY OF FINANCE
(Department of Revenue)

NOTIFICATION

New Delhi, the 18th November 2009.

S.O. 2941 (E) In exercise of the powers conferred by clause (vii a) and (xxiii a) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) the Central Government, hereby makes the following amendment in the Notification S.O. 1055(E), dated 19th October, 2001, namely :-

In the Table at the end after Note 3, the following Note shall be inserted, namely :-

NOTE 4 :-

The quantities shown in column 5 and column 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 substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

“ NOTIFICATION SPECIFYING SMALL QUANTITY AND COMMERCIAL QUANTITY

S.O. 1055 (E), dated 19.10.2001 :- In exercise of the powers conferred by clauses (vii a) and (xxiii a) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of Ministry of Finance, Department of Revenue

Notification S.O.527 (E) dated 16th July 1996 except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies the quality mentioned in columns 5 and 6 of the Table below, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the Purposes of the said clauses of that Section.”

TABLE

[See sub-clause (viia) and (xxiiiia) of section 2 of the Act]

Sr. No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN))	Other non-proprietary name	Chemical Name	Small Quantity (in gm)	Commercial Quantity (in gm./kg.)
1.	2.	3.	4.	5.	6.
From item No.1 to 168	xx	xx	xx	xx	Xx
169	BUPRENORPHINE		21-cyclopropyl-7-alpha-[(S)-1-hydroxy-1,2,2-trimethylpropyl]-6,14,endo-ethano-6,7,8,14-tetrahydrooripavine	1	20gm
170 to 238	xx	xx	xx	xx	Xx
239	Any mixture or		-----	*	**

preparation that of with or without a natural material, of any of the above drugs.				
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* Lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture.

** Lesser of the Commercial quantity between the quantities given against the respective narcotic drugs and psychotropic substances mentioned above forming part of the mixture.

A bare perusal of the above said provisions of the Act shows that sections 2(viia) and 2(xxiiiia) of the NDPS Act give the power to the Government to prescribe the quantity of Narcotic drugs and psychotropic substances, for the purpose of quantum of punishment. These provisions do not give any power to the Government to prescribe or include in quantities to be specified in the schedule, a substance which is not a narcotic substance.

Therefore, it was held by the Hon'ble Supreme Court in the case of **E.Micheal Raj's case (Supra)** as under : -

“13. 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 advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms. and contains 0.2% of heroin or more would be punishable under [Section 21\(c\)](#) of the NDPS Act, because the intention of the legislature as 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 gms. of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gms. is mixed with 50 kgs. of the 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 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 purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appear 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.”

A bare perusal of judgment of Hon'ble Supreme Court

clarifies that any neutral material which has nothing to do with the psychiatric substance as such, cannot be counted towards the total weight of the seized contraband, even if the same happened to be the part of the mixture which is recovered from the accused. It is only actual quantity of the contraband which is to be taken into consideration. Any other interpretation would lead to absurd results as has been pointed out by Hon'ble the Supreme Court in this judgment, and as has been seen by this Court in the coming paragraphs of this judgment. Hence, this judgment of Hon'ble the Supreme Court lead to the situation where Section 2(viia) and Section 2(xxiiiia) were interpreted, as not conferring any power upon the Government to prescribe any quantity in terms of a mixture which included substances which are 'neutral' or which are not designated as psychotropic substance. Before this judgment also, the psychotropic substance, called Buprenorphine, in its injection form by itself, was considered by Hon'ble the Supreme Court in the case of **Ouseph alias Thankachan's case (supra)**. In that case also the Hon'ble Supreme Court has held that it is the only actual quantity of Buprenorphine which is to be taken into consideration and not the total solution contained in an ampule of the injection, contained as a medical preparation. Although the question of mixture being taken into consideration, instead of the pure contents of drug, also came for consideration before the Supreme Court in the subsequent

judgments rendered in Harjit Singh's case (supra) and in case of Mushtaq Ahmad and others' case (supra) those cases were decided with reference to the materials involved in those cases only and the decision rendered in case of E. Micheal Raj's case (Supra), which was based on case of Ouseph alias Thankachan's case (supra), were neither overruled nor differed with. Therefore, the position regarding not counting of the neutral material or a non-psychotropic substance contained in the solution containing psychotropic substance, continued as was laid down in the judgment of Hon'ble Supreme court rendered in E. Micheal Raj's case (Supra).

