

**HIGH COURT OF TRIPURA
AGARTALA**

Crl.Ref. 1/2020

Court on its Own Motion,
High Court of Tripura, Agartala

-----**Petitioner(s)**

Versus

The Union of India,
Represented by the Secretary to the Ministry of Home Affairs,
South Block, New Delhi-110001

-----**Respondent(s)**

For the Petitioner (s)	:	Mr. S. Lodh, Amicus Curiae
For the respondents(s)	:	Mr. B. Majumder, ASGI. Mr. R. Datta, P.P.
Date of hearing	:	01.04.2021
Date of judgment & order	:	04.06.2021
Whether fit for reporting	:	YES

**HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY**

सत्यमेव जयते
JUDGMENT & ORDER

In exercise of power conferred by Section 395 (2) of the Code of Criminal Procedure, the Special Judge (under NDPS Act), West Tripura, Agartala has made the reference for opinion of this court whether the clause (viii) of Section 2 can be read in Section-27A in

place of the clause (viiiia) of Section 2. The reference as formulated by the Special Judge reads as under:

"Whether provision of clause (viiiia) of section 2 of NDPS Act* is required to be read in section 27-A of the Act as it stands now or whether present clause (viiiib) of section 2 is required to be read in section 27-A in place of clause (viiiia)."

*Narcotic Drugs and Psychotropic Substances Act, 1985.

02. Whether present clause (viiiib) of Section 2 can be read in Section-27 A of the NDPS Act in place of the clause (viiiia)? The reference has to be understood in the perspective of the legislative change. Section 27-A reads as follows:

"27A. Punishment for financing illicit traffic and harbouring offenders.- Whoever indulges in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of clause (viiiia) of section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

03. Sub-clause (viiiia) of Section 2 of the NDPS Act was amended, re-lettered and relocated at the clause (viiiib) of Section 2 of the NDPS Act by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 which came into effect from 01.03.2014. By the said amendment, Section-2 (viiiia) has been re-lettered as:

"(viiiia) 'essential narcotic' drug means a narcotic drug notified by the Central Government for medical and scientific use."

Content of the former Section-2, clause (viiiia) of the NDPS Act has been re-lettered and relocated at Section-2, clause (viiiib) and after the amendment, the clause(viiiib) of Section-2 reads as follows:

“(viiiib) ‘illicit traffic’ in relation to narcotic drugs and psychotropic substances, means-

(i)cultivating any coca plant or gathering any portion of coca plant;

(ii)cultivating the opium poppy or any cannabis plant;

(iii)engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;

(iv)dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or

(v)handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv);

other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorization issued, thereunder, and includes-

(1)financing, directly or indirectly, any of the aforementioned activities;

(2)abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and

(3)harbouring persons engaged in any of the aforementioned activities;”

Thus, it provides a definite catalogue of illicit activities.

04. But it is apparent that having regard to the re-lettering and emergence of the clause (viiiib) in its present character, no amendment has been carried out in Section-27A of the NDPS Act. In

Section-27A, the activities remained to be under sub-clause (i-v) of clause (viii-a) of Section-2. As a result, Section-27A has become an inoperable provision and lost its definiteness as the penal provision. The former clause (viii-a) is still retained, but in view of the said re-lettering, the amendment was essential and ought to have been carried out in Section-27A as well, by substituting '*specified in sub-clause (i-v) of clause (viii-a) of Section-2*' as '*specified in sub-clause (i-v) of clause (viii-b) of Section-2 of the NDPS Act*'. But that has not been done. For purpose of reference, Section-27A of the NDPS Act has been reproduced before.

05. It is not difficult to understand that for not amending Section-27A of the NDPS Act in the wake of re-lettering of the clause (viii-a) of Section-2 of the NDPS Act, Section 27A has lost its operability. Thus the Special Judge (under NDPS Act), West Tripura, Agartala has made the reference with apparent intent of how to overcome the difficulty and to operate a very important provision of the NDPS Act.

06. We have heard Mr. Lodh, learned Amicus Curiae as well as Mr. B. Majumder, learned ASGI and Mr. R. Datta, learned P.P. on the reference.

