

State Of Uttaranchal vs Rajesh Kumar Gupta on 10 November, 2006

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Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:

Appeal (crl.) 672 of 2006

PETITIONER:

State of Uttaranchal

RESPONDENT:

Rajesh Kumar Gupta

DATE OF JUDGMENT: 10/11/2006

BENCH:

S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T S.B. Sinha, J.

The respondent herein is an Ayurvedacharya. He operates from two clinics known as : (1) Neeaj Clinic Pvt. Ltd. (NCPL) and (2) Dr. B.S. Gupta Medical Charitable Society (BSGMCS). Advertisements were, allegedly, being issued by him in various newspapers claiming that medicines used by him were prepared from herbal plants collected from the Banks of Ganges and by application thereof patients suffering from epilepsy can be cured. The State, however, on the allegation that in his medicine, he had been using unlabelled tablets containing psychotropic substances making the unsuspecting patients addicted to the drugs, raided the premises of the said clinics. 70 kgs. pure phenobarbitone were recovered. It is alleged that through NCPL 336.88 kgs., 524 kgs., 537.32 kgs. and 117 kgs. of drugs (phenobarbitone) were sold in the years 2001-2002, 2002-2003, 2003-2004 and 2004-2005 (April to July) respectively and through BSGMCS 398.65

kgs., 406.88 kgs., 519.95 kgs. and 235.12 kgs. of drugs (phenobarbitone) were sold in the years 2001-2002, 2002-2003, 2003-2004 and 2004-2005 (April to July) respectively.

The drugs allegedly used to be dispatched by post also. Appellant was arrested on 13.8.2004 and since then he is in jail custody. Charges were framed against him under Section 8 read with Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 ('1985 Act', for short) and Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954. An application for bail was moved by him before the Special Judge. It was dismissed. He filed an application for bail, however, before the High Court on 30.7.2005, which has been granted. Special Leave Petition was filed thereagainst and by an order dated 14.11.2005, the bail application was revived. The High Court was requested to dispose of the same expeditiously. By reason of the impugned order dated 2.12.2005 the said bail application has been allowed. The State is, thus, before us.

In its order the High Court noticed that ordinarily applications for bail are required to be considered having regard to Section 37 of the 1985 Act. It, however, opined that the drugs in question not being listed in the 1st Schedule appended to Narcotic Drugs and Psychotropic Substances Rules, 1985 ('the Rules', for short), the respondent cannot be said to have committed any offence under Section 8 read with Section 22 of 1985 Act.

Mr. A. Sharan, learned Additional Solicitor General appearing on behalf of the State submitted that the High Court committed a serious error in opining that the offence under Section 22 having not been referred to in Section 37 of 1985 Act, the rigours thereof have no application. The learned Additional Solicitor General urged that although in terms of Section 8 of 1985 Act, an exception has been made as regards use of the psychotropic substances for medicinal or scientific use, such use must be bona fide and in terms of the Rules framed under the 1985 Act.

Mr. K.T.S. Tulsi, learned Senior Counsel appearing on behalf of the respondent, on the other hand, contended that the drugs alleged to have been seized from the Neeraj Clinic being Schedule H drugs as envisaged in Drugs and Cosmetics Act and the same having been used for medicinal purposes and being not the drugs provided for in the rules framed under the 1985 Act, prima facie no offence can be said to have been committed under the 1985 Act. Our attention in this behalf has been drawn to a decision of a learned Single Judge of the Delhi High Court in Rajinder Gupta vs. The State reported in 123 (2005) DLT 55.

The 1985 Act was enacted with a view to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

Section 2 (viia) defines "commercial quantity" to mean any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. "Small quantity" has been defined in Section 2(xxiiia) to mean any quantity lesser than the quantity specified by the

Central Government by notification in the Official Gazette. Section 8 provides for prohibition in respect of certain operations, stating :

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

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

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

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes."