There is another interesting aspect in this matter. The Government fully knew that it was not having any power, to prescribe the quantities for punishments, by including quantities of mixture or solutions or preparations, *per se*, under the provisions of the Act. Therefore, after the above said judgment of the Hon'ble Supreme Court in the case of E. Micheal Raj's case (Supra), the Government tried to acquire the power to include, the mixture and neutral substance in the solution; along with the psychotropic substance, in the notification for deciding the 'commercial quantity' of a psychotropic substance. For that purpose, the Central Government moved an amendment to Section 2(viia) and Section 2(xxiiiia) of the NDPS Act, to include therein the word, "preparation" of such drug of

psychiatric substance and the words 'pure drug content or otherwise'. The matter was sent by Parliament to the Standing Committee of the Parliament. However, the Standing committee formally and finally rejected the amendment suggested by the Government, saying that this amendment is vague and unclear which is liable to be misused by all concerned. Therefore, the amendment of these provisions was not approved by the Standing Committee. Resultantly, the proposal to acquire such powers through the amendment of the Act had to be dropped by the Government.

The relevant paras of the proceedings of the Standing Committee dated 20.3.2012 in this regard are reproduced herein below : -

1. Narcotic Drugs and Psychotropic Substances continue to have several medical and scientific uses. Their permissible use worldwide is for medical & scientific purposes only. At the same time, these drugs & substances have tremendous potential for abuse. In fact, these are abused and trafficked worldwide. India's approach towards Narcotic Drugs and Psychotropic Substances is enshrined in Article 47 of the Constitution of India which mandates that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health'. The same principle of preventing use of drugs except for medicinal use was also adopted in the three international conventions on drug

related matters, viz., Single Convention on Narcotic Drugs, 1961, Convention on Psychotropic Substances, 1971 and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. India has signed and ratified these three conventions. India's commitment to prevention of drug abuse and trafficking predates the coming into force of the three conventions.

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14. The NDPS Bill, 2011 proposes the following amendments in Section 2: For clause (vii a) the following clause shall be substituted, namely:—

"commercial quantity", in relation to a narcotic drug, psychotropic substance or any preparation of such drug or such substance, means any quantity of such drug, substance or preparation of such drug or substance greater than the quantity specified, in terms of the pure drug content or otherwise, by the Central Government by notification in the Official Gazette;'

For clause (xxiiiia), the following clause shall be substituted, namely:—

"small quantity", in relation to a narcotic drug, psychotropic substance or any preparation of such drug or such substance, means any quantity of such drug, substance or preparation of such drug or substance lesser than the quantity specified, in terms of the pure drug content or otherwise, by the Central Government by notification in the Official Gazette.

15. On being asked why the terms of quantities are not

specified in the Act itself, the Ministry of Finance (Department of Revenue) inter alia furnished their reply as stated under:

—If small and commercial quantities were to be specified in the Act itself, it would mean that every time a new substance gets included in the list of narcotic drugs or psychotropic substances and 'small' and 'commercial' quantities in respect of the same are to be specified, it would require an amendment in the Act itself. Since amending the Act is a long process, traffickers of such newly included narcotic drug or psychotropic substance, would get relief from the Courts during the period such quantities remain unspecified. In UK, the Home Secretary can list new drugs and upgrade, 16 downgrade or delist previously controlled drugs without the need for passing an Act through both Houses of Parliament.

16. Views and suggestions on the issue submitted to the Committee by an Organization include the following points:

—The NDPS (Amendment) Bill, 2011 seeks to modify the definitions of the 'commercial quantity' and 'small quantity', which will affect the penalties imposed under the NDPS Act. The Lawyers Collective is particularly concerned that the proposed amendments may weaken the rationalized penalty structure introduced by the 2001

Amendment to the NDPS Act, wherein persons involved in minor drug offences were subject to lesser punishment while traffickers attracted stringent sentences. Clause 2:- Sub-clauses 2(b) and 2(c) seek to insert the word — “preparation” in the definitions of commercial and small quantity, as well as add the phrase —”in terms of the pure drug content or otherwise”.

Proportionate Sentencing based on quantity. The 2001 Amendment was a watershed development in the history of the NDPS Act that sought to make a distinction between drug users/persons committing minor offences and drug traffickers, by rationalizing punishment on the basis of the quantity of drugs involved. The Act classified narcotic drugs and psychotropic substances into —small and —commercial quantities and brought in notification S.O 1055(E), dated 19th October 2001 (hereinafter —2001 notification) that specified quantity thresholds for 239 entries (238 drugs + 1 entry for mixture of one or more drugs). Note 2 of the 2001 Notification made it clear that the stipulated quantities applied to the preparations of drugs and substances also. Thus, quantity of drugs involved in the offence became the basis to distinguish drug traffickers from less serious offenders. Determination of Drug Quantity by Courts. Prior to 2001, in cases pertaining to drug

users, the Supreme Court, took into account the actual drug content in calculating quantity and not the entire quantity seized. After the 2001 notification, the penalties were determined by the quantity of drugs involved, but the NDPS Act did not provide any guidance of ascertaining the quantity of narcotic drugs or psychotropic substances. Consequently, some Courts relied on definitions of certain drugs that referred to a numerical percentage, like coca leaf includes leaf of the coca plant, mixture of the same and all preparations containing more than 0.1% cocaine [Section 2(vi)]

17 opium' consists of coagulated juice of opium poppy; mixture of opium poppy juice including preparations with 0.2% morphine [Section 2(xv)] opium derivatives' includes medicinal opium, prepared opium, heroin, morphine, codeine, thebaine and preparations containing more than 0.2% morphine or containing any diacetylmorphine [Section 2(vi)] to calculate the quantity of drugs involved. This resulted in several inconsistencies. In many cases, the Courts relied on the definitions of drugs to calculate the total quantity of drugs involved, while in other cases including those relating to preparations of diacetylmorphine, the Courts ignored the definitions and looked at the percentage of diacetylmorphine, in contrast to the definition in S.2(vi) that includes preparations containing any

diacetylmorphine. The inconsistency became more pronounced when the drug was a preparation or a mixture inclusive of neutral materials, wherein some Courts included neutral materials in calculating the total quantity of drugs involved while others excluded neutral materials.

E. Michael Raj's Case : In 2008, the Supreme Court in *E. Michael Raj v. Intelligence Officer, Narcotic Control Bureau* held that —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 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 purposes of determining whether it would constitute small quantity or commercial quantity. Despite the above decision, the confusion in determination of drug quantity did not cease. Some Courts sought to limit the application of Michael Raj decision only to cases of heroin or opium derivatives. Opium/Cannabis cases were distinguished from the rest and held to be inclusive of neutral materials.

2009 Notification In 2009, the Central Government brought in a new notification, through S.O.2941 (E), dated 18 November 2009 (—2009 Notification hereinafter), wherein the quantities shown as small and commercial, apply to the entire mixture or solution of the narcotic drug or psychotropic substance and not just its pure drug content. It must be noted that the 2009

notification makes the entire quantity of narcotic drugs or psychotropic substances liable, irrespective of pure drug content. It is contended that the relation between the 2009 notification and the proposed amendment, which brings in the terms 'pure drug content or otherwise' to the definitions of commercial and small quantity, is unclear and will further compound the confusion and result in arbitrary interpretation of the Act.

18 Penal Statutes can't be vague It is a cardinal principle of penal law that what constitutes an offence must be clear and not vague. It is argued that preparations are already included in the definition of narcotic drugs and psychotropic substances under the present Act as well as in the 2001 notification. It is unclear what the addition of the expression — 'preparation' to the definitions of commercial and small quantities would achieve. Further, the term 'otherwise' in the proposed amendment is vague and imprecise and can result in arbitrary interpretation.

The fact that the Act also prescribes the death penalty for repeat offences involving specified quantity of drugs, underscores the importance of due diligence in ascertaining the quantity of drug involved in the offence. It is submitted that apart from capricious sentencing, arbitrariness in the determination of quantity would have other significant implications, since quantity is a determinant factor vis-a-vis i) jurisdiction of courts, that is, if the accused to be tried before the Magistrate or the Special Court, ii) grant of bail and iii) the duration of pre-

trial detention.

19. The Committee are given to understand that the proposed amendments on Clause (vii a) and (xxiii a) of Section 2 are intended to remove ambiguity in respect of narcotic drugs and psychotropic substances to determine the consequential penalty for the illegal consumption, possession, trafficking etc. of the drugs and substances. The Committee, however, Note that meanings denoted by the terms/expressions “preparation” and “otherwise” in proposed amendments are vague and unspecific. Such ambiguity in the clause would lead to arbitrariness in the interpretation of the law and may weaken the rationalized penalty structure introduced by the 2001 Amendment to the NDPS Act. The Committee feel that if the proposed amendments intend to provide specific provisions for considering the pure drug content of a recovery to determine the consequential penalty/punishment for an offender, no word/term/clause with ambiguous meaning should be used in the provisions. In the opinion of the Committee, this will enable the Courts/law enforcement agencies to award punishment commensurate with the seriousness of the crime committed under the NDPS Act. The Committee desire that the Clauses (viiia) and (xxiiia) of Section 2 may be amended suitably so as to spell out in clear terms and measure the difference of “small quantity” and “commercial quantity”.

A bare perusal of the above said report of the Standing Committee shows that even despite specific attempt by the Executive, to get the power

of inclusion of mixture/preparation/neutral solvent, for deciding commercial quantity of a particular psychotropic substance has been specifically turned down by the Legislature. Hence, on the face of it, it cannot be said that the executive has any power to prescribe for punishment the quantity of contraband through the notification; by including the preparation; mixture and the neutral substances.