07. Mr. Lodh, learned counsel has contended that when a statute dealing with a criminal offence impinging upon liberty of citizens, and loophole is found, it is not for Judges to cure it, for it is

dangerous to derogate the principle that a citizen has a right to know what conducts may push him in conflict with penal law leading to conviction and sentence. He cannot be convicted, unless that conduct falls fairly within the definition of crime, for contravention of which he might be charged. In this regard Justice G P Singh in his Principles of Statutory Interpretation has referred to **Spicer vs. Holt** reported in **(1976) 3 ALL ER 71** in a different context. **Spicer vs. Holt** has been referred, when the decision of the apex court in **P. K. Unni vs. Nirmala Industries and Others** reported in **(1990) 2 SCC 378** has been discussed. The apex court had approved the contention of Mr. K. Parasaran, Senior Advocate who had contended that even if there was an omission it was not for the court to rectify it. The Court must indeed proceed on the assumption that the legislature did not make a mistake and that it intended to say what it said. The reference has been made to **Nalinakhya Bysack v. Shyam Sunder Haldar & Ors.** reported in **AIR 1953 SC 148** where the apex court has enunciated that assuming there is a defect or an omission in the words used by the legislature, the Court would not go for any aid to correct or make up the deficiency. The Court cannot add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. No case can be found to authorise any court to alter a word so as to produce a casus omissus **Lord Halsbury in Mersey Docks vs. Henderson (1888) 13 App Cas 595, p.602**) has observed thus: "*We cannot add and mend,*

and, by construction, make up deficiencies which are left there”:

Crawford vs. Spooner: (1846) 6 Moore P. C.1,8-9 where the language of the statute leads to manifest contradiction with the apparent purpose of the enactment, has held that the Court can, definitely, adopt a construction which will carry out the obvious intention of the legislature. In doing so ‘a judge must not alter the material of which the Act is woven, but he can and should iron out the creases as stated by Lord Denning L. J, as he then was, in **Seaford Court Estates vs. Asher:(1949) 2 All ER 155 (at 164).**

The apex court in **M. Pentiah vs. Muddala Veeramallappa: AIR 1961 SC 1107** had adopted that principle of **Seaford Court Estates** (supra).

08. In **Spicer vs. Holt**, Viscount Dilhorne, J observed having quoted from Simon LC, J in **Barnard vs. Gorman:(1941) 3 All ER 45** as under:

“Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because, on a narrower construction, the words might leave a loophole for fraud against the Revenue. If, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context.”

[Emphasis added]

09. Mr. R. Datta, learned P.P. has submitted that the similar controversy has been decided by Bombay High Court in **Julie Singh**

vs. Union of India reported in **2017 SCC OnLine Bom 488**. In **Julie Singh** (supra) it has been observed that it must be noticed that section 27A of the NDPS Act deals not merely with harbouring of any person engaged in activities referred to in sub clauses (i) to (v) of clause (viii b) of Section 2 of the NDPS Act, but also refers to financing directly or indirectly of such activities as specified in the sub clauses. In **Julie Singh** (supra) Bombay High Court having referred a decision of the Judicial Committee in **Dyke vs. Elliott: (1872) LR 4 PC 184** has observed that the said report provides an aid for construction neatly stating the principle what Lord Justice James spoke:

"No-doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

[Emphasis added]

In order to give a fair, pragmatic and a common sense interpretation, **Julie Sing** (supra) has favoured reading of the clause (viii b) of Section 2 of the NDPS Act in place the clause (viii a) of

Section 2 of the NDPS Act in Section 27A of the NDPS Act in order to achieve the object of the statute.

09. Some illustrations in respect of omisus casus in the various penal statutes have been referred to in **Julie Singh** (supra). But Bombay High Court has discarded the principle that the courts are powerless to fill up lacuna in the law by process of interpretation. But it has been observed in **Julie Sing** (supra) that there is nothing wrong when a court fill up a wholly unintended legislative omission by the process of interpretation. Thus, the Bombay High Court has read Section-2(viii b) in the place of Section-2 (viii a) of the NDPS Act for protecting the very purpose of Section-27A of the NDPS Act.

10. Mr. Datta, learned P.P. has quite strenuously argued that the interpretation as proposed by Justice G.P. Singh in his Principles of Statutory Interpretation is not inflexible.

11. Mr. B. Majumder, learned ASGI has prefaced his submission by mentioning that the Director (Narcotic Control) by a written instruction has asked him to place before this court the opinion of the Government of India in this regard. For purpose of reference, the relevant part of the said written instruction dated 31.03.2021 is extracted:

"2. In this regard, it is to say that the NDPS Act was last amended in 2014 (copy enclosed) for carrying out changes in many sections of the NDPS Act. While carrying out amendments, inter alia, under Section 2 (pertaining to definitions) of the NDPS Act, a clause

relating to definitions of 'essential narcotic drugs' was inserted and numbered at clause (viii a) under Section 2 *ibid*. Therefore, the existing clause (viii a) of Section 2 was re-lettered as clause (viii b). However, this re-lettered clause has not been changed correspondingly in Section 27A in which there was mention/reference of this clause (viii a) of Section, apparently due to oversight.