Section 37 of the 1985 Act reads as under:

"37. Offences to be cognizable and non-bailable. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 2 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and

that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

The Central Government is empowered to permit, control and regulate cultivation or gathering of any portion of coca plant or the production, possession, sale, purchase, transport import inter-State, export inter-State, use or consumption of coca leaves, etc. in terms of Section 9 of the 1985 Act. Section 10 empowers the State Government to permit, control and regulate in regard to matters specified therein. Section 22 provides for a penal provision for three categories of cases in regard to contravention involving small quantity, contravention involving quantity lesser than commercial quantity but greater than small quantity and contravention involving commercial quantity.

The Central Government is conferred with the power under Section 9 read with Section 76 to frame rules, pursuant where to rules have been framed, known as Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred as 'the Rules'). Chapter VI of the Rules deals with import, export and transshipment of narcotic drugs and psychotropic substances.

Rule 53 of the Rules reads thus :

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

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

Rule 64 provides for general prohibition, stating :

"64. General Prohibition.- No person shall manufacture, possess, transport, import Inter-State, export inter-State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I."

Rule 65 provides for manufacture of psychotropic substances with certain restrictions imposed therefor. Sub-Rule (3) of Rule 65 permits manufacture of psychotropic substances by a licensee in regard to the quantity mentioned therein. The proviso appended thereto reads as follows :

"Provided that nothing contained in this rule shall apply in case the psychotropic substances specified in Schedule I are manufactured, possessed, transported, imported inter-State, exported inter-State, sold, purchased, consumed or used subject to other provisions of this Chapter which applies to psychotropic substances

which are not included in Schedule I and for the purposes mentioned in Chapter VII-A :

Provided further that the authority in charge of the drug control in a State referred to in sub-rule (2) of rule 65 shall consult the Narcotics Commissioner before issuing a licence under rule 65 in respect of psychotropic substances included in Schedule I and Schedule III."

Rule 66 of the Rules reads thus :

"66. Possession, etc., of psychotropic substances. (1) No person shall possess any psychotropic substance for any of the purposes covered by the 1945 Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under these Rules.

(2) Notwithstanding anything contained in sub-rule (1), any research institution or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person:

Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time.

(3) The research institution, hospital and dispensary referred to in sub-rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession."

Rule 67 provides for transport of psychotropic substances. It reads as under :

"67-A. Special provisions regarding manufacture, possession, transport, import-export, purchase and consumption of narcotic drugs and psychotropic substances for medical and scientific purposes. Notwithstanding anything contained in the foregoing provisions of these rules

(a) a narcotic drug and psychotropic substance may be used for

(i) scientific requirement including analytical requirements of any Government laboratory or any research institution in India or abroad;

(ii) very limited medical requirements of a foreigner by a duly authorised person of a hospital or any other establishment of the Government especially approved by that Government;

(iii) the purpose of de-addiction of drug addicts by Government or local body or by an approved charity or voluntary organisation or by such other institution as may be approved by the Central Government.

(b) persons performing medical or scientific functions shall keep records concerning the acquisition of the substance and the details of their use in Form 7 of these rules and such records are to be preserved for at least two years after their (sic);

(c) a narcotic drug and psychotropic substance may be supplied or dispensed for use to a foreigner pursuant to medical prescription only from the authorised licensed pharmacists or other authorised retail distributors designated by authorities responsible for public health."

The High Court as noticed hereinbefore proceeded on the basis that offences under Section 8 or Section 22 do not come within the purview of Section 37 of the Act. Our attention was drawn to Section 22 of the 1985 Act to contend that offences in relation to commercial quantity having specifically been mentioned in Section 37 of the 1985 Act, the same shall also be applicable. We would proceed on the assumption that Section 37 embraces within its fold an offence contemplated under Section 22 of the 1985 Act also so far as it, inter alia, relates to possession of commercial quantity of contraband.

