THE HIGH COURT OF ORISSA, CUTTACK

OHC-RULES-SCM-0013-2025/..10162(30)../dated 19.06.2025

From;

Asanta Kumar Das,
Registrar General

To,

The District & Sessions Judge,.....(All)

Sub: **Forwarding of the Judgment dated 17th April, 2025 passed in Criminal Appeal No. 1319 of 2013 and Criminal Appeal No. 272 of 2014 titled *Directorate of Revenue Intelligence vs. Raj Kumar Arora* & *Ors.* by the Hon'ble Supreme Court**

Sir,

With reference to the subject cited above, I am directed to forward herewith a copy of the judgement dated 17th April, 2025, passed by the Hon'ble Supreme Court of India in Criminal Appeal No. 1319 of 2013 and Criminal Appeal No. 272 of 2014 titled "*Directorate of Revenue Intelligence vs. Raj Kumar Arora & Ors.*" (copy enclosed), for your information.

You are therefore requested to circulate the judgement among all the Judicial Officers within your jurisdiction for their information and necessary guidance.

Yours faithfully,

ASANTA KUMAR DAS
Digitally signed by ASANTA KUMAR DAS
Date: 2025.06.19 14:15:55 +05'30'

REGISTRAR GENERAL

Encl.: As above.

2025 INSC 498

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1319 OF 2013

DIRECTORATE OF REVENUE INTELLIGENCE ...APPELLANT(S)

VERSUS

RAJ KUMAR ARORA & ORS. ...RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 272 OF 2014

J U D G M E N T

Signature Not Verified

Digitally signed by VISHAL ANAND
Date: 2025.04.17 14:29:54 IST
Reason:

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts:

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1. Since the issues raised in both the captioned appeals are the same, those were taken up for hearing analogously and are being disposed by this common judgment and order.

2. These appeals arise from the Judgment and Order passed by the High Court of Delhi in Criminal Revision Petition No. 494 of 2007 dated 13.07.2011 and in Criminal M.C. No. 2335 of 2010 dated 20.03.2013 respectively, by which the High Court rejected the respective petitions having found no legal infirmity in the orders passed by the Trial Court arriving at the conclusion that no offence under Sections 8, 22 and 29, and under Section 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, the "**NDPS Act**"), respectively, could be said to have been made out since the psychotropic substance in question do not figure in Schedule I of the NDPS Rules, 1985. The Trial Court ultimately transferred the matter to the court of Metropolitan Magistrate with a direction to proceed in accordance with the provisions of the Drugs and Cosmetics Act, 1940 (hereinafter, the "**D&C Act**").

A. FACTUAL MATRIX

i. Criminal Appeal No. 1319 of 2013

3. On 27.09.2003, an officer of the Department of Revenue Intelligence Headquarter (hereinafter, the "**DRI(HQ)**") received an information that several

glass ampoules containing the injectable preparation of Buprenorphine were stored in an office premises located at 198, Office Complex, Jhandewalan Extn., Cycle Market, New Delhi. The further information was that the injections had been illegally manufactured and cleared by M/s. Win Drugs Ltd., Bhiwani Road, Jind, Haryana and that a few injections along with the raw materials of Buprenorphine could also be found at that location. Two teams of DRI(HQ) officers were deputed – one team to undertake the search of the premises in Delhi and another team who coordinated their action with the office of Central Excise Commissionerate, Rohtak (hereinafter, the "**CEC**") for the purpose of search at the premises of Win Drugs Ltd. at Jind, Haryana.

4. On the same day, i.e., 27.09.2003, at around 08:15 pm, the DRI(HQ) officers visited the premises in Delhi with a search authorisation under Section 41 of the NDPS Act along with two witnesses. It is stated that upon entering the premises, Raj Kumar Arora (hereinafter, "**respondent no. 1**") who was the proprietor of M/s Kanishka Cargo Service, was present in the office premises. The DRI(HQ) officers recovered 25 corrugated card board cartons which contained small packets, each having ten unlabelled glass ampoules with a water coloured liquid, along with several sheets of printed labels which read as "Buprenorphine Hydrochloride". They also recovered one labelled glass ampoule containing the same coloured liquid from the table drawer of the respondent no. 1. Upon preparing a detailed inventory, it was stated that 1

labelled and 40,000 unlabelled glass ampoules containing Buprenorphine Hydrochloride which is a substance listed in the Schedule to the NDPS Act were recovered. Since the respondent no. 1 was unable to provide any permission or licence for the possession of the recovered glass ampoules, they were seized under the provisions of the NDPS Act. The samples were drawn and the test memo was prepared in the presence of the respondent no. 1 and the witnesses. On 27.09.2003, i.e., on the same day, the officers of CEC, Rohtak are said to have seized 23400 injections of Buprenorphine along with 100 grams of Buprenorphine in its powder form, from M/s Win Drugs Ltd at Jind, Haryana as well.

5. In response to the summons issued, the respondent no. 1 appeared and is said to have made a voluntary statement in writing dated 28.09.2003 which mentioned that during the course of his business as a customs clearing agent, he came in contact with one Mohd. Shebar Khan (hereinafter, "**respondent no. 2**") who handled the customs clearance of the drugs and medicines on behalf of Devang Bipin Parekh (hereinafter, "**respondent no. 3**") of M/s Sarvodiya Enterprises, Mumbai. The statement further revealed the fact that the respondents were collectively involved in the illegal manufacture, storage, transport, sale and purchase of Buprenorphine Hydrochloride along with one Naresh Mittal of Win Drugs Ltd.

6. On 28.09.2003, the respondent no. 1 was arrested for the alleged commission of the offence punishable under Sections 22 and 29 of the NDPS Act respectively and was remanded to judicial custody. Since Naresh Mittal of M/s Win Drugs Ltd. had failed to appear despite repeated summons, a complaint for non-compliance of summons was filed against him before the Court of ACMM, New Delhi. The court took cognizance of the alleged offence and also issued a non-bailable warrant for his arrest.

7. The respondent no. 2 was summoned and is said to have tendered a voluntary statement dated 13.11.2004. The respondent no. 2 stated that during the course of his import business, he came in contact with one person named Mohd. Abdul who showed him three ampoules of Buprenorphine and enquired whether the respondent no. 2 could procure one lakh ampoules of Buprenorphine manufactured by Neon Laboratories Ltd. or in the alternative, procure unlabelled drug ampoules of a similar size and shape having a red ring on the neck of the ampoules for him. Mohd. Abdul is said to have given an advance of Rs. 2,50,000. The respondent no. 2, thereafter, contacted the respondent no. 1 for the purpose of procuring the same and paid him the advance amount he had received along with three samples of the drug which he had obtained from Mohd. Abdul. Initially, 2,000 and 10,000 ampoules respectively, were procured and delivered. On 27.09.2003, the respondent no.1 informed the respondent no.2 that another consignment of 40,000 ampoules had been received by him

at his office. When the respondent no.2 tried to contact the respondent no. 1 at around 09:15 pm, on the same day, he came to know of the fact that the office premises of respondent no. 1 had been raided by a government agency. The respondent no. 2 further stated that upon complete delivery of one lakh ampoules, Mohd. Abdul had promised to give him an additional amount of Rs. 25,000. In light of the same, on 13.11.2003, the respondent no. 2 was also arrested for having committed the offence punishable under Sections 22 and 29 of the NDPS Act respectively and was remanded to judicial custody.

8. In the meanwhile, the DRI officers of the Mumbai Zonal Unit visited the premises of M/s Sarvodaya Enterprises, which is run by the respondent no. 3 and during the search recovered certain documents in the presence of witnesses. The respondent no. 3 was then summoned. He gave a voluntary statement dated 03.12.2003 stating that as a part of his business, his company had bought Buprenorphine in its powder form from M/s Pioneer Agro Industries, Mumbai and were selling the same to the manufacturers like M/s Win Drugs Ltd. He further stated that he knew the respondent no. 1 since he used to clear their pharmaceutical import consignments on a need basis. The respondent no. 3 further stated that he was the one who had directed the respondent no.1 to contact Naresh Mittal of M/s Win Drugs Ltd for the purchase of Buprenorphine injections and that he had also spoken to Naresh Mittal in that regard despite knowing that the respondent no. 1 did not possess any licence to deal with the

said psychotropic substance. The respondent no. 3 is also said to have intervened when the consignments were not being received in time from M/s Win Drugs Ltd and used to get the delivery to the respondent no. 1 expedited. In the transaction in question which involved the supply of one lakh ampoules to the respondent no. 1, the respondent no. 3 was to get Rs. 1 Lakh from M/s Win Drugs Ltd in addition to some amount from the respondent no.1, for his involvement. As a result, on 03.12.2003, the respondent no. 3 was also arrested for alleged commission of the offence punishable under Sections 22 and 29 of the NDPS Act respectively and was remanded to judicial custody.

9. The Chemical Examiner of the Central Revenue Control Laboratory, New Delhi, *vide* his report dated 20.11.2003 opined that, upon chemical analysis conducted by him, the samples were found to be of Buprenorphine which is a psychotropic substance under the NDPS Act. It is the case of the appellant that despite their best efforts, Naresh Mittal of M/s Win Drugs Ltd. could not be summoned and therefore, it was decided that the prosecution *qua* him and all other concerned persons would be considered as and when they would be available for enquiry.

10. On 25.03.2004, a criminal complaint as regards the offence punishable under Sections 22 and 29 of the NDPS Act respectively was filed against the respondents by one Mr. R. Roy (hereinafter, the "**complainant**"), an

intelligence officer of the Directorate of Revenue Intelligence, New Delhi, (hereinafter, the "**appellant**") before the Special Court for NDPS cases, New Delhi.

11. On 03.02.2005, the Special Court observed that Buprenorphine is a psychotropic substance as per the Schedule to the NDPS Act and its commercial quantity is fixed at 20 gms. The test memo as regards the present seizure indicated that the contents of each of the ampoules varied between 0.23 mg to 0.34 mg. On a consideration of the above and the attendant circumstances, including that the respondent no. 1 did not possess any permission or licence for dealing in the substance and that all the respondents had conceded to their involvement in the crime, the Special Judge held that a *prima facie* contravention of Section 22 along with a case of conspiracy under Section 29 of the NDPS Act was made out. The Special Judge was also *prima facie* of the view that meticulous examination of the evidence is not required to be assessed at the stage of framing of charge and a mere strong suspicion of involvement in the crime is sufficient. Stating so, charge was directed to be framed. The charge was formally framed by the Special Judge on 08.02.2005.

12. The respondents applied for bail before the Special Judge and the same was declined. However, the High Court *vide* a common Judgment and Order dated 11.01.2005 granted bail to the respondent no. 3 along with several others. The

respondent nos. 1 and 2 respectively, had also moved the High Court for bail and *vide* a common Judgment and Order dated 22.08.2005, the High Court stated that no offence under the NDPS Act was made out and directed that the respondent nos. 1 and 2 be released on bail upon furnishing a personal bond in the sum of Rs. 25,000 with one surety of the like amount to the satisfaction of the concerned trial court. The High Court in its common Judgement and Order dated 22.08.2005 had framed two questions of law for the purpose of considering the plea for bail – (a) Whether Buprenorphine Hydrochloride is a "psychotropic substance" within the meaning of the NDPS Act?, and (b) If yes, whether Buprenorphine Hydrochloride is a "psychotropic substance" to which Chapter VII of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter, the "**NDPS Rules**") apply and to what effect? The first question was answered in the affirmative, however, on the second question, it was concluded that since Buprenorphine Hydrochloride is a psychotropic substance not included under Schedule I of the NDPS Rules, its manufacture, possession, sale and transport etc. would neither be prohibited nor regulated by the NDPS Rules and consequently by the NDPS Act. It was observed that an examination of Schedule H of the Drugs and Cosmetics Rules, 1940 (hereinafter, the "**D&C Rules**") made it clear that Buprenorphine Hydrochloride was listed therein as a "Prescription Drug" and therefore, the offence would fall within the rigours of the D&C Act and its Rules.

13. The appellant had preferred a petition for Special Leave to Appeal against both the orders of the High Court granting bail to the respondents. *Vide* order dated 31.03.2006, this Court declined to interfere with the grant of bail, however, made it clear that the observations of the High Court that Buprenorphine Hydrochloride would not be covered under the NDPS Act and that no offence under the NDPS Act and its rules was made out, would not have any persuasive effect when the matter would be finally considered before the Special Judge on merits.

14. The respondents thereafter preferred an application under Section 216 of the Code of Criminal Procedure, 1973 (hereinafter, the "**CrPC**") before the Special Judge for amendment/alteration of charge. Before filing the application under Section 216 CrPC, the respondent no. 3 had filed a Criminal Revision Petition No. 204 of 2005 before the High Court challenging the order dated 03.02.2005 and 08.02.2005 respectively, which framed charge against the respondents herein. *Vide* judgment and order dated 01.08.2006, the High Court disposed of the petition by observing that the application under Section 216 pending before the Special Judge shall be decided first before the matter is proceeded with. The relevant observations are as follows:

> "*This revision petition is directed against the order on charge dated 03.02.2005 as well as the formal charge framed on 08.02.2005 against the petitioner under Section 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985. Mr. Sud, the learned Senior counsel for the petitioner has pointed out that the*

main issue involved in the present case is whether Buprenorphine Hydrochloride I.P. would be a psychotropic substance covered under the NDPS Act and Rules. According to Mr. Sud, this matter has been considered by this Court in the case of R Gupta v State: 123 (2005) DLT 55. This decision came after the order which is impugned in the present proceedings was passed. Mr. Sud, also submitted that he had moved an application under Section 216 of Code of Criminal Procedure 1973 for amendment/alteration of the charge. That application, I have been told, is pending before the learned Additional Sessions Judge.

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

(Emphasis supplied)

15. The Special Judge heard the submissions of the counsel with respect to the Section 216 CrPC application made before him. *Vide* order dated 30.11.2006, the Special Judge echoed the reasoning adopted by the High Court while granting bail to the respondents and also arrived at the conclusion that the respondents are to be tried under the D&C Act and the Rules thereunder. The Special Judge allowed the application filed under Section 216 CrPC taking the view that since the offence under the NDPS Act was not made out, the file be

sent to the ACMM, New Delhi for further proceedings. The relevant observations are as thus:

> "*12. I have heard the Ld. Counsel for the parties at length. The Ld. Counsel for the DRI also has not made out any other arguments which have been already dealt in the Hon'ble High Court in passing the judgment. Moreso, the accused has placed on record one order passed by Sh. N. K. Gupta, Special Judge in the matter, Manoj Kumar Gupta Versus State of NCT and said discussed above, since offence is made out under D & C Act which are triable by Ld. MM and not by the Court of Sessions. Accordingly, the matter was remanded back to Ld. ACMM to dealt with the judgment in accordance with law. Since Ld. Counsel for the DRI could not place any other material on record to come out with a different view that Buprenorphine Hydrochloride is covered under NDPS Act or Rule. It remains a substance to be dealt under D & C Act or Rules, Previous case of Manoj Kumar Gupta Versus State of NCT with similar allegations were ordered to be charged and tried under D & C Act and Rules and so it has to face the same consequences and not to be dealt differently.*
>
> *13. In these circumstance of the matter, I allow the application of the accused U/s 216 of Cr. P.C. and say that the charge framed by my Ld. Predecessor dated 08.02.2005 for the offence under NDPS Act is not made out against them and it has to be a case under D & C Act which are triable by Ld. MM and not by the court of Sessions. Accordingly, let the file be sent to Ld. ACCMM, New Delhi for further proceeding in accordance with law by herself or by assigning it to any other court of competent jurisdiction. The accused is directed to appear before Ld. ACMM on 11.12.2006. The file be sent immediately to the said Court."*

16. Aggrieved by the aforesaid order dated 30.11.2006 passed by the Special Judge, the appellant preferred Criminal Revision Petition No. 494 of 2007. *Vide* judgment and order dated 13.07.2011, the High Court dismissed the revision petition. The High Court followed the rationale adopted by this Court in ***State***

of Uttranchal v. Rajesh Kumar Gupta reported in **(2007) 1 SCC 355** wherein it was observed that if any particular drug does not find mention in the Schedule I appended to the NDPS Rules, then the provisions of Section 8 of the NDPS Act would have no application whatsoever. On the question of the respondents being discharged under Section 216 CrPC, the High Court remarked that it would not be right to say that the Special Judge had discharged the respondents. The matter was accordingly remitted to the Metropolitan Magistrate to proceed in accordance with the provisions of the D&C Act. The relevant observations have been reproduced below:

> *"17 [...] I am not in agreement with learned counsel for the Petitioner that by interpreting the Statute and the Rules, a penal offence be made out and the Respondents should be tried thereof. Thus, I am of the considered view that the possession and transportation intra country of Buprenorphine Hydrochloride would not be an offence under the Act and hence not punishable under Section 22 and 29 of the Act and the learned Trial Court had rightly remanded the matter to the learned Metropolitan Magistrate holding that no case for offence under the NDPS Act was made out and the learned MM would examine the same in the light of the provisions of D&C Act.*
>
> *xxx xxx xxx*
>
> *25. There is no denying that the above decision was rendered in the context of an order granting bail and when the Supreme Court was considering as to whether it should exercise its jurisdiction under Article 136 of the Constitution of India to interfere with the order passed by the High Court. But that does not enable us to detract from the position that the Supreme Court, while considering the question, did examine the relevant provisions of the NDPS Act and the NDPS Rules and came to the conclusion that if the drugs did not find place in Schedule-I appended to the Rules, the provisions of Section 8 of the NDPS Act would have no*

application whatsoever. This, of course, was in the context of phenobarbitone which was also a Schedule 'H' drug under the Drugs and Cosmetics Rules, 1945. Mr Malhotra, as pointed out above, wanted us to ignore this decision because, according to him, it did not lay down the law or settle the issue inasmuch as the Supreme Court was only concerned with a bail order and consequently was required to take a prima facie view. We are not impressed by this argument advanced by Mr Malhotra. The aforementioned detailed narration concerning the said decision indicates that the Supreme Court had specifically gone into the issue and had interpreted the provisions of the NDPS Act as well as the NDPS Rules. Mr Malhotra, the learned ASG, is asking us to shut our eyes to the clear dictum of the Supreme Court which is before us in black and white. We cannot do that. The Constitutional scheme of things which sets out the judicial hierarchy does not permit us to do that. Mr Malhotra submitted that the observations in Rajesh Kumar Gupta (supra) are in the nature of obiter dicta and do not constitute the ratio of the said decision [...].

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28. From these decisions, it is clear that, in the first place, the observations with regard to the provisions of the NDPS Act and the NDPS Rules in Rajesh Kumar Gupta (supra) cannot be construed as obiter dicta. This is so because the discussion and conclusion with regard to the said provisions as appearing in Rajesh Kumar Gupta (supra) cannot be regarded as unnecessary to the decision.

29. Secondly, even if we assume for the sake of argument that the observations are in the nature of obiter dicta, they are normally binding on the High Courts in the absence of any direct pronouncement on that question by the Supreme Court. There is no other direct pronouncement of the Supreme Court on this issue and, therefore, even if the observations are regarded as obiter dictum, they would be binding on this Court.

30. Thirdly, apart from this, even if it is assumed that the observations of the Supreme Court in Rajesh Kumar Gupta (supra) are not binding on us, the said observations will, in the least, be required to be construed as having considerable weight and of great persuasive value. We are in full agreement with the observations of the Supreme Court and are indeed persuaded by the line of thought adopted in the said decision in Rajesh Kumar Gupta (supra.). Thus, viewed from any angle, the submission of Mr Malhotra to ignore the decision of the Supreme Court in Rajesh Kumar Gupta (supra), deserves rejection.

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

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

(Emphasis supplied)

17. In such circumstances referred to above, the appellant is here before this Court with the present appeal.

ii. Criminal Appeal No. 272 of 2014

18. On 07.10.2004, the Delhi Zonal Unit of the Narcotics Control Bureau (hereinafter, the "**NCB**") received an information from the Ahmedabad Zonal

Unit that they had recovered and seized 50,000 ampoules of Buprenorphine and during the course of their investigation it was revealed that a huge quantity of these ampoules was also supplied by M/s Rusan Health Care Ltd. to their stockists in Delhi. One Monish Nayyer the proprietor of M/s Belsons was summoned in this regard. M/s Belsons had originally distributed the said ampoules to M/s Rusan Health Care Ltd. In his statement, he disclosed that his firm had a drug licence and therefore, they had received large quantities of the said psychotropic substance from their suppliers out of which the major chunk was sold to one M/s International Drugs. Sajesh Sharma (hereinafter, the "**respondent no. 1**" had taken delivery of the substance on behalf of M/s International Drugs. Pursuant to this information, summons were issued to the respondent no. 1 who admitted that his firm was selling the ampoules of Buprenorphine Hydrochloride/bunogesic injections after purchasing them from M/s Belsons with a valid invoice. The respondent no. 1 then stated that he had sold 2,50,400 injections to a person named Shakeel without an invoice or consignment note as required under Rule 67 of the NDPS Rules and that he was not aware whether Shakeel had a valid drug licence or permission in accordance with law. In the absence of any further information on Shakeel, it is the case of the appellant that no further action could be taken against him. However, on 09.10.2004, the respondent no. 1 was arrested and remanded to judicial custody.

19. On 02.03.2005, the appellant through its Intelligence Officer filed a complaint against the respondent no. 1 under Sections 8(c) and 22(c) of the NDPS Act respectively and on 04.05.2005, upon a *prima facie* case being made against the accused, a charge for the offence under Section 22(c) was framed. On 28.11.2006, in the midst of the trial and during the stage of recording evidence, the respondent filed an application under Section 216 CrPC drawing the attention of the Special Judge to the decision rendered by the Delhi High Court in ***Rajender Gupta v. State*** reported in **2005 SCC OnLine Del 873** which held that dealing in substances mentioned in the Schedule to the NDPS Act and not mentioned in Schedule I of the NDPS Rules would not constitute an offence under the NDPS Act. As a consequence, the respondent no. 1 prayed that the charge be altered and the case be remitted to the appropriate court for trial under the D&C Act.

20. On 06.07.2009, the appellant moved an application before the Special Judge for stay of the proceedings since the matter on this issue was sub-judice before this Court by way of an SLP and also that the decision of the Delhi High Court in ***Rajender Gupta*** *(supra)* was challenged in appeal. Since this application was not being heard, the appellant also preferred a petition before the High Court seeking stay of the further proceedings. *Vide* order dated 16.09.2009, the High

Court directed the Special Judge to hear and dispose of the said application in the first instance before proceeding with the main matter.

21. *Vide* order dated 17.04.2010, the Special Judge observed that the judgement rendered in ***Rajender Gupta*** *(supra)* was not stayed by this Court in appeal. In fact, the same was even approved by this Court in ***Rajesh Kumar Gupta*** *(supra)*. Therefore, the application dated 06.07.2009 made by the appellant was rejected. In the same breath, the Special Judge held that Buprenorphine Hydrochloride is a Schedule "H" drug under the D&C Act read with its Rules. Despite it being a psychotropic substance under the NDPS Act, it was not included in Schedule I of the NDPS Rules. That being the case, dealing in the said substance is not prohibited under the NDPS Act and the offence under Sections 8 and 22 of the NDPS Act respectively, were not made out. However, it was observed that the respondent no. 1 was involved in the illegal sale of the said substance since no record had been maintained in that regard. In such a scenario, the case was remanded to the Court of the Metropolitan Magistrate, Delhi to deal with in accordance with law. The relevant observations of the Special Judge are reproduced hereinbelow:

> *"19. There is no order of the stay of proceedings under the NDPS Act in this case by the Apex Court or in any other case on this issue. The operation of the judgment in Rajender Gupta's case supra has not been stayed by the Supreme Court. Further Rajender Gupta's decision had been considered and dealt with by the*

Supreme Court in Rajesh Kumar Gupta case supra where the Supreme Court has specifically approved of the same. In that case the Supreme Court had made observations with regard to the legal question. The Supreme Court has given its conclusive verdict thereon. Keeping this view in the matter I do not find any merit in the application. Same is accordingly dismissed.

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27. Section 36 of the Act provides for constitution of special courts for providing speedy trial of offences under NDPS Act. The Special Courts are authorised to take cognizance of the case without its commitment by a Magistrate. The offences committed under NDPS Act are to be tried by the court of sessions. Section 80 of the Act provides that the provisions of this Act or the rules made thereunder shall be in addition and not in derogation of, the Drugs and Cosmetics Act 1940 or the Rules made thereunder. The cases under Drugs and Cosmetics Act are triable by the Court of Metropolitan Magistrate. The provisions of the Code of Criminal Procedure are applicable besides the provisions contained in the NDPS Act. Section 228 of the code of Criminal Procedure provides that if, after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence which is not exclusively triable by the Court of Sessions, he may transfer 'the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for trial in warrant cases. Section 32 of the Drugs and Cosmetics Act, 1940 provides that even if the complaint is not filed by the Drug Inspector, the cognizance against the accused is not bad. The prosecution can be launched by any Gazetted Officer of the Central Government authorised in writing in this behalf by the Central Government or a person aggrieved.

28. As indicated above, Buprenorphine Hydrochloride is a Schedule 'H' drug under the Drugs and Cosmetic Act and Rules and though it is a psychotropic substance under the NDPS Act, it is not included in Schedule I to the NDPS Rules. That being the case, its manufacture, possession or sale is not prohibited. As such, there is no contravention of the provisions of the NDPS Rules. Consequently, the offence under Section 8 of the NDPS Act

is not made out. Obviously, punishment under Section 22 of the NDPS Act is also not attracted.

29. In the present case, the accused has not maintained any record by way of consignment/ Form VI. He is involved in illegal sale of Buprenorphine Hydrochloride, a Schedule 'H' drug. As per CRCL report, the samples gave positive for the test of the Buprenorphine. Thus it being Schedule 'H' drug, it would fall within the rigors of Drugs and Cosmetics Act and Rules.

30. The offences under Drugs and Cosmetics Act and Rules are triable by the court of Metropolitan Magistrate and not by the Special Hon'ble or Court of Sessions. As such this case is remanded to Ld Chief Metropolitan Magistrate, Delhi to deal with the case in accordance with law. Ld CMM may also assign the case to any other Metropolitan Magistrate as may deem fit. It is made clear that question of limitation would not stand in the present case.

Parties are directed to appear before Ld CMM on 07.05.2010."

(Emphasis supplied)

22. Aggrieved by the aforesaid order, the appellant preferred a Criminal M.C. No. 2335 of 2010 under Section 482 of the CrPC before the High Court. However, *vide* impugned Judgement and Order dated 20.03.2013, the High Court dismissed the petition being devoid of any merit and observed as thus:

"14. It is true that in Rajinder Gupta the learned Single Judge had taken the view while dealing with the bail application. The reasoning, however, as stated by me earlier fully applies even while dealing with the question whether the person is guilty for the offence punishable under Section 22 of the NDPS Act.

15. In this view, I also find support from another judgment of the Coordinate Bench of this Court in DRI v. Raj Kumar Arora & Anr. where relying on Rajinder Gupta and Rajesh Kumar Gupta, the learned Single Judge of this Court held that a person found in possession of Buprenorphine Hydrochloride will not be guilty under Section 22 of the NDPS Act.

16. In view of the foregoing discussion, the Petition is devoid of any merit; the same is accordingly dismissed.

17. Pending Applications stand disposed of."

(Emphasis supplied)

23. In such circumstance referred to above, the appellant is here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellant(s)

a. Criminal Appeal No. 1319 of 2013

24. Mr. Vikramjit Banerjee, the learned Additional Solicitor General appearing on behalf of the appellant, submitted that, in the present case, there was a recovery of 40,001 injections of buprenorphine, which is a psychotropic substance mentioned in the Schedule to the NDPS Act. Therefore, the Respondent could be said to have contravened section 8(c) of the NDPS Act which prohibits the production, manufacturing, possession, selling,

purchasing, transporting, warehousing, using, consuming, importing inter-State, exporting inter-State, importing into India, exporting from India or transhipment of 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.

25. It was submitted that the respondent no. 3 and respondent nos. 1 and 2 respectively were granted bail by the High Court *vide* its orders dated 11.01.2005 and 22.08.2005 respectively. However, in doing so, the High Court had observed that Buprenorphine Hydrochloride is beyond the pale of Chapter VII of the NDPS Rules and owing to it being a Schedule H drug under the D&C Act and its Rules, the offence under Section 8 of the NDPS Act would not be made out. Consequently, it was observed that the accused cannot be punished under Sections 22 and 29 of the NDPS Act respectively. Being aggrieved by the aforesaid observation made by the High Court, the appellant filed a Special Leave Petition against both the orders granting bail to the respondents and this Court *vide* its order dated 31.03.2006 had clarified and directed that the observations made by the High Court shall not have any binding effect when the matter is finally considered before the Special Judge on merits.

26. It was further submitted that the High Court committed an error in placing reliance on the decision in ***State of Uttaranchal vs. Rajesh Kumar Gupta*** reported in **2007 (1) SCC 355** as the said decision is not applicable to the facts of the present case. In the said case, the accused who possessed an Ayurveda Shashtri Degree was running a clinic while being assisted by eight other medical practitioners who were Allopathic and Ayurvedic doctors. A total of 7 medicines were seized and all of them were mentioned in Schedules G & H of the D&C Rules and the same were said to be used for medical purposes. However, in the present case, the contraband found in the illegal possession of the respondent no. 1 was without any label. Furthermore, the respondents are neither registered medical practitioners nor were they able to produce any document, permit or license to deal with said substances or medicines.

27. It was vehemently submitted that the High Court had erred in holding that Rules 53 and 64 of the NDPS Rules respectively, only pertain to the psychotropic substances mentioned in Schedule I to the NDPS Rules and since Buprenorphine Hydrochloride is a psychotropic substance mentioned in the Schedule to the NDPS Act but not in Schedule I to the NDPS Rules, the offence under the NDPS Act would not be made out. It was argued that the said observation was contrary to the subsequent judgement passed by this Court in ***Union of India & Anr. Vs. Sanjeev V. Deshpande*** reported in **2014 13 SCC 1**,

wherein it has been clearly held that the prohibition under 8 of the NDPS Act is attracted in respect of the psychotropic substances listed in Schedule to the NDPS Act as well as Schedule I to the NDPS Rules framed under the Act. It was further held that the NDPS Act does not contemplate the framing of rules for prohibiting activities involving drugs and psychotropic substances for the reason that Section 8(c) of the NDPS Act already prohibits such activities.

28. As regards the issue of prospective overruling, the counsel submitted that the decision of this Court in ***Sanjeev V. Deshpande*** *(supra)* overruled the decision in ***Rajesh Kumar Gupta*** *(supra)* without a specific declaration that the same was prospectively overruled. In the absence of such a declaration, the interpretation of law in ***Sanjeev V. Deshpande*** *(supra)* must be held to be retrospectively applicable to all cases, including those which have been pending before different courts.

29. It was then submitted that Section 80 of the NDPS Act provides that the provisions of the NDPS Act and Rules made thereunder, shall be in addition to, and not in derogation of the D&C Act, 1940 or the Rules made thereunder. Therefore, the High Court wrongly held that the psychotropic substance in the present case is governed exclusively by the D&C Act without attracting an offence under the NDPS Act.

30. In the last, the learned counsel submitted that subsequent to bail being granted, the respondents, as a clever device, filed an application under section 216 of the CrPC, seeking alteration of charges. The Special Judge, in complete disregard to the direction passed by this Court, allowed the application and held that the offence under the NDPS Act is not made out *qua* all the respondents, and that the case rather pertains to the D&C Act. Such an order could not be said to be in tune with the judgement rendered by this Court in ***K. Ravi vs. State of Tamil Nadu & Anr.*** reported in **(2024) SCC OnLine SC 2283**, wherein it was specifically held that Section 216 of the CrPC does not entitle the accused to file a fresh application seeking discharge, once the charges have been framed by the Court. It was further stated therein that an application under Section 216 CrPC is sometimes filed due to the ignorance of law and also with an aim to deliberately delay the trial proceedings. In the present case, the application filed under Section 216 CrPC was absolutely misconceived and was with a sole intent to derail the trial proceedings.

b. Criminal Appeal No. 272 of 2014

31. Mr. Arvind Kumar Sharma, the learned counsel appearing on behalf of the appellant herein adopted the submissions canvassed by the learned ASG. In addition, the counsel submitted that there is nothing to indicate that Rule 64 is the "governing rule" under Chapter VII of the NDPS Rules and since Rule 64

pertains only to Schedule I substances, all the other rules must also necessarily apply to Schedule I substances. The language of Rules 66 and 67 respectively, is unambiguous and they clearly apply to "any psychotropic substance" which cannot be read to exclude the substances which only find mention in the Schedule to the NDPS Act. Furthermore, Rules 65 and 66 respectively, adopt the provisions of the D&C Rules rather than excluding it. Therefore, the resultant effect must be that the contravention of the D&C Rules would *ipso facto* tantamount to a violation of Rules 65 and 66 of the NDPS Rules respectively, thereby attracting punishment under the NDPS Act.

32. It was submitted that certain drugs are regulated by both the NDPS Act and the D&C Act simultaneously since they can be used as both psychotropic substances as well as medicinal drugs in view of their narcotic properties. This does not necessarily mean that an accused would be absolved of his guilt under the NDPS Act once the substance finds mention under the D&C Rules.

33. In the last, both the counsels prayed that the impugned orders of the High Court be set aside and the appeals be allowed.

ii. <u>Submissions on behalf of the Respondent(s)</u>

34. Mr. Yash Pal Dhingra, the learned counsel appearing on behalf of the respondents submitted that the drug/substance in question is covered by the

exception to Section 8 of the NDPS Act i.e., non-applicability of the prohibition in case the substance is to be used for "medical or scientific purposes". Furthermore, he argued that an offence under Section 8 cannot be said to have been committed unless the substance also finds mention under Schedule I of the NDPS Rules. To fortify his contention, the learned counsel placed reliance on the decisions of the Delhi High Court in ***Rajender Gupta & Ors. v. State*** reported in **2005 SCC OnLine Del 873** and ***Rajesh Sharma v. Union of India*** reported in **2009 SCC OnLine Del 1330** along with the decision of this Court in ***Rajesh Kumar Gupta*** *(supra)*.

35. The counsel vehemently submitted that the decision in ***Sanjeev V. Deshpande*** *(supra)* must strictly be held to be prospectively applicable. If not, it would serve to cause immense prejudice to the respondents who have already been discharged by the Special Judge.

36. It was submitted that the decision of the Delhi High Court in ***Rajesh Sharma*** *(supra)* cannot be said to be inapplicable solely because it was rendered in the context of a bail application. It was submitted that while dealing with an application for bail under the NDPS Act, the Court must get over the rigour contained in Section 37(1)(b)(ii) of the NDPS Act. Therefore, only after giving an opportunity to the Public Prosecutor and recording a satisfaction to the effect that there are reasonable grounds for believing that the accused is not guilty of

such offence, a decision to grant bail is arrived at. Hence, the findings rendered in a bail application are also extremely relevant while deciding the question whether an offence under Section 8 of the NDPS Act is made out or not.

37. In the last, the counsel submitted that there being no merit in the appeals, those may be dismissed.

C. ISSUES FOR DETERMINATION

38. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

I. Whether the production, manufacture, possession, sale, purchase, transport, warehouse, use, consumption, import inter-State, export inter-State, import into India, export from India or transhipment of a psychotropic substance which is listed under the Schedule to the NDPS Act but not mentioned under Schedule I of the NDPS Rules would constitute an offence under Section 8(c) of the NDPS Act?

II. Whether the decision of this Court in ***Sanjeev V. Deshpande*** *(supra)* must operate with prospective effect?

III. Once, the charge has been framed by a competent court under Section 228 of the CrPC, can an accused thereafter seek for discharge/deletion of a particular offence from the charge under Section 216 CrPC?

D. ANALYSIS

i. Whether an offence under Section 8(c) could be said to have been made out when an accused "deals with" psychotropic substances mentioned in the Schedule to the NDPS Act but not figuring in Schedule I of the Rules thereunder.

a. Object of the NDPS Act and the United Nations Convention on Psychotropic Substances, 1971.

39. Before we advert to the rival submissions canvassed on either side, it would be apposite to first look into the object and history behind the enactment of the NDPS Act and its Rules along with the broad scheme of the United Nations Convention on Psychotropic Substances, 1971.

40. As per its Preamble, the NDPS Act, 1985 seeks to consolidate and amend the law relating to narcotic drugs, make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances, amongst others. This Court in ***State of Rajasthan v. Udai Lal*** reported in **(2008) 11 SCC 408** elaborated that the NDPS Act is a special Act which has been enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and stated as thus:

"*10. [...] Before analysing the same, it is relevant to mention that in order to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the 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, Parliament enacted the NDPS Act in the year 1985. <u>This is a special Act and it has been enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances</u> [...]*"

(Emphasis supplied)

41. Another decision of this Court in ***Hira Singh v. Union of India*** reported in **(2020) 20 SCC 272** opined that while determining the "small or commercial quantity" of the narcotic drug or psychotropic substance in cases of seizure of a mixture of narcotic drugs or psychotropic substances with one or more neutral substances, the quantity of the neutral substance(s) is not to be excluded and is to be taken into consideration along with the actual content by weight of the offending drug. While declaring so, the Court also discussed the object of the NDPS Act and highlighted that the enactment was intended to be a deterrent against the use of narcotic drugs and psychotropic substances. The relevant observations are reproduced below:

"10. [...] As per the Preamble of the NDPS Act, 1985, it is an Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operation relating to narcotic drugs and psychotropic substances. To provide for forfeiture of the property derived from or use in illicit traffic in Narcotic Drugs and Psychotropic Substance. <u>The</u>

Statement of Objects and Reasons and the Preamble of the NDPS Act imply that the Act is required to act as a deterrent and the provisions must be stringent enough to ensure that the same act as deterrents.

xxx *xxx* *xxx*

10.5. The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances, which led to enactment of the NDPS Act. As observed hereinabove, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more important. Therefore, prevention of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1985 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the courts will have to safeguard the life and liberty of the innocent persons. Therefore, the provisions of the NDPS Act are required to be interpreted keeping in mind the object and purpose of the NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and Preamble of the Act [...].”

(Emphasis supplied)

42. There exist three Conventions (collectively referred to as the "International Drug Control Conventions") under the auspices of the United Nations which form the current normative framework for the control of narcotic drugs, psychotropic substances and precursor chemicals. They are :- The Single Convention on Narcotic Drugs, 1961; The Convention on Psychotropic Substances of 1971; and the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. India has acceded to and is therefore, a party to the abovementioned International Drug Control Convention framework.

43. The Preamble to the Convention on Psychotropic Substances, 1971 (hereinafter, the "**Convention**"), elucidates that the Convention was adopted keeping in mind the primary concern as regards the health and welfare of mankind along with the public health and social problems which arise as a result of abuse of certain psychotropic substances. It called for a collective and determinative action from all States to prevent and combat the abuse of such substances and the rise in illicit trade thereof. Rigorous measures were considered necessary to restrict the use of psychotropic substances to legitimate purposes while simultaneously acknowledging that their use for medical and scientific purposes must not be unduly restricted or curtailed. The Convention is annexed with four Schedules containing controlled psychotropic substances,

where arguably, Schedule I substances are the most restricted while Schedule IV substances are the least restricted.

44. Article 1(e) of the Convention defines a "psychotropic substance" as any substance, natural or synthetic, or any natural material in Schedules I, II, III or IV of the Convention. Article 4 provides that, as regards the substances other than those mentioned in Schedule I i.e., in Schedule II, II and IV respectively, the States may permit – (a) the carrying by international travellers of small quantities of lawfully obtained preparations for personal use; (b) the use of such psychotropic substances in industry for the manufacture of non-psychotropic substances or products subject to the application of control measures until the psychotropic substances come to be in such a condition that they will not be abused or recovered in practice; and (c) the use of such psychotropic substances for the capture of animals by specifically authorised persons subject to the application of control measures. Article 5, in addition, states that the manufacture, export, import, distribution, stocking, trade, use and possession, of substances in Schedules II, III and IV respectively, must be limited to medical and scientific purposes, except for those purposes already enumerated under Article 4. Furthermore, Article 5 states that it would be desirable if States

do not permit the possession of substances mentioned in Schedules II, III and IV respectively, except under legal authority.

45. As per Article 8, the manufacture of, trade in, and distribution of substances listed in Schedules II, III and IV respectively, must also be under a licence or other similar control measures, provided that the requirements of licencing or other control measures need not apply to persons who are duly authorised to perform or are performing therapeutic or scientific functions. Article 9 states that the substances in Schedules II, III and IV respectively, shall be supplied or dispensed for use by individuals only pursuant to a medical prescription except when being lawfully obtained, used, dispensed or administered in the duly authorised exercise of therapeutic or scientific functions.

46. In so far as the substances mentioned in Schedule I are concerned, Articles 4 and 7 respectively state that their use shall be prohibited except for scientific and very limited medical purposes, by duly authorized persons in medical or scientific establishments, which are either directly under the control of the government or specifically approved by them. Such persons performing medical or scientific functions must be required to maintain records concerning the acquisition of the substances and the details of their use which must be

preserved for at least two years after the last use recorded therein. States must also require that the manufacture, trade, distribution and possession of Schedule I substances be under a special licence or prior authorization and be closely supervised. The quantity of Schedule I substances supplied to a duly authorised person must also be restricted to such level as required for his authorized purpose. The export and import of Schedule I substances shall be prohibited except when both the exporter and importer are the competent authorities or agencies of the exporting or importing country, or other persons or enterprises which are specifically authorised for that purpose. During the export and import as enumerated above, the authorities or persons specifically authorized must have export and import authorizations for the substances mentioned in Schedule I.

47. Article 11 elaborates on record-keeping and provides that – (a) In respect of substances in Schedule I, manufacturers and all other authorised persons under Article 7 shall maintain records indicating the details of the quantity manufactured, the quantity held in stock and, for each acquisition and disposal, the details of the quantity, date, supplier and recipient; (b) In respect of substances in Schedules II and III respectively, manufacturers, wholesale distributors, exporters and importers must keep records showing details of the quantity manufactured and, for each acquisition and disposal, details of the

quantity, date, supplier and recipient; (c) In respect of substances mentioned in Schedule II, retail distributors, institutions for hospitalization and care, and scientific institutions must keep records showing for each acquisition and disposal, details of the quantity, date, supplier and recipient; (d) Information regarding the acquisition and disposal of substances in Schedule III by retail distributors, institutions for hospitalization and care, and scientific institutions must be made readily available through appropriate methods and by taking into account the professional and trade practices of the respective States; and (e) In respect of substances in Schedule IV, manufacturers, exporters and importers must keep records indicating the quantity manufactured, exported and imported.

48. Article 12 elaborates on the provisions relating to international trade and states that every State permitting the export or import of substances in Schedules I or II respectively, shall require a separate import or export authorization which shall state the international non-proprietary name or the designation of the substance in the Schedule, the quantity to be exported or imported, the pharmaceutical form, the name and address of the exporter and importer, and the period within which the export or import must be effected. Additionally, the export authorization shall also state the number and date of the import authorization and the authority by whom it has been issued. Before an export

authorization is issued, the States shall require an import authorization issued by the competent authority of the importing country or region which certifies that the importing of the substance(s) referred to therein is approved and such an authorization shall be produced by the person or establishment while applying for the export authorization. A copy of the export authorisation is to accompany each consignment and the government issuing the export authorisation shall also send a copy to the government of the importing country or region. When the importation has been effected, the government of the importing country or region shall then return the export authorization to the government of the exporting country or region, with an endorsement certifying the amount of the substance which has actually been imported.

49. With respect to the export of substances mentioned in Schedule III, Article 12 states that exporters must draw up a declaration in triplicate, on a form, which contains information including the name and address of the exporter and importer, the international non-proprietary name or the designation of the substance in the Schedule, the quantity and the pharmaceutical form in which the substance is exported, the name of the preparation, if any, and the date of despatch. Exporters must furnish two copies of the declaration to the competent authorities of their country or region and attach the third copy to their consignment. Thereafter, the State from whose territory a Schedule III

substance has been exported, shall not later than 90 days after the date of despatch, send to the competent authorities of the importing country or region, one copy of the declaration received from the exporter by registered mail with return of receipt requested. The States may also require that after the consignment has been received, the importer shall transmit the copy of the declaration accompanying the consignment which has been duly endorsed stating the quantities received and the date of the receipt, to the competent authorities of the importing country or region.

50. On a conspectus of the aforementioned Articles of the Convention, it can be seen that the substances mentioned in Schedules I, II, III and IV respectively are subject to different treatment and restrictions on their manufacture, use, possession, import and export, amongst others. While Schedule I substances are to be used for limited purposes by the authorized persons under a special licence or prior authorization, the substances mentioned under Schedule II, III and IV respectively, are used for a comparatively wider range of purposes by the licence holders and its supply is allowed to be made pursuant to a medical prescription. Therefore, it cannot be stated that the substances other than the Schedule I substances are completely unregulated or allowed to be dealt with in any manner whatsoever. These substances also have the potential to be

misused or abused and hence are subject to certain restrictions and procedural requirements albeit not up to the standards as strict as the Schedule I substances.

51. On a closer look at the substances mentioned in the Schedules to the Convention, it is evident that Buprenorphine and its salt Buprenorphine Hydrochloride is listed under Schedule III. Therefore, according to the scheme of the Convention, the manufacture, distribution, stocking, and possession of Buprenorphine and its salt Buprenorphine Hydrochloride shall be limited to medical and scientific purposes in addition to the limited purposes as provided in Article 4. The Convention casts a mandate upon States that the manufacture of, trade in and distribution of Buprenorphine and its salt Buprenorphine Hydrochloride be under a licence or other similar control measure. The only exception being that such a licence or other control measure need not necessarily apply to persons who are duly authorised to perform therapeutic or scientific functions.

b. Relevant Statutory Provisions of the NDPS Act and its Rules

52. Section 2(xxiii) of the NDPS Act defines a "Psychotropic substance" as –

> "*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*"

A bare reading of the definition would indicate that all items listed in the Schedule to the Act along with its salts and preparations come within the purview of a "psychotropic substance" under the NDPS Act.

53. Section 8 of the NDPS Act prohibits certain operations and reads as thus:

> ***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.*
>
> (Emphasis supplied)

54. The mandate under Section 8 is that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship (hereinafter collectively referred to as "**deal in/dealing in**") 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. In a case where any such provision imposes any requirement by way of licence, permit or authorisation, the narcotic drugs and psychotropic substances must also be dealt in accordance with the terms and conditions of such licence, permit or authorisation. The term "psychotropic substance" mentioned in Section 8 must be seen in light of Section 2(xxiii) which refers to the Schedule to the Act and all the psychotropic substances mentioned therein. Additionally, to bring a case within the exception carved out under Section 8, each of the conditions specified therein must be satisfied. In other words, for the accused to take the plea that his dealing in the narcotic drug or psychotropic substance does not constitute an offence under Section 8, it must be proved that the drug or substance was being dealt with (a) for medical or scientific purposes **AND**; (b) in the manner and to the extent provided by the provisions of the NDPS Act or the NDPS Rules or the orders made thereunder **AND**; (c) in accordance with the terms and conditions of the licence, permit or authorisation, if any.

55. It is just not enough to prove or establish that the narcotic drug or psychotropic substance is capable of being used for a medical or scientific purpose. That would give unnecessary leeway to persons to indiscriminately deal with narcotic drugs and psychotropic substances under the garb that they could also be potentially used for medical or scientific purposes. Moreover, several of these drugs and substances are inherently of such a nature that they have widespread medicinal and scientific applications. Therefore, an expansive interpretation of the exception that the mere potential for usage of the narcotic drug or psychotropic substance ,for medical or scientific purpose, is sufficient would run counter to the object of the Act which seeks to act as a deterrent to the widespread dealing in narcotic drugs and psychotropic substances. What must, therefore, be proved to take the benefit of the exception is that the narcotic drug or psychotropic substances was being dealt in for a specified and real medical or scientific purpose, in the manner and to the extent provided by the provisions of the Act, the rules and orders made thereunder and, in case such provisions imposes any requirement by way of licence, permit or authorisation, in accordance with the terms and conditions of such licence, permit or authorisation.

56. Therefore, if any psychotropic substance mentioned in the Schedule to the Act is being dealt with for a purpose other than medical or scientific purposes, an

offence under Section 8(c) of the NDPS Act would be made out. Furthermore, if any psychotropic substance mentioned in the Schedule to the Act is being dealt with for a medical or scientific purpose, but not in accordance with other provisions of the Act, rules, orders or, the terms and conditions of the licence, permit or authorisations, if any, then also, an offence under Section 8(c) of the NDPS Act could be said to have been made out. It is only when the exception is complied with entirely or wholly, that an accused can lay claim to the benefit provided under the said provision.

57. Section 9 of the NDPS Act empowers the Central Government to permit and regulate certain activities subject to the provisions of Section 8. The same reads thus:

> "***9. Power of Central Government to permit, control and regulate.***—
> *(1) Subject to the provisions of section 8, the Central Government may, by rules—*
> *(a) permit and regulate—*
>
> *xxx* *xxx* *xxx*
>
> *(vi) the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances;*
> *(vii) the import into India and export from India and transhipment of narcotic drugs and psychotropic substances;*
>
> *(b) prescribe any other matter requisite to render effective the control of the Central Government over any of the matters specified in clause (a).*

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

xxx xxx xxx

(i) prescribe the forms and conditions of licences or permits for the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances, the authorities by which such licences or permits may be granted and the fees that may be charged therefor;

(j) prescribe the ports and other places at which any kind of narcotic drugs or psychotropic substances may be imported into India or exported from India or transhipped; the forms and conditions of certificates, authorisations or permits, as the case may be, for such import, export or transhipment; the authorities by which such certificates, authorisations or permits may be granted and the fees that may be charged therefor."

58. Section 76 of the NDPS Act also empowers the Central Government to make rules for carrying out the purposes of the NDPS Act and reads thus:

"***76. Power of Central Government to make rules.—***
(*1) Subject to the other provisions of this Act, the Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.*

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

xxx xxx xxx

(e) the conditions and the manner in which narcotic drugs and psychotropic substances may be supplied for medical necessity to the addicts registered with the Central Government and to others under sub-section (1) of section 71;

xxx xxx xxx

(h) any other matter which is to be, or may be, prescribed."

59. The NDPS Rules, 1985, have been brought into being by the Central Government in exercise of its powers under Sections 9 and 76 of the NDPS Act, respectively referred to above. However, what must necessarily be kept in mind is that the power conferred upon the Central Government under Sections 9 and 76 of the NDPS Act, respectively, is subject to Section 8 and this is evident by the use of the phrase "*subject to the provisions of Section 8*" and "*subject to the other provisions of the Act*" in both the provisions. Therefore, the NDPS rules must not be understood as laying down standards different from or inconsistent with the substantive provisions of the NDPS Act, especially Section 8 and the Schedule to the NDPS Act. The underlying object of the NDPS rules is to "*permit and regulate*" certain activities for carrying out the purposes of the NDPS Act and not to "prohibit" those activities.

60. Rule 2(k) of the NDPS Rules, 1985, states that – "*words and expressions used herein and not defined, but defined in the Act shall have the meanings respectively assigned to them in the Act.*". Therefore, any reference to "psychotropic substances" under the NDPS Rules must relate to the definition provided under Section 2(xxiii) of the NDPS Act, which consists of the entire list of psychotropic substances enumerated under the Schedule to the Act. Chapter VI of the NDPS rules relate to the import, export and transhipment of narcotic drugs and psychotropic substances and Chapter VII deals with the

manufacture, sale, purchase, consumption, use, possession and transport of psychotropic substances. Chapter VIIA details certain special provisions regarding the manufacture, possession, transport, import-export, purchase and consumption of narcotic drugs and psychotropic substances for medical, scientific and training purposes. It would be apposite to mention at this stage that the NDPS rules have undergone some significant changes over the years. However, our inquiry would be limited to the version of the NDPS Rules as it existed during the time the offence is alleged to have been committed in the present case i.e., as on 27.09.2003.

61. Chapters VI and VII respectively, contain Rules 53 to 63 and 64 to 67 respectively. Under Chapter VI, Rule 53 provides for a general prohibition and states that 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 appended to the Rules" is prohibited. However, an exception to this general rule was carved out under its first proviso by stating 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 under Chapter VIIA. The expression "the drug substance" mentioned in the proviso must naturally be read to mean a "Schedule I substance" since the language of Rule

53 is phrased such that it alludes to a Schedule I substance only. Therefore, in short, the import and export of narcotic drugs and psychotropic substances specifically mentioned under Schedule I of the Rules is generally disallowed provided that person may import and export them, with a valid import certificate or export authorisation, for the limited purposes mentioned under Chapter VIIA.

62. Rule 55 on the 'Application for an Import Certificate' provides that, subject to Rule 53 as enumerated above, no narcotic drug or psychotropic substance specified in the "Schedule of the Act" shall be imported into India without an import certificate, in respect of the consignment, issued by the issuing authority, as per the form appended to the Rules. Rule 57 on 'Transit' states that subject to the provisions of Section 79 of the NDPS Act and Rule 53, no consignment of any narcotic drug or psychotropic substance specified in the "Schedule of the Act" shall be allowed to be transited through India unless such consignment is accompanied by a valid export authorisation in this behalf issued by the Government of the exporting country. Rule 58 relating to the 'Application for Export Authorisation' provides that, subject to Rules 53 and 53A, no narcotic drugs or psychotropic substances specified in the "Schedule of the Act" shall be exported out of India without an export authorisation in respect of the consignment, issued by the issuing authority in the requisite form

appended to the Rules. Rule 60 relating to 'Transhipment' provides that, subject to the provisions of Section 79 of the NDPS Act and Rule 53, no consignment of narcotic drug or psychotropic substance specified in the "Schedule to the Act" shall be allowed to be transhipped at any port in India save with the permission of the Collector of Customs. Rule 61 on the 'Procedure for Transhipment' states that while allowing any consignment of narcotic drug or psychotropic substance specified in the "Schedule to the Act" to be transhipped, the Collector of Customs shall *inter alia* satisfy himself that the consignment is accompanied by a valid export authorisation issued by the exporting country.

63. What is discernible from the aforementioned rules under Chapter VI is that the import into and export out of India of all psychotropic substances (as listed in the Schedule to the Act) must be accompanied by a valid import certificate and export authorisation issued by the issuing authority in India. As regards the transit and transhipment of any psychotropic substance (as listed in the Schedule to the Act) in India, a valid export authorisation issued by the exporting country is a requisite. On the other hand, what Rule 53 seeks to achieve is to restrict the import and export of substances enumerated in Schedule I of the Rules to a pre-determined set of purposes as explained under Chapter VIIA, despite having obtained an import certificate or export authorisation under the other rules of this Chapter. This provision i.e., Rule 53

relating to the Schedule I substances must not be flouted and this is especially evident through the phrase "*subject to Rule* 53" featuring in almost every rule under this Chapter. It is therefore, clear that, as far as import or export is concerned, the substances mentioned in Schedule I appended to the Rules are more strictly regulated or restricted in comparison to the larger list of psychotropic substances mentioned in the Schedule to the Act. However, this is not to say that the psychotropic substances mentioned only in the Schedule to the Act are unregulated. Furthermore, it also cannot be said that the substances mentioned in Schedule I of the NDPS Rules are absolutely prohibited from being imported or exported as per Section 8 of the NDPS Act since they are clearly allowed to be validly imported and exported for the limited purposes enumerated under Chapter VIIA.

64. Under Chapter VII, Rule 64 on 'General Prohibition' states that no person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the "psychotropic substances specified under Schedule I" of the Rules. Rule 65 relating to the 'Manufacture of psychotropic substances', under sub-rule (1), provides that, subject to the provisions of sub-rule (2), the manufacture of any of the psychotropic substances other than those specified in Schedule I (i.e., those mentioned only under the Schedule to the Act) shall be in accordance with the conditions of a licence granted under the

Drugs and Cosmetics Rules, 1945 framed under the Drugs and Cosmetics Act, 1940, by an authority in charge of Drugs Control in a State appointed by the State Government in this behalf. Sub-rule (2) states that the authority in charge of drugs control in a State/the Licensing Authority shall consult the Drugs Controller (India) with regard to the assessed annual requirements of each of the psychotropic substance (which has been referred to in sub-rule (1) i.e., the substances mentioned only under the Schedule to the Act) in bulk form in the country and after taking into account the requirement of such psychotropic substances in the State, as also the quantity of such substance required for supply to other manufacturers outside the State and the quantity of such substance required for reasonable inventory to be held by a manufacturer, the authority in charge of drugs control in a State/the Licensing Authority shall specify, by order, a limit to the quantity of such substance which may be manufactured by the manufacturer in the State. Sub-rule (3) provides that the specific quantity which may be manufactured by a specific licensee in a year shall be intimated by the Licensing Authority to the licensee at the time of issuing the licence. Then, there are two provisos to Rule 65 sub-rule (3) which were inserted *vide* notification dated 25th June, 1997 w.e.f 27.06.1997. Through the first proviso, an exception has been carved out under the Rule by stating 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 apply to psychotropic substances which are not included in Schedule I and for the purposes mentioned in Chapter VIIA. The second proviso contemplates that the authority in charge of drugs control in a State shall consult the Narcotics Commissioner before issuing a licence under Rule 65 in respect of psychotropic substances included in "Schedule I appended to the Rules" and Schedule III appended to the Rules as well.

65. What can be discerned from the Rules 64 and 65 respectively, elaborated hereinabove is that: *First,* the manufacture of all psychotropic substances (as listed in the Schedule to the Act) must be in accordance with the conditions prescribed in the licence granted under the D&C Rules and the permissible quantity to be manufactured would be intimated to the licensee at the time the licence is issued. Notwithstanding the prohibition to deal in psychotropic substances contained in Section 8(c) of the NDPS Act, the manufacture thereof is permitted subject to compliance with the D&C Act and its Rules. *Secondly,* there is a general rule absolutely prohibiting the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of any of the psychotropic substances which find mention in Schedule I appended to the Rules. However, the above activities can be done *vis-á-vis* the

substances mentioned in Schedule I appended to the Rules if their manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use is in accordance with other provisions of the Chapter which generally apply to all psychotropic substances (as listed in the Schedule to the Act) and for the limited purposes mentioned under Chapter VIIA. In other words, Schedule I substances can also be dealt in, in due compliance with the rules applicable generally to all the psychotropic substances but specifically only for the purposes mentioned under Chapter VIIA. However, while issuing a licence of manufacture with respect to the Schedule I substances, the Licensing Authority shall consult the Narcotics Commissioner. Therefore, Rules 64 and 65 respectively, permit the manufacture of psychotropic substances mentioned under Schedule I of the Rules however subject to certain provisions and purposes. This can be culled out from a holistic reading of Rules 64 and 65 respectively, and the two provisos which follow Rule 65(3). *Thirdly,* the manufacture of all psychotropic substances (as listed in the Schedule to the Act), and those mentioned under Schedule I of the Rules specifically for the purposes elaborated under Chapter VIIA, in violation of the conditions of licence of manufacture issued under the D&C Act would amount to a contravention of Rule 65 of the NDPS Rules and thereby Section 8 of the NDPS Act itself. Therefore, when such a contravention of the conditions of licence occurs, it cannot be said that an offence under the NDPS Act would not be made

out and that the contravention would be solely covered by the D&C regime. Due to the operation of Rule 65, violation of any of the conditions of licence under the D&C Act read with its Rules would *ipso facto* tantamount to a violation of the NDPS Act read with its Rules as well.

66. Rule 66 on 'Possession etc. of psychotropic substances' states that no person shall possess any psychotropic substance (as listed in the Schedule to the Act) for any of the purposes covered by the D&C Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under these rules. Therefore, what is being conveyed herein is that as far as substances mentioned under Schedule I are concerned, they can be possessed only for the purposes mentioned under Chapter VIIA, and as far as the other substances not being Schedule I substances but which are listed in the Schedule to the Act are concerned, they can be possessed for the purposes mentioned under Chapter VIIA and also for other purposes which necessarily fall under the broader considerations of medical or scientific purposes as mentioned under Section 8 of the NDPS Act. This compliance is in addition to the accused persons possessing the said substances in accordance with the purposes elaborated under the D&C Rules and the requirements thereunder. Sub-rule (2), however, allows any research institution or a hospital or a dispensary maintained or supported by the Government or local body or by charity or voluntary

subscription, which is not normally authorised to possess the psychotropic substances under the D&C Rules, or any person who is not so authorised under the D&C Rules, to possess a reasonable quantity of such substance as may be necessary for their genuine scientific or medical requirements or both, for such period as is deemed necessary by the said research institution or hospital or dispensary or person, as the case may be. In case, of an individual person, possessing the substance for his personal medical use, the quantity shall not exceed one 100 dosage units at a time. The research institution, hospital and dispensary referred to herein shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession.

67. Rule 67 on 'Transport of psychotropic substance' provides that, subject to the provisions of Rule 64, no consignment of psychotropic substance shall be transported, imported inter-State or exported inter-State unless such a consignment is accompanied by a consignment note appended to the Rules and in the manner provided under the Rules. The consignor and consignee must keep the consignment note for a period of two years and the said note may be inspected at any time by an officer authorised in this behalf by the Central Government. This Rule would again apply to all psychotropic substances (as mentioned under the Schedule to the Act).

68. At this stage, it may be observed that it was *vide* a notification dated 25th June, 1997 that Chapter VIIA containing Rule 67A came to be inserted in the NDPS Rules. Chapter VIIA states that, notwithstanding anything contained in the foregoing provisions of these Rules, a narcotic drug or psychotropic substance may be used for - (i) scientific requirements including analytical requirements of any Government laboratory or any research institution in India or abroad; or (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 foreign Government; or (iii) the purpose of de-addiction of drug addicts by the 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. The persons performing medical or scientific functions as mentioned hereinabove shall maintain 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. Furthermore, a narcotic drug or psychotropic substance may be supplied or dispensed for use to a foreigner pursuant to a medical prescription only from authorised licensed pharmacists or other authorised retail distributors designated by authorities responsible for public health.

69. Upon a meticulous analysis of the NDPS rules relating to psychotropic substances and analysing the purposes for which they are to be dealt in, along with the requirements and procedures to be complied with for each kind of dealing in the psychotropic substances, an underlying idea resonates throughout these rules i.e., that any dealing in the psychotropic substances mentioned under Schedule I of the Rules must strictly be in accordance with the NDPS Rules **AND ONLY** for the purposes enumerated under Chapter VIIA of the NDPS Rules. The substances not finding a mention under Schedule I of the Rules but listed in the Schedule to the Act must also meet with the requirements cast upon by the NDPS Rules. The difference as regards these substances however is that while they may be dealt with for the purposes enumerated under Chapter VIIA of the NDPS Rules, they can also be dealt with for other purposes, provided that those purposes strictly fall under the larger umbrella of "medical or scientific purposes" as provided for in Section 8 of the NDPS Act. Whether the accused has dealt with it within the confines of the expression "medical or scientific purposes" must obviously be determined on the facts and circumstances of each case. It can therefore be said that the substances under Schedule I to the Rules are more strictly restricted compared to the remaining psychotropic substances under the Schedule to the Act which are restricted more moderately in comparison. On this aspect, our scheme is more or less similar to the scheme of the Convention on Psychotropic substances, 1971. The

different levels in restriction could be seen as the primary reason behind providing two different schedules, i.e., one under the Act and another under the Rules. Moreover, the Schedule to the Act can be considered as a superset of all psychotropic substances wherein those substances mentioned under Schedule I of the Rules form a small, more restricted subset of the larger superset.

c. Analysing the treatment of substances mentioned in the Schedule to the Act and not in Schedule I of the Rules by previous decisions of this Court.

70. It is evident from the decision of this Court in ***Hussain v. State of Kerala*** reported in **(2000) 8 SCC 139** that "Buprenorphine" being listed under the Schedule to the NDPS Act and not under Schedule I of the NDPS Rules, would be a psychotropic substance under the NDPS regime, to which Section 8 of the NDPS Act would apply. The appellant therein was found in possession of 6 ampoules of "Buprenorphine tidigesic" each containing 2ml. The defence that he put forth to justify his possession was that he was regularly using it under medical advice with a valid prescription. Despite such defence put forward by the appellant, the Trial Court convicted him under Section 21 of the NDPS Act which relates to the contravention of the law in respect of "manufactured drugs and preparations" since the District Medical Officer had opined that "Buprenorphine tidigesic" is a manufactured drug. He was sentenced to

undergo rigorous imprisonment for a period of 10 years along with payment of fine. On appeal, the High Court affirmed the conviction and sentence. However, this Court opined that the prosecution had, *first*, failed to prove that the substance in question was a 'manufactured drug' falling within the definition given under Section 2(xi) of the NDPS Act. Instead, it was observed that "Buprenorphine" is a substance listed under Item 92 of the Schedule to the Act and is therefore, a psychotropic substance. *Secondly*, this Court proceeded to examine whether the possession of the said substance would constitute an offence under Section 8 of the NDPS Act. Upon examining Rule 66 of the NDPS Rules, it was held that a person is permitted to keep in his possession, for his personal medical use, a psychotropic substance up to 100 dosage units at a time and the 6 ampoules possessed by the appellant therein could not be said to exceed the said limit of 100 dosage units. It was declared that, in such circumstances, the conviction and sentence imposed on the appellant was without the sanction of law and as a consequence, the judgment of the High Court as well as the Sessions Court was set aside. The relevant observations made by this Court are reproduced hereinbelow:

> *"7. It is unnecessary for us to consider whether the said substance is a narcotic drug as defined in the Act, for, it is easily discernible from Item 92 of the Schedule to the Act (which is a list of psychotropic substances) that "Buprenorphine" is a psychotropic substance. We may point out that the aforesaid Item 92 had been added to the list of psychotropic substances by the notification dated 26-10-1992. The offence in this case is alleged to have been committed on 25-6-1994. We have therefore, no doubt that the*

substance recovered from the appellant is a psychotropic substance.

8. If it was "psychotropic substance" possession of the same would amount to an offence only if it was in contravention of Section 8 of the Act. That section shows that no person shall possess any 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.

9. Section 9 of the Act empowers the Central Government to permit, control and regulate the cultivation, production, possession etc. of psychotropic substances. Rules have been formulated by the Central Government under that power. Rule 66 falling under Chapter VII of the Rules is important and hence the same is extracted below:

> *"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."

10. The proviso to sub-rule (2) is very evident that a person is permitted to keep in his possession for his personal medical use the psychotropic substance up to one hundred dosage at a time.

11. We are not disposed to think that 6 ampoules would cross the above limit and there is no attempt made either through DW 1 (Doctor) or through Court Witness 1 (DMO) that 100 dosage would be below the 6 ampoules recovered from him.

12. It is unfortunate that the aforesaid points have not been put forward before the trial court or the High Court. We feel that the conviction and sentence imposed on this appellant were without the sanction of law. The appellant is unlawfully deprived of his personal liberty for such a long period of 5 years on account of overlooking the aforesaid facts and the legal position.

13. We, therefore, allow this appeal and quash the judgment of the High Court as well as the Sessions Court. We acquit the appellant and direct him to be set at liberty forthwith. In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose."

(Emphasis supplied)

71. Therefore, the dictum as laid in ***Hussain*** *(supra)* is that "Buprenorphine tidigesic" is a psychotropic substance to which the rigours of Section 8 of the NDPS Act and Rule 66 of the NDPS Rules would apply, however, as the

accused was found to be in possession of less than 100 dosage units of the substance, with a valid medical prescription, for his personal medical use, he was held to have not committed an offence under Section 8 of the NDPS Act as there was no violation of Rule 66.

72. In yet another decision of this Court in ***Ouseph alias Thankachan v. State of Kerala*** reported in **(2004) 4 SCC 446**, it was declared that "Buprenorphine" is a psychotropic substance and if an accused is found in possession of the same, his case would have to be examined through the rigours of Sections 8 and 22 of the NDPS Act read with Rule 66 of the NDPS Rules respectively. The appellant therein was found to be in possession of 110 ampoules of Buprenorphine. He stood convicted under Section 22 of the NDPS Act and was sentenced to ten years of rigorous imprisonment along with fine. The High Court dismissed the appeal challenging the order of conviction and sentence. This Court considered the alternate argument canvassed under Section 27 of the NDPS Act which provides that whoever, in contravention of any provision of this Act, possesses any psychotropic substance, "which is proved to have been intended for his personal consumption and not for sale or distribution" shall be punishable for a term which may extend to 6 months or fine or both. To consider the applicability of the aforesaid provision, it had to be determined whether the substance was in a "small quantity" and if so, whether it was

intended for personal consumption. Answering both the questions in the affirmative, it was held that the offence proved to have been committed by the appellant would fall under Section 27 of the Act and accordingly, the conviction of the appellant therein was altered. The relevant observations made by this Court are reproduced as thus:

> *"5. Though the investigating agency thought that the article recovered from the appellant was a narcotic substance, it is in fact a psychotropic substance. This is clearly discernible from Item 92 of the Schedule of the NDPS Act. If it is a psychotropic substance, possession of it would become an offence only if it was in contravention of the Rules prescribed. Under Rule 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985 any person may possess a reasonable quantity of psychotropic substance "as may be necessary for their genuine scientific requirements or genuine medical requirements". This is subject to the limitation contained in the proviso that he is in possession of the said substance for his personal medical use, the quantity thereof shall not exceed one hundred dosage units at a time.*
>
> *6. Some arguments have been advanced before us to show that in the absence of any quantification of a dosage 110 ampoules recovered from the appellant cannot be held to be in excess of the aforesaid limit indicated in Rule 66. We would have certainly considered the said arguments seriously if the appellant had thought it fit to adopt such a line of defence in the trial court or before the High Court. Unfortunately, it has not been done.*
>
> *7. In any case we are inclined to consider another argument advanced before us by the learned counsel for the appellant based on Section 27 of the NDPS Act. It says that whoever, in contravention of any provision of this Act, possesses any psychotropic substance, "which is proved to have been intended for his personal consumption and not for sale or distribution" shall be punishable for a term which may extend to six months or with fine or with both [unless the substance is not one falling under clause (a) of Section 27].*

8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words "small quantity" have been specified by the Central Government by the notification dated 23-7-1996. Learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only .3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification.

9. Then the next question is whether this substance was possessed by him for personal consumption. As the accused had adopted a defence of repudiating the allegation against him, it may look that he cannot rely upon the alternative contention that it was possessed by him for personal consumption. It is too harsh to deny the accused-appellant a right to resort to the alternative contention. Merely because on legal advice, he has chosen one line of defence he cannot be precluded from reaching other defence available to him, particularly since the consequences visiting him are very serious. If the fact situation is sufficient for the court to satisfy that the small quantity in his possession was for personal consumption, he should not be denied the benefit of Section 27 of the NDPS Act.

10. In the aforesaid context we notice a significant factual aspect that along with the small quantity of psychotropic substance recovered, two syringes were also recovered from him by the police. That aspect reflects that he only wanted to use buprenorphine (Tidigesic) for his personal consumption and not for trading purposes. The burden on the accused in this respect need not be discharged in the (sic this) manner and the prosecution is to prove the case beyond a reasonable doubt. It is enough that he satisfies the judicial mind by a preponderance of probability.

11. On account of the aforesaid fact situation, we are inclined to believe that the small quantity of buprenorphine (Tidigesic) was in the possession of the appellant for his personal consumption and,

therefore, the offence committed by him would fall under Section 27 of the NDPS Act.

12. We, therefore, alter the conviction of the appellant to Section 27 of the Act. We sentence him to the maximum provided under Section 27(b) of the NDPS Act, which is imprisonment for six months. He is already in jail for nearly six years by now. It is not necessary for us to say that he has been in jail far beyond the sentence imposed by us. We, therefore, direct the jail authorities to release him from jail forthwith unless required in any other case. The appeal is disposed of in the abovesaid terms."

(Emphasis supplied)

73. In ***Ravindran alias John and Anr. v. Superintendent of Customs*** reported in **(2007) 6 SCC 410** the two appellants along with one another accused named Hiralal were convicted for the offence under Section 8(c) read with Sections 22 and 29 of the NDPS Act respectively and were sentenced to undergo rigorous imprisonment for 10 years along with fine, in relation to the possession, transport and sale of diazepam (which is also a substance listed under the Schedule to the Act and not in Schedule I of the Rules) weighing 1.53 kgs. On appeal, the High Court affirmed the conviction of the appellants but acquitted Hiralal against whom it found no satisfactory evidence to prove the charges. While dismissing the appeal so far as one of the accused was concerned and allowing the appeal against conviction of the other, this Court observed that Section 8 along with Section 22(c) of the NDPS Act would be attracted even while the substance in question was Diazepam which is listed as Sl. No. 43

under the Schedule to the NDPS Act and absent in Schedule I of the NDPS Rules. The relevant observations are as thus:

> "*15. It was lastly urged that though the Chemical Analyst had reported the presence of diazepam, he had not given particulars as to the proportion in which its components were found. Counsel for the appellant placing reliance on the judgment of this Court reported in Amarsingh Ramjibhai Barot v. State of Gujarat [(2005) 7 SCC 550 : 2005 SCC (Cri) 1704] submitted that this may have a bearing on the question of sentence. In the instant case, we are concerned with diazepam. According to the notification 20 grams of diazepam is considered to be small quantity. Any quantity in excess of 500 grams is commercial quantity. In the instant case 1.528 kilograms of diazepam was found. In these facts the case is clearly covered by Section 22(c) of the Act. We, therefore, find no merit in any of the submissions urged on behalf of the appellant Ravindran. His appeal fails and is, therefore, dismissed.*"
>
> (Emphasis supplied)

74. In ***Rajesh Kumar Gupta*** *(supra)* this Court considered the plea of the State to cancel the bail granted to the accused therein. In the said case, the premises of the two clinics run by the respondent claiming to be a Ayurvedacharya was raided. In the search, 70kg of pure Phenobarbitone was recovered and seized. It was further found out that huge quantities of Phenobarbitone was being sold to the patients in both his clinics over a period of several years. Therefore, the respondent was charged under Section 8 read with Section 22 of the NDPS Act. While the Special Judge had refused to grant bail, the High Court allowed the bail application and released the accused on bail. Agreeing with the High Court, this Court held that *prima facie* the provisions of the Act were not found to be

applicable in a case wherein the psychotropic substance in question was only mentioned under the Schedule to the NDPS Act and not under Schedule I of the NDPS Rules.

75. While declining to interfere with the grant of bail, this Court in ***Rajesh Kumar Gupta*** *(supra)* expounded the law on several aspects:

i. ***First,*** that the use of the psychotropic substance or contraband for medical or scientific purposes is excluded from the purview of operation of Section 8 of the NDPS Act. However, that such dealing in the substance for medical or scientific purposes must also be in the manner and to the extent provided by the provisions of the NDPS Act or rules or orders made thereunder. The exception contained in Section 8 of the NDPS Act must be judged on the touchstone of whether the drugs are used for medicinal or scientific purposes and whether they come within the purview of the regulatory provisions contained in Chapters VI and VII of the NDPS Rules. Therefore, in the facts and circumstances of the case, once the drugs are said to be used for medicinal purposes and found to be beyond the pale of the rules contained in Chapters VI and VII of the NDPS Rules (owing to the substance in question not figuring in Schedule I of the Rules), the exception contained under Section 8 would

kick in and no offence could be said to have been made out. The relevant observations are reproduced hereinbelow:

> "*18. 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 carved out under the 1985 Act specifically refers to the manner and to the extent provided by the provisions of the 1985 Act or the rules or orders made thereunder.*
>
> *19. 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 9 of the 1985 Act read with Section 76 thereof, however, provide for both the manner and the extent, inter alia, of production, manufacture, possession, sale, purchase, transport, etc. of the contraband [...]*"
>
> *xxx xxx xxx*
>
> *21. The 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. The 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 Rules [...]*
>
> *xxx xxx xxx*

23. In view of the fact that all the drugs, Items 1, 2, 3, 4, 6 and 7 being allopathic drugs mentioned in Schedules G and H of the Drugs and Cosmetics Rules 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".

24. 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.

(Emphasis supplied)

ii. ***Secondly***, it was held that Rules 53 and 64 of the NDPS Rules respectively, contain a genus and the other provisions following the same under the said Chapter are species thereof. Both the rules were said to contain a general prohibition as regard the narcotic drugs and psychotropic substances specified in Schedule I of the NDPS Rules. Therefore, the reference to "psychotropic substances" in the other rules following in Chapters VI and VII of the NDPS Rules respectively were also said to be construed as a reference to the Schedule I psychotropic substances under the NDPS Rules and not the larger list of substances mentioned in the Schedule to the Act itself. Hence, if the said psychotropic substances do not find a place in Schedule I appended to the NDPS Rules, the provisions of Section 8 of the NDPS Act would

have no application whatsoever. The relevant observations are reproduced hereinbelow:

> *19 [...] Chapter VI of the 1985 Rules provides for import, export and trans-shipment 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 prohibition, 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 prohibition 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, consumption 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.*
>
> *20.* ***The general prohibitions 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.*
>
> *xxx xxx xxx*
>
> *22. 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 Rules. It is furthermore not in dispute that*

> *the medicines Epilan C. Phenobarbitone and Chlordiazepoxide are mentioned in Entries 69 and 36 of the 1985 Act respectively, whereas none of them finds place in 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.*
>
> (Emphasis supplied)

76. In ***Sanjay Kumar Kedia v. Narcotics Control Bureau and Another*** reported in **(2008) 2 SCC 294**, this Court was faced with deciding, yet again, whether bail should be granted to the appellant wherein he was arrested in connection with the commission of offence under Sections 24 and 29 of the NDPS Act respectively, for the illegal sale of drugs, more particularly "Phentermine" and "Butalbital", through the internet. These two substances feature at Sl. Nos. 70 and 93 of the Schedule to the NDPS Act respectively and are not found in Schedule I of the NDPS Rules. While agreeing with the High Court that bail should not be granted and also providing a disclaimer that the observations made by this Court must not influence the decision on trial, this Court said that the benefit under Section 79 of the Information Technology Act, 2002 given to the intermediaries could not be extended to the appellant. In declaring so, it was held that the two drugs finding a place in the Schedule to the Act made it clear that they are psychotropic substances falling within the prohibition contained in Section 8 thereof and stated thus:

> "*9. It is clear from the Schedule to the Act that the two drugs Phentermine and Butalbital are psychotropic substances and therefore fall within the prohibition contained in Section 8 thereof. The appellant has been charged for offences punishable under Sections 24 and 29 of the Act [...]*
>
> *10. A perusal of Section 24 would show that it deals with the engagement or control of a trade in narcotic drugs and psychotropic substances controlled and supplied outside India and Section 29 provides for the penalty arising out of an abetment or criminal conspiracy to commit an offence under Chapter IV which includes Section 24 [...]"*
>
> (Emphasis supplied)

77. Again in ***D. Ramakrishnan v. Intelligence Officer, Narcotic Control Bureau*** reported in **(2009) 14 SCC 603**, the appellant and a co-accused were engaged in the internet pharmacy business and were alleged to have exported drugs abroad including "Alprazolam", "Lorazepam" and "Nitrazepam" which find place at S. Nos. 30, 56 and 64 of the Schedule to the NDPS Act respectively. Since the activities were carried on without a valid export authorisation as required under the NDPS regime, the appellant and his co-accused were prosecuted under Section 8(c) read with Sections 22, 23, 25, 27-A, 53, 53-A and 58 of the NDPS Act. Taking recourse to ***Rajesh Kumar Gupta*** *(supra),* it was argued that the drugs being Schedule G and H drugs under the D&C Rules and not mentioned in Schedule I to the NDPS Rules, its export thereof would not attract the provisions of Rule 58 of the NDPS Rules which requires an export authorisation. This is because Rules 53 and 64 respectively being the genus and dealing with substances under Schedule I of the NDPS Rules would

mean that Rule 58 is also applicable only to such Schedule I substances. Furthermore, it was contended that since the drugs were used for medicinal purposes, the same is acknowledged in terms of the proviso under Section 8(c) of the NDPS Act. However, this Court took the view that the fact that the appellant and his co-accused had obtained licences under the D&C Act with a general permission for import and export did not enure any particular benefit to them since the D&C Act does not deal with exports. The appellant and his co-accused being licensees were thus required to comply with the specific requirements of the NDPS Act and its Rules. Hence, an offence under Section 8(c) was said to have been made out in the absence of an export authorisation and it was held that the application for bail was rightly rejected by the Special Judge as also the High Court. The relevant observations are as thus:

> *"13. The appellant and his co-accused are said to have got licences under the Drugs and Cosmetics Act, 1940. They had got general permission for import and export.*
>
> *14. Section 80 of the Act provides that the provisions of the Act or the Rules made thereunder are in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the Rules made thereunder. The Drugs and Cosmetics Act, 1940 does not deal with exports. The provisions of the Customs Act do. The licensees, therefore, were, thus, required to comply with the specific requirements of the Act and the Rules. It is not denied or disputed that the appellant neither applied for nor granted any authority to export by the Narcotic Commissioner or any other officer who is authorised in this behalf.*
>
> *15. We, therefore, are of the opinion that the High Court is right in opining that the decision of this Court in Rajesh Kumar*

Gupta [(2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356] is not applicable to the facts of this case."

(Emphasis supplied)

78. A three-Judge Bench decision of this Court in ***Union of India and Another v. Sanjeev V. Deshpande*** reported in **(2014) 13 SCC 1** related to a batch of matters, all pertaining to prosecutions under the provisions of the NDPS Act wherein each one of the accused was alleged to have been in possession of a psychotropic substance only mentioned under the Schedule to the Act. In some of the cases bail was granted by the concerned High Court and in few others, bail was denied. This Court examined the legality of the conclusion that the absence of mention of a particular psychotropic substance in Schedule I to the Rules excludes the application of Section 8, notwithstanding the fact that such a drug is included in the Schedule to the Act.

i. ***First***, this Court in its decision analysed the true scope and ambit of Section 8(c) of the NDPS Act and stated that Section 8(c) in no uncertain terms prohibits the dealing in any manner in any narcotic drug or psychotropic substance. However, an exception to such prohibition is also contained in the said section and that is, that the dealing in any narcotic drug or psychotropic substance would be permitted "i*n the manner and to the extent provided by the provisions of this Act or the Rules or Orders made thereunder*". Therefore, it was declared that a twin condition must be fulfilled i.e., the dealing must

be for medical or scientific purposes AND in the manner and to the extent provided by the provisions of the Act, Rules, or Orders made thereunder and the Court stated as thus:

> *"24. Before we examine the correctness of various submissions, we deem it appropriate to analyse and find out the true scope and ambit of Section 8(c). Section 8(c) in no uncertain terms prohibits the dealing in any manner in any narcotic drug or psychotropic substance. However, an exception to such prohibition is also contained in the said section.*
>
> > *"**8. Prohibition of certain operations**.—*
> > *No person shall -*
> >
> > ***
> >
> > *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:"*
> >
> > *The exception being that dealing in any narcotic drug or psychotropic substance is permitted "**in the manner and to the extent provided by the provisions of this Act or the Rules or Orders made thereunder**".*
>
> *25. In other words, dealing in narcotic drugs and psychotropic substances is permissible only when such dealing is for medical purposes or scientific purposes. Further, the mere fact that the dealing in narcotic drugs and psychotropic substances is for a medical or scientific purpose does not by itself lift the embargo created under Section 8(c). Such a dealing must be in the manner and extent provided by the provisions of the Act, Rules or Orders made thereunder [...]"*
>
> (Emphasis supplied)

ii. ***Secondly***, it was opined that Sections 9 and 10 of the NDPS Act respectively, enable the Central and State Governments respectively, to frame rules to "permit and regulate" various aspects contemplated under Section 8(c) of dealing in narcotic drugs and psychotropic substances. It was clarified that the Act does not contemplate the framing of rules for "prohibiting" various activities of dealing in the same since such a prohibition is already present under Section 8(c). Therefore, it cannot be said that the prohibition contained under Section 8 would not be attracted in respect of all those psychotropic substances which find a mention only in the Schedule to the Act but not in Schedule I to the Rules framed under the Act. The relevant observations are as thus:

> *"25. [...] Sections 9 ["**9.Power of Central Government to permit, control and regulate**.—(1) Subject to the provisions of Section 8, the Central Government may, by rules—(a) permit and regulate—(i)-(v) ***(vi) the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances;"] and 10 ["**10.Power of State Government to permit, control and regulate**.—(1) Subject to the provisions of Section 8, the State Government may, by rules—(a) permit and regulate—***"] enable the Central and the State Governments respectively to make rules permitting and regulating various aspects (contemplated under Section 8(c), of dealing in narcotic drugs and psychotropic substances.*
>
> *26. The Act does not contemplate framing of rules for prohibiting the various activities of dealing in narcotic drugs and psychotropic substances. Such prohibition is already contained in Section 8(c). It only contemplates of the framing of*

Rules for permitting and regulating any activity of dealing in narcotic drugs or psychotropic substances.

27. ***Therefore, we are of the opinion that the conclusion reached by the various High Courts that prohibition contained under Section 8 is not attracted in respect to all those psychotropic substances which find a mention in the Schedule to the Act but not in Schedule I to the Rules framed under the Act is untenable****."*

(Emphasis supplied)

iii. ***Thirdly***, while overruling the decision made in ***Rajesh Kumar Gupta*** *(supra)*, it was stated that the rules framed under the Act cannot be understood to create rights and obligations contrary to those contained in the parent Act. Therefore, neither Rule 53 nor Rule 64 is a source of authority for prohibiting the dealing in narcotic drugs and psychotropic substances, instead the source is Section 8 of the NDPS Act itself. The provisions of Chapter VI of the NDPS Rules, contain rules permitting and regulating the import and export of narcotic drugs and psychotropic substances other than those specified in Schedule I to the NDPS Rules subject to various conditions and procedures stipulated in Chapter VI. Whereas, Chapter VII deals exclusively with various other aspects of dealing in psychotropic substances and the conditions subject to which such dealing is permitted. In that sense, both Rules 53 and 64 are really in the nature of an exception to the general scheme of Chapter VI and VII

respectively, wherein those two rules pertain to a list of narcotic drugs and psychotropic substances which cannot be dealt with in any manner notwithstanding the other provisions of these two chapters. The relevant observations are reproduced hereinbelow:

> *29. We are unable to agree with the conclusion (reached in Rajesh Kumar Gupta case [State of Uttaranchal v. Rajesh Kumar Gupta, (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356]) that the prohibition contained in Rule 63 ["**63.Prohibition of import and export of consignments through a post office box, etc**.—The import or export of consignments of any narcotic drug or psychotropic substance through a post office box or through a bank is prohibited."] of the 1985 Rules is applicable only to those narcotic drugs and psychotropic substances which are mentioned in Schedule I to the Rules and not to the psychotropic substances enumerated in the Schedule to the Act. Such a conclusion was reached in Rajesh Kumar Gupta case [State of Uttaranchal v. Rajesh Kumar Gupta, (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356] on the understanding that Rule 53 (prohibiting the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I to the Rules) is the source of the authority for such prohibition. Such a conclusion was drawn from the fact that the other Rules contained in the Chapter permit import into and export out of India of certain narcotic drugs and psychotropic substances other than those specified in Schedule I to the Rules. Unfortunately, the learned Judges in reaching such a conclusion ignored the mandate of Section 8(c) which inter alia prohibits in absolute terms import into and export out of India of any narcotic drug and psychotropic substance. Rules framed under the Act cannot be understood to create rights and obligations contrary to those contained in the parent