Learned counsel for the petitioner appears to be right in contending that the above-mentioned provisions of the NDPS Act do not confer any powers upon the Government to include preparation, mixture and solutions in the total quantity for the purpose of deciding the commercial quantity; except in case of opium and opium derivatives ; where it has specifically been permitted by the legislation itself. Learned counsel for the petitioner is further, right in arguing that when the Legislature has not permitted something to be done by the Executive directly, then the Executive cannot be permitted to do the same thing indirectly as well. Hence, by specifying the quantity of contraband in terms of the mixture and solution containing the neutral material also, the Executive cannot be permitted to convert a neutral or non-psychotropic material into a psychotropic substance, and thus make its possession a punishable offence. Any such attempt by the Executive would tantamount to prescribing new parameters for offence by an executive notification, which is not the

domain of the Executive. The offences and its parameters can be prescribed by the competent Legislature only. There can be an argument that since the definition of psychotropic substance includes 'preparation' as well, therefore, the 'preparation' can include any substance mixed with a psychotropic substance and hence the quantity of neutral substance can also be taken into consideration to prescribe for the total quantity of the contraband. However, this reasoning is equally fallacious. The word 'preparation' has been defined to include preparation of one or more drug or psychotropic substance in 'dosage form'. Further though the definition says that preparation means any solution or mixture but these words are further qualified by the words-containing one or more of "such drug," or substance. The words "such" has reference to the drug or substance in 'dosages form' used in earlier part of definition. Any other interpretation would render the earlier part of the definition as superfluous. So, it is clear that it is only the "dose" of drug or psychotropic substance in a mixture; which is the 'preparation' of a drug or psychotropic substance as per the definition; and not the the neutral part of the solutions which is added to the dose of medicine to make the dose of a drug as worth administering to the patient. As per medical lexicon, the dose means the quantity of a medicinal substance, expressed by weight or volume of that medicinal substance which can be administered to an individual human being of ordinary built

up, at one time, to cure the ailment without producing the direct and immediate adverse effect on the body or its metabolism. This quantity of dose is determined by testing the tolerance of human body for that particular medicine through extensive trials on animals and human beings. Normally the tolerance level of human body for externally administered substances is very minimal. So the dosage of the medicine come only in micrograms and milligrams by weight or in low quantity of milliliters by volume. Since such small quantity of micrograms or part of milligram, in itself, cannot be administered, so to make the quantity large and worth administering; neutral substance is added, so that the quantity is also increased to the level of being worth administration and nature of drug content is also not changed or altered. So merely because a neutral substance like water is added as a solvent with psychotropic contents of the drug does not make the water as a psychotropic substance.

Still further, the word 'preparation' or mixture is not included either in Section 2(viia) or Section 2 (xxiiiia) of the NDPS Act, which gives power to the Government to prescribe quantity. Not only this even the attempt of the Government to acquire this power through amendment was denied by the Legislature. Moreover, a substance cannot be declared as narcotic substance only because a functionary or authority in the Government so thinks. For a particular substance to be declared as narcotic and

psychotropic substance by the Government, a criteria has been specified in Section 3 of the NDPS Act. Unless that criteria is applicable and actually applied qua that substance also, which is included only as a solvent in the mixture or solution, such a neutral substance cannot be, indirectly, made as psychotropic substance, merely by including the mixture and solution in the table notified by the Government.

As mentioned above, although the neutral substance has not been defined in any way in the NDPS Act. However, this is well defined in chemistry. As seen in forging paragraphs, neutral substance, by definition, is a substance which does not, *per se*, have tendency to react with the substance with which it is being mixed. It does not create a new 'substance' after mixing with another substance. Neutral substance retains its independent identity and chemical composition even in the mixture as such. Despite being invisible in a mixture with psychotropic substance, a neutral substance can very well be separated by way of appropriate process of separation. For example, the Buprenorphine being a carbon compound, is not soluble with water. Therefore, Buprenorphine is converted into its 'salt' Buprenorphine hydrochloride to make it partly soluble with water. Still further, another solution like 'dextrose' is added to make it a suitable solution. In this mixture, Buprenorphine hydrochloride only, can very well be separated from the water and the dextrose. Therefore, it would be

totally impermissible to include even a distilled water and the dextrose in the category of Buprenorphine, merely because Buprenorphine has to be mixed with, and has been mixed with, the water and the dextrose to make the dosages of Buprenorphine worth administering to human body.

Even while reading the entry No.239 along with its accompanied stipulations, which are marked with Astrik, makes it clear that entry No.239, column No.2 contains words any mixture or preparation of the drugs (mentioned from Sr. No.1 to 238) with or without natural material, however, the Astrik in column No.5 and 6, as given and explained below this table shows that the quantity which is to be taken into consideration for the purpose of seeing 'small' or 'commercial' quantity is the lesser of 'small' or the 'commercial' between the quantities of various drugs or psychotropic substance as mentioned against the respective drug or psychotropic substance, which form part of the mixture. The word “between” qualifies the quantities of psychotropic substances and makes the things clear. Hence, it is clear that even when present in a mixture or solution; it is only quantity of the psychotropic substance, which forms part of the mixture, which is to be taken into consideration, and even that for individual psychotropic substance separately, and not the quantity of mixture as such.

Similarly, much stress has been laid by the learned counsel for the respondents on the Note 4, which was added vide notification dated

18.11.2009. However, a bare reading of this Note also makes it clear that is only the pure drug or isomers, esters, ethers and salt of that particular drug; which are present in the prepared drug, which is to be taken into consideration for determining the 'commercial quantity' ; and not all the materials included in the solution, which may contain a neutral solvent as well. First of all it deserves to be noted that this Note does not contain the word 'neutral substance' to make such a substance psychotropic substance and thus to be counted, if mixed with any prohibited psychotropic substance. Further, for better understanding of this Note, the language of this Note can be broken down as follows : -

(A) The quantities shown in column No.5 and 6 of the table

(B) relating to respective drugs shown in column No.2

(C) shall apply to : -

(i) the entire mixture or any solution or any one or more

narcotic drugs or psychotropic substances of that particular drug in dosage form ;

(ii) or isomers, esters, ethers and salt of these drugs ;

(iii) including salts of esters, ethers and isomers, wherever existence of such substance is possible, and not just its pure drug content.

Analysis of above Note also shows that even if the entire mixture is to be considered for finding out the quantity of drugs/substances then quantity of psychotropic substance mentioned in Column No.2, shall be seen with respect to “that particular drug” and even that in "dosage form”

or with respect to the isomers, esters, ethers and salt of these drugs in dosage form. The words “of that particular drug in dosage form” has not been used just for wastage of words. Rather the significance of these words is that the drug mentioned in column No.2 along with its isomers, esters, ethers and salt of these drugs used as dose of that particular drug in mixture is to be taken into consideration. Further reading of this Note shows that if the salts of isomers, esters and ethers of the drugs mentioned in column No.2 can possibly exist in independent form, then it is not the pure content of the drug; which shall be taken into consideration, rather even the independently existing salts of such esters and ethers of the drugs mentioned in column No.2, which are in existence in the mixture, shall also be counted. The words “not just its pure content” has been used with reference to and in contrast of the salts, isomers, esters and ethers of a pure drug content of a prohibited substance and not with reference to and in contrast with 'mixture' or 'solution' as such. This interpretation is further supported by the Note I, attached with the original notification dated 19.10.2001, which contained a similar stipulation that along with listed pure drugs its salts and esters, ethers and isomers, and the salts of esters, ethers, where these can independently exist, shall also be counted. Note 4 has only tried to explain the countability of salts of esters, ethers and isomers in a solution or mixture, if existing independently, instead of the

pure content of the drug. Hence by no means, it can be said that these Notes made, even 'neutral material' or non-psychotropic substance, having independent existence in a solution/mixture containing psychotropic substance, liable to be included in the quantity of such a psychotropic substance. Hence the argument of the learned counsel for the petitioner, that even if the entry No.239 and Notes attached to table are read as it is, then also any neutral substance or a substance which is not a designated psychotropic substances; but form part of the mixture, cannot be included for the purposes of counting of the commercial quantity, is found to be sustainable.

So far as the judgment cited by the learned counsel for the parties in this regard are concerned, much need not be said after the reference order of the Hon'ble Supreme Court in **Hira Singh and another's case (supra)**. The relevant order of the Hon'ble Supreme Court is reproduced herein below : -

“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 12 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*** 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*** - followed or distinguished. In ***Amarsingh Ramjibhai Barot vs. State of Gujarat***, 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.”

A bare reading of the order of Hon'ble the Supreme court shows that even a coordinate Bench of Hon'ble Supreme Court has held that the earlier judgment rendered in E.Micheal Raj's case (supra) is binding upon the subsequent Bench. In view of this situation, if the judgment of E. Micheal Raj's case (supra) is binding upon the Supreme Court itself, then there is no reason or occasion for the High Court to say that it is not binding upon the High Court. Therefore, as of today judgment of the Hon'ble Supreme in E. Micheal Raj's case (supra) holds the field and is binding upon this Court. Hence this Court is bound to follow the same principle as laid down in the judgment of Hon'ble Supreme Court in E. Micheal Raj's case (supra).

Learned State counsel has tried to distinguish the above said judgment of the Hon'ble Supreme Court by arguing that this judgment was rendered before the Notification dated 18.11.2009 was issued by the Government which added Note 4 to the table of psychotropic substance. Therefore, it is contended by the learned State counsel that since the

judgment has not taken into consideration the relevant provisions of law, therefore, the same is *per incuriam* and has no significance after 18.11.2009. However, this court finds that even the Hon'ble Supreme Court was apprised of all the material including Note dated 18.11.2009, which is being relied upon the State counsel now to contend that **E.Micheal Raj's case (Supra)**, has been rendered insignificant. Despite that the Hon'ble Supreme Court has said that the Judgment of the Supreme Court in **E.Micheal Raj's case (Supra)**, is binding upon the subsequent Bench of the same Court, which was considering the matter in **Hira Singh's case (supra)** in the year 2017. Hence by no means, it can be said that the judgment of the Hon'ble Supreme Court rendered in **E.Micheal Raj's case (Supra)**, has lost its significance. This holds the field till today.

For the same reason, the reliance of the counsel for the State on judgments, rendered by a Division Bench of this Court in **Inderjit Singh @ Laddi's case(supra)** and **Sarabjit Singh @ Sabbi's case (supra)** is also not sustainable.

First of all, a perusal of the judgment of the Division Bench in **Inderjit Singh @ Laddi's case (supra)** shows that the method of calculation of commercial quantity was not the point referred to that Bench. The limited point referred to that Bench was as to, if a substance covered under the Drugs and Cosmetics Act, is also a prohibited substance under

NDPS Act then; whether that substance would be dealt with only under the Drugs & Cosmetics Act or the same can also be dealt with under NDPS Act. Para Nos.5 and 16 of the judgment in this regard can be reproduced herein below for reference:-

5 The learned Single Judge after considering the rival contentions found that the question whether such substances/drugs are covered under the NDPS Act or not, or can be dealt with only under the D&C Act has been arising frequently in many cases. The consequences would be completely different if the substances were held to be within the purview of the D&C Act instead of the NDPS Act. The matter was, therefore, referred to a larger bench. Meanwhile, the petitioner was ordered to be released on interim bail to the satisfaction of the learned trial Court/Chief Judicial Magistrate/Duty Magistrate, Ludhiana.

16. We have given our thoughtful considerations to the matter. The question that arises for consideration is whether an accused can be tried for an offence under the NDPS Act in case he is found in possession of 'manufactured drugs' which fall in the definition of 'manufactured drugs' in terms of Section 2(xi) of the NDPS Act and has been notified as such by notifications dated 14.11.1985 and 29.1.1993 as 'manufactured drugs', but contain an exception as regards the percentage of dosage in the drug.

Therefore, the question whether the 'neutral material' in a solution containing narcotic and psychotropic substance can be included with the quantity of such narcotic or psychotropic substance; for the

purpose of prescribing prohibited commercial quantity of that substance or not, was not even under consideration in that case.

Although Para 35 and 36 of the judgment of the Division Bench in **Inderjit Singh's case (supra)** makes a reference to Note 4 of Notification dated 18.11.2009 and observes that as per this note the mixture is to be taken into consideration, however, analytical import or validity of this Note has not been considered by the Division Bench with reference to the legal provisions contained in the Act, or by considering the language of the Note and other explanations attached to the entry No. 239 in the Table. Therefore, the observations of the Division Bench in **Inderjit Singh's case (supra)** are based only on a presumption that notification is validly issued and also presumes that it provides for inclusion of neutral material as well for counting commercial quantity. The question where the solution contains a neutral material or the substance, which is not a designated psychotropic substance, whether even then such a substance would be counted towards commercial quantity or not, was not specifically considered and decided with reference to the statutory provisions contained in the Act. Therefore, the Division Bench can not be considered to be laying down any binding precedent on the point of countability of neutral or non-psychotropic substance; present in the mixture, towards the commercial quantity. Further more, as observed above, since the judgment of the Hon'ble Supreme Court in **E. Micheal Ral's case (supra)** holds the field and has been taken to be

binding precedent even by Hon'ble Supreme Court, even after the Division Bench judgment of this Court in Inderjit Singh Laddi's case(supra), therefore, by any means the observations in the said judgment of Division Bench in the case of Inderjit Singh @ Laddi's case (supra), which go against the judgment of E. Micheal Ral's case (supra) of the Supreme Court, cannot be taken as a judgment holding the filed on the point. Same is the situation regarding another judgment relied upon by learned State counsel in this regard.

If the interpretation as put forward by State Government is accepted and it is held that in a mixture containing psychotropic substance even the neutral material would be taken as prohibited psychotropic substance, if the same is found to be beyond the quantity prescribed for such a prohibited substance, then such an interpretation would lead to disastrous and absurd results. Besides, being beyond the power of the Central Government to include such substance while counting commercial quantity, this would also frustrate the other provisions of the Act and the Rules itself. If this interpretation is accepted; and any mixture of narcotic substance and non-narcotic substance is taken to be a preparation and, therefore, entire mixture is counted towards commercial quantity, then it would make, as common a substance as the water and the common dextrose; which are widely used in daily living and in hospital treatment, a prohibited and

psychotropic substance. This would mean that even if one ampule of injection containing .25mg of Buprenorphine is added to one liter of water then a person shall be held liable for possessing one liter of Buprenorphine.