Chapter III of the 1985 Act, however, provides for prohibition, control and regulation. Section 8 provides for prohibition of certain operations in terms whereof no person shall make any cultivation of the plants mentioned in Clauses (a) and (b) thereof or, inter alia, produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance. The said provision contains an exception which takes within its fold all the classes of cases preceding thereto. Use of the contraband for medical or scientific purposes is, therefore, excluded from the purview of the operation thereof. However, such exception carves out under the 1985 Act specifically refers to the manner and to the extent provided by the provisions of the 1985 Act or the rules or orders made thereunder.

It has not been brought to our notice that the 1985 Act provides for the manner and extent of possession of the contraband. The Rules framed under Section 8 of the 1985 Act read with Section 76 thereof, however, provides for both the manner and the extent, inter alia, of production, manufacture, possession, sale, purchase, transport, etc. of the contraband. Chapter VI of the 1985 Rules provides for import, export and transshipment of narcotic drugs and psychotropic substances. Rule 53 contains general prohibition in terms whereof the import and export out of India of the narcotic drugs and psychotropic substances specified in Schedule-I appended thereto is prohibited. Such prohibitions, however, is subject to the other provisions of the said Chapter. Rule 63 to which

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

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

Respondent admittedly possesses an Ayurveda Shastri degree. It is stated that by reason of a notification issued by the State of Uttar Pradesh dated 24.2.2003, the practitioners of Ayurvedic system of medicines are authorised to prescribe allopathic medicines also. Respondent runs a clinic commonly known as 'Neeraj Clinic'. He is said to be assisted by eight other medical practitioners being Allopathic and Ayurvedic doctors. It is also not in dispute that only seven medicines were seized and they are mentioned in Schedules G and H of the Drugs and Cosmetics Act. In this regard, we may notice the following chart:

S.No.	Medicine seized	Schedule H Drugs & Cosmetics Act	The Schedule 1985 Act	Schedule I Rules
1.	Epilan C. Phenobarbitone	Yes	Entry 69	-
2.	Phensobar	50	Yes	-
3.	Chlorodiazepoxide	Yes	Entry 36	-

1.

Epilan C. Phenobarbitone Yes Entry 69

-

2. Phensobar 50 Yes

-

-

3. Chlorodiazepoxide Yes Entry 36

-

4. Carbin Yes

-

-

5. Wefere (ayurvedic)

-

-

-

6. Phenso (Schedule G)

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-

-

7. Epibar 30 Yes

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It is not in dispute that the medicines seized from the said clinic come within the purview of Schedules G and H of the Drugs and Cosmetics Act. It is furthermore not in dispute that the medicines Epilan C. Phenobarbitone and Chlorodiazepoxide are mentioned in Entries 69 and 36 of the 1985 Act respectively, whereas none of them finds place in the Schedule I appended to the 1985 Rules. If the said drugs do not find place in Schedule I appended to the Rules, the provisions of Section 8 of the 1985 Act would have no application whatsoever. Section 8 of the 1985 Act contains a prohibitory clause, violation whereof leads to penal offences thereunder.

In view of the fact that all the drugs being Item Nos. 1,2,3,4,6 & 7 being allopathic drugs mentioned in Schedules G and H of the Drugs and Cosmetics Act indisputably are used for medicinal purposes. Once the drugs are said to be used for medicinal purposes, it cannot be denied that they are acknowledged to be the drugs which would come within the purview of description of the expression "medicinal purposes".

The exceptions contained in Section 8 of the 1985 Act must be judged on the touchstone of :

(i) whether drugs are used for medicinal purposes.

(ii) whether they come within the purview of the regulatory provisions contained in Chapters VI and VII of the 1985 Rules.

Chapter VII-A of the 1985 Rules which was introduced by a notification dated 25.6.1997 with effect from 27.6.1997 provides for special provisions regarding manufacture, possession, transport, import-export, purchase and consumption of narcotic drugs and psychotropic substances for medical and scientific purposes.