3. This aspect/omission has been figured out by this Ministry in the matter of NCB Cr-04/2016 wherein a bail was sought by the applicant on the basis of said omission. Accordingly, matter was referred to Deptt of Legal Affairs, Ministry of Law. It was opined by Ministry of Law that it is settled principle of law that any legislation should be read as whole and not in piecemeal. Amended clause (viii a) of Section to being an introductory clause has to be read in true spirit. It is also settled principle of law that intention of legislature should be gathered and interpretation has to be made after analyzing the provisions of statute. Further it was advised that the bail application should be opposed and, in the meantime, necessary amendment in Section 27A of the act may be carried out.

4. Further it is stated it was felt that there is need of more amendments in the NDPS Act and therefore in consultation with other stakeholder Ministries/Department an exercise to consider various amendments has been initiated. Therefore, a collective amendment in the NDPS Act would be considered at the earliest by this Ministry."

The crux of the said written instruction is that the existing clause (viii a) of Section 2 was re-lettered as clause (viii b). However, the said re-lettered clause has not been changed to correspond Section-27A due to mistake. Further, it has been contended that it is settled principle of law that intention of legislature should be gathered and interpretation has to be made after analyzing the provision of the statute. They have also felt necessity of amending the NDPS Act in order to remove that omission.

12. Mr. Majumder, learned ASGI has painstakingly referred to several decisions of the apex court broadly on the making up of the legislative omission by the court. He has drawn our notice to **Punjab Land Development and Reclamation Corporation Ltd. Chandigarh vs. Presiding Officer, Labour Court, Chandigarh and Others** reported in **(1990) 3 SCC 682**. The apex court in that report has observed that the literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning whatever the result that may produce. In that report, a passage from Lord Denning's Discipline of Law has been approvingly extracted by the apex court which reflects on what a judge can do without blaming the draftsman. For reference, the said passage is extracted:

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be lettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature."

[Emphasis added]

13. Further reference has been made in the said report to an early decision of the apex court in **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd.** reported in **(1987) 1 SCC 424** where the apex court has observed that interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.

14. Mr. Majumder, learned ASGI, thereafter, has referred to **Reema Aggarwal vs. Anupam and Others** reported in **(2004) 3 SCC 199**. In **Reema Aggarwal** (supra) the apex court has provided the interpretation based on the **Reserve Bank of India vs.**

Peerless General Finance and Investment Co. Ltd. (supra) but they have also referred to **Seaford Court Estates Ltd. vs. Asher** reported in **(1949) 2 All ER 155 (CA)**. In **Seaford Court Estates Ltd.** (supra) Lord Denning advised a purposive approach to interpret a word used in a statute [see para 12 of this judgment]. Having observed that he had commented that a judge must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

Further Lord Denning had observed as follows:

"A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

15. Having referred to **Standard Chartered Bank and Others vs. Directorate of Enforcement and Others** reported in **(2005) 4 SCC 530**, Mr. Majumder, learned ASGI has contended that the rule of interpretation requires strict construction of the penal statute, but it does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape. In **Standard Chartered Bank** (supra) having referred to **Murlidhar**

Meghraj Loya vs. State of Maharashtra reported in **(1976) 3 SCC 684** it has been observed that a penal statute has to be construed as to avoid a lacuna, to suppress mischief and to advance a remedy following the rule as developed in **Heydon's case: (1584) 3 Co Rep 7a**. Thus, a common sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. For this purpose, reference has been made to **State of A.P. vs. Bathu Prakasa Rao** reported in **(1976) 3 SCC 301** and, Justice G.P. Singh's treaty on Principles of Statutory Interpretation. According to Mr. Majumder, learned ASGI that the omission is apparent and to achieve the object of the statute, the criminal court shall read Section-27A of the NDPS Act couching in it Section-2(viib) in place of Section-2(viia) of the NDPS Act. After re-lettering of clause (viia) of Section 2 of the NDPS Act, Section 27A was of the NDPS Act left unamended. Section-27A will be rendered otiose if such interpretation is not accepted by the courts. He has further referred a decision of the apex court in **Balaram Kumawat vs. Union of India and Others** reported in **(2003) 7 SCC 628** where the apex court has clearly observed that any narrow, pedantic, literal and lexical construction may not always serve the purpose of justice. The law would have to be interpreted having regard to the subject matter of the offence and the object of the law which it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal Jurisprudence does not say so.

16. Mr. Majumder, learned ASGI has referred **Bihar State Council of Ayurvedic and Unani Medicine vs. State of Bihar and Others** reported in **(2007)12 SCC 728**. In that report the apex court has observed that court must always lean to the interpretation which is a reasonable one, and discard the literal interpretation which does not fit in the scheme of the Act under consideration.

17. Mr. Majumder, learned ASGI has concluded by stating that to avoid absurdity or incongruity even grammatical and ordinary sense of the words can in certain circumstances be avoided.

18. Mr. S. Lodh, learned counsel has in the rejoinder submitted that **Julie Singh vs. Union of India** (supra) has crafted a solution to overcome the legislative omission. So far the criminal law is concerned whether such interpretation will universally or ordinarily be accepted or not, will remain debatable. While interpreting a penal statute we cannot forget what Lord Halsbury had addressed in **Mersey Docks vs. Henderson** (supra). Lord Halsbury has observed that no case can be found to authorise any Court to alter a word so as to produce a casus omissus. But at the same time, by way of a mechanical interpretation, the courts cannot render a substantive provision of law otiose. The courts have a duty to serve the provisions of law which have been drawn up for a purpose. If from the statute, its purpose/object can be gathered, the court may provide an interpretation which would give a meaning to the said

provision being harmonious to the object. Mr. Lodh, learned counsel is to a greater extent correct. Whether such interpretation would serve the constitutional requirement of predictability? In this regard, we may turn to Article 20 of the Constitution of India which enshrines protection in respect of conviction. No person shall be convicted of any offence, unless he violated a law in force at the time of commission. Therefore, at the time of commission of the act which constitute offence, the law must be predictable and predictability comes from the plain words. While interpreting the penal statute that aspect of the matter cannot be forgotten in the anxiety of replenishing any omission in the penal statute. The right of the individual emanating from Article 20 cannot be forgotten. In this regard the principle is neatly formulated by Lord James while speaking for the Privy Council. Lord Justice James had addressed as follows:

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip; that there has been a casus omissus; that the thing is so clearly within the mischief that it must have been included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words, and within the spirit, there a penal enactment is to be construed, like any other instrument, according to fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other enactment."

The said method has been approved by the House of Lords and the Supreme Court of India.

19. In **Balaram Kumawat** (supra), the apex court has observed that in view of permitting a penal statute operate effectually it may always be construed to avoid a lacuna or to suppress the mischief and advance the remedy in the light of the rule in **Heydon's** case (supra). Further, a common sense approach for solving a question of applicability of a penal enactment is not ruled out by the rule of strict construction.

20. From the opinions as discussed above, it is apparent that the jurists are divided into two camps, one is completely against to make up any omission in the statute by the courts particularly in the penal statute and the other camp has taken a comparatively flexible approach stating that to suppress the mischief and advance the remedy or achieve the object of the statute, even a penal enactment can be interpreted by the courts to make up the omission.

21. Having read the entire amendment Act as enacted in the year, 2014, we are of the view that if the statute is entirely read nobody would find difficulty that due to oversight, no amendment was carried out by substituting 'sub-clauses (i-v) of clause (viii a) of Section-2', "sub-clauses(i-v) of clause (viii b) of Section-2" in section 27A of the NDPS Act. For that omission, the acts which are to be designated as offence got dislocated. However, the latter part as well

turned out to greatly dislocated when it refers to those clauses by stating 'aforementioned activities'. Unless in Section-27A of the NDPS Act in place of sub-clause (i-v) of clause (viii a) of Section-2, "sub-clause (i-v) of clause (viii b) of Section-2" is read, Section-27A which is one of the substantive penal provision in the NDPS Act would be rendered inoperable. As such, we would hold that until the appropriate legislative change occurs by amending Section 27A of the NDPS Act appropriately, sub-clauses (i) to (v) of clause (viii a) of Section-2 of the NDPS Act shall suffer effect of deletion and bringing in sub-clauses i-v of the clause viii-b of Section-2 of the NDPS Act in that place. We are worried this effect might create an incongruity to the constitutional protection provided under Article-20. We have adopted this approach after reading the entire statute. We have only given effect of deletion and conjunction. As the same time we are constrained to observe that Central Government has failed to introduce the Amendment Act for amending the NDPS Act for purpose of removing that omission and bringing in the substitution by sub-clause i to v of clause (viii b) of Section-2 of the NDPS Act. In this circumstances we are persuaded to direct the Central Government in the Ministry of Home Affairs to take appropriate steps for amendment as required in Section-27A without further delay.

22. In terms of the above, this reference is answered. Both the Central Government and the State Government shall publish a notification bringing about the content of this order in short for the

public notice so that the requirement of Article-20 of the Constitution of India is not diminished. Such notification be made within a month from today.

A copy of this order be sent to the court of the Special Judge (under NDPS Act), West Tripura, Agartala. A copy of this judgment be circulated to all special courts (under NDPS Act) in the State of Tripura.

We place our appreciation for the valuable assistance provided by Mr. R. Datta, learned P.P., Mr. S. Lodh, learned Amicus Curiae and Mr. B. Majumder, learned ASGI.

JUDGE

JUDGE