Same thing can happen to common dextrose, which is given as an immediate life support liquid to the patient on arrival in Hospital. This

could so happen despite the fact that it is not any isomers, esters, ethers and salt of the Buprenorphine and it is a totally independent substance. If

one injection of Buprenorphine is added to one bottle of dextrous which is being administered to the patient in the hospital then it would be covered

under the commercial quantity of Buprenorphine and the doctor treating in the hospital would be liable to put in jail for possessing one bottle of

Buprenorphine. The entire aspect would be well understood by Rule 24 and 25 of Punjab Narcotics Drugs and Psychotropic Substances Rules, 2012,

in short - Rules, 2012) which are reproduced hereinbelow :-

“ 24. Possession of drugs by Medical practitioner and Medical Institutions .-(1) A Medical Practitioner, duly registered under the provisions of sub-rule (4) of this rule, may possess the following quantities of manufactured drugs other than prepared opium and coca leaves for use in his practice and not for sale, -

- | | |
|--|--------|
| (i) Morphine (in all forms) | 5 gram |
| (ii) Pethidine injection | 5gram |
| (iii) Fentanyl (in all forms) | 1 gram |
| (iv)Su-Fentanyl (in all forms) | 1gram |
| (v) Medicinal Opium in the form of
Ayurveda and Unani medicines
containing more than 0.2percent
morphine in the preparations. | 30gram |

(vi) Any other manufactured drug 100doses.

Provided that a Medical Practitioner of the indigenous systems of medicines, may possess only those manufactured drugs, which are included in the indigenous system of medicine.

Provided further that the Drug Controller or the Director, Ayurveda, Punjab, as the case may be, with the prior approval of the Government authorise any Medical Practitioner to possess the aforesaid manufactured drugs in the larger quantity.

Explanation. - The term 'use in his practice' covers only the actual direct administration of the drugs in injections, surgical operations or other emergent cases by or in the presence of Medical Practitioner.

(2) to (4) xx xx xx xx xx xx xx xx xx xx xx xx xx

25. Mixing of manufactured drugs.- A Medical Practitioner may mix for use in his practice manufactured drugs, which he is lawfully entitled to possess and which are required for use in the exercise of his profession.”

A bare perusal of these Rules show that a medical practitioner is entitled to possess only small quantity of the specified drugs and narcotic substance. He is also permitted to mix for use the drugs or substances which he is entitled to possess. It is also a well recognized medical fact that a medical practitioner can administer the injection either as intravenous injection or through the solution of dextrose which is normally used in hospitals or for administering intravenous injections. In that situation, taking for example; if a medical practitioner mixes ½ gram of “fantail” and 2 grams of 'morphine' in 500 grams dextrose solution, then he exceeded his prescribed limits for 'fantail' and 'morphine' both as permitted under

Rule 24. Hence, there cannot be any way out for such a medical practitioner, but to go to Jail and to suffer a risk of ten years imprisonment. This cannot be either the object or rational behind the prescribed provisions of Narcotic and Psychotropic Act.

In view of the above discussion, it is held that in case of a mixture/solution containing neutral or non-psychotropic substance as well as the narcotic/psychotropic substance, it is only the quantity of such narcotic/psychotropic substance present in such mixture/solution; which is to be taken into counting for the purpose of determining the 'commercial quantity' of such narcotic/psychotropic substances. The neutral solution or non-psychotropic substance is not to be counted towards the commercial quantity of said narcotic psychotropic substance present in mixture/solution.

This Court finds substance in the arguments raised by the learned counsel for the petitioner that, even during the pendency of a reference to a larger Bench before the Supreme Court, the law laid down in the judgment of the Hon'ble Supreme Court which holds the field till the reference is decided, has to be followed.

This Court also held in **Bharti AXA General Insurance Company Ltd.'s case (supra)** that mere pending of a reference of is not ground to deny a litigant the decision of his case in accordance with the existing law. The relevant para is reproduced below : -

Although the point of future prospects has been referred to the larger bench of the Hon'ble Supreme Court, however, till the larger Bench takes a different view; the judgment of the Supreme Court which holds the field as of today; is the binding precedent for this Court. The point as decided by the larger bench of the Supreme Court; shall hold the field only after and as and when it is pronounced by the Hon'ble Supreme Court. The otherwise available right of the party before the Court cannot be denied by this Court only for the reason that Hon'ble Supreme Court has kept the point qua that right for reconsideration. Keeping a point for reconsideration does not, by implication, over-rule the existing judgment/precedent on that point. Therefore the amount of compensation on account of future prospects cannot be denied to the claimants on the ground that the matter has been referred to the larger Bench.

In view of the above proposition, facts and the FSL report which is attached with the present petition, it has to be held that the quantity involved in the alleged recovery from the petitioner is only 30 miligram, which is, less than even the small quantity.

Section 37(1)(b) of the NDPS Act, is applicable only where offence alleged is under Sections 19, 24 or Section 27-A of the NDPS Act or when the quantity recovered from accused is 'commercial' one. In the present case, the offence involved is under Section 22 of the NDPS Act. Still further, as held above, the quantity recovered from the petitioner is only less than 'small' quantity. Therefore, the conditions prescribed

under Section 37(a)(b) of the NDPS Act cannot stand in the way of the petitioner for the purpose of seeking bail. Otherwise also, this Court has already held in case of **Ankush Kumar @ Sonu vs. State of Punjab CRM-M-30643 of 2018 decided on 09.08.2018** that the State cannot insist upon the conditions sprescribed under Section 37(i) (b)(ii) of the NDPS Act for the purpose of defeating the right of the petitioner to get enlarged on bail, if otherwise found eligible by the Court despite the fact that the quantity recovered is commercial quantity.

However, even by applying the conditions as specified in Section 37 of the NDPS Act, it cannot be said that petitioner is not entitled to bail. As is clear from the record, the petitioner was holding the alleged recovered material in a bag in his hand. The Hon'ble Supreme Court, in case of **2018 (2) RCR (Criminal) 931, Arif Khan @ Agha Khan vs. State of Uttrakhand**, has held that Section 50 of the NDPS Act is mandatory in nature. In that case despite the fact that the police had prepared a consent of the accused that he could be searched by the officer present on the spot, the Supreme Court held the recovery to be vitiated on the ground that the search of the accused was not conducted by or in the presence of the Magistrate or Gazetted Officer. Admittedly, in the present case also no Magistrate or Gazetted Officer was called by the arresting officer. The search has been made by the Arresting Officer on his own.

Therefore, the requirement of Section 50 of the NDPS Act has not been complied. Still further, no independent witness has been joined by the arresting officer at the time of search and seizure of the contraband. Moreover since the arresting Officer himself investigated the case, therefore, in terms of judgment of Hon'ble Supreme Court in **2018 AIR (SC) 3853 - Mohan Lal vs. State of Punjab**, the investigation itself stands vitiated. Therefore, it cannot be said that the recovery is duly effected from the petitioner and that the petitioner is involved in the present case. Although, the learned counsel for the State has relied upon the judgment rendered by the Hon'ble Supreme Court in **1999(8) SCC page 257- Kalema Tumba vs State of Maharashtra** to contend that calling of the Magistrate or Gazetted Officer was not required because the material was recovered from the bag held by the petitioner. However, this case is distinguishable on the facts of this case because in that case, the alleged material was recovered from baggage of the person. Moreover, as mentioned above the calling of a Magistrate has been held to be a mandatory requirement by the Supreme Court in case of **Arif Khan @ Agha Khan's case (supra)**.

Still further, the reliance of the counsel for the respondent-State on judgment of Hon'ble the Supreme Court rendered in **Bharatbhai Bhagwanjibhai's case (supra)** is not sustainable because in that case the

person was running away and, therefore, it was held that Section 50 of the NDPS Act could not have been applied. In the present case, admittedly the petitioner has been arrested on the spot. He has not offered any resistance. Even the investigating officer has mentioned that the petitioner himself disclosed that there was contraband in his bag and therefore, there was no resistance on the part of the petitioner. He has also recorded the petitioner consented to search even by the arresting officer. Admittedly, in this case, the alleged contraband was held by the petitioner in gunny carry bag held in his hand. Therefore, he was consciously keeping that material held by his body. The material consciously held by a person in his hand would fall in the definition of “personal possession”. Hence, search of such a person falls in the category of personal search. Just like the apparels consciously put on by a person on his body, the material held in the carry bag in his hand is also consciously held by the body of the person. No rational distinction can be made between the pocket of the consciously worn part of a person and the consciously held in hand carry-bag of that person. Since, it was a personal search, therefore, it cannot be said that Section 50 of the Act was not required to be complied with. Therefore, there is substantial reason to believe that the petitioner has not committed the offence as alleged against him.

Although this Court has already held in **Ankush Kumar @**

Sonu's case (supra) that it is not possible to predict future conduct of the person, therefore, it is not possible for the Court to record satisfaction based on reasonable grounds as to the petitioner not committing any offence after getting released from the custody. However, the record of this case does not contain any material, on the basis of which it can be said, that if petitioner is released on bail, then he would likely commit any offence after coming out of custody. Since, this Court is of the view; that even in the present incident petitioner has committed no offence, therefore, this Court has no reason to believe that if released on bail, the petitioner would indulge in any such activity under NDPS Act. Therefore, the opposition of the bail by the counsel for the State on the basis of Section 37 of the NDPS Act, is otherwise also, not sustainable. The petitioner has been in a long custody since 25.5.2017 and the trial is likely to take more time.

In view of the above, the present petition is allowed. It is ordered that the petitioner be released on bail pending trial on his furnishing bail/surety bonds to the satisfaction of the trial Court.

**(RAJBIR SEHRAWAT)
JUDGE**

August 21 , 2018

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1. Whether speaking/reasoned Yes/No.
2. Whether reportable ? Yes/No.