It, therefore, permits use of narcotic drugs and psychotropic substances for the purposes mentioned therein. Rule 67-A does not abrogate the provisions of Rule 53 or Rule 64 provided for in Chapters VI and VII of the 1985 Rules. They are in addition to the said provisions. It, however, contains some more restrictions. We are only concerned with Clause (b) of Rule 67-A, in terms whereof the records concerning the acquisition of the substance and the details of their use in Form 7 of those Rules are to be mentioned.

Violation of Clause (c) of Rule 67-A does not appear to have been alleged against Respondent. It was, however, stated at the Bar that Respondent has complied with the said provisions and, in fact, along with his bail application requisite documents have been furnished. Rule 67-A expressly permits use of certain drugs for limited medical requirements of a foreigner. It, however, appears that the sentence contained in Sub-Rule (b) of Rule 67-A is not complete.

Section 37 of the 1985 Act must be construed in a pragmatic manner. It cannot be construed in such a way so as to negate the right of party to obtain bail which is otherwise a valuable right for all practical purposes.

We may notice that in *Dadu alias Tulsidas vs. State of Maharashtra* [(2000) 8 SCC 437], this Court struck down Section 37 of the 1985 Act in terms whereof power to suspend sentence by an appellate court was taken away. This Court, however, opined that Section 37 of the 1985 Act would be applicable. On the aforementioned backdrop we may analyse the requirements of the provisions contained in Section 37 of the 1985 Act.

In *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr.* [(2005) 5 SCC 294], the law has been stated in the following terms:

"The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a

judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

The law to the same effect has been laid down in Babanrao Tukaram Ranjabe vs. State of Maharashtra [JT 2006 (11) SC 33].

Reliance has been placed by the learned Additional Solicitor General of India on Collector of Customs, New Delhi vs. Ahmadalieva Nodira [(2004) 3 SCC 549] wherein this Court stated:

"7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely overlooked the underlying object of Section

37."

This Court, thus, therein was required to consider the merit of the prosecution case against the accused therein and on consideration thereof opined that the rigours of Section 37 of the Act are applicable.

This Court, however, in the said decision was not concerned with the construction of Section 8 of the 1985 Act. It does not and did not lay down a law that although the provisions of the 1985 Act shall prima facie not apply, no bail can be granted.

In *Sajan Abraham vs. State of Kerala* [(2004) 4 SCC 441], this court held :

"Learned counsel for the State submitted that unless the appellant held a permit granted under Rule 66 of the NDPS Rules, he cannot claim benefit under the provisions of that rule. We find no substance in the argument because having regard to the provisions of Section 9 of the NDPS Act under which the Rules have been framed, the Central Government is empowered by the Rules to permit and regulate the matters mentioned therein. Rule 66 itself permits possession of psychotropic substance below a specified quantity and subject to the conditions stated therein. Thus if the possession of psychotropic substance is justified under the said rule, no separate permit is required to be issued to the person possessing such psychotropic substance because the rule itself permits possession of such psychotropic substance to the extent mentioned in the rule and subject to the conditions laid down therein."

{See also *Hussain vs. State of Kerala* [(2000) 8 SCC 139].} In the instant case, we are of the opinion that Section 37 of the 1985 Act would prima facie has no application in view of the exception contained in Section 8 thereof read with the Rules.

The views which we have taken appear also to have been taken by the High Court of Delhi in *Rajinder Gupta vs. The State* [123 (2005) DLT 55] as also the Bombay High Court in *Pradeep Dhond vs. Intelligence Officer, Narcotic & Control Bureau, Ballard Estate and Anr.* [Criminal Application No. 6787 of 2005] disposed of on 7th February, 2006 by the Bombay High Court.

Respondent is charged with a grave offence. It was, therefore, all the more necessary to apply the principles of law strictly. A person cannot be denied the right of being released on bail unless a clear case of application of the 1985 Act is made out. He might have committed an offence which repulses out morality. He may ultimately be found guilty even for commission of an offence under the 1985 Act, but in a case of this nature when prima facie the provisions of the said Act are not found applicable particularly in view of the fact that he has been in custody for a period of more than two years now, in our opinion, it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India.

For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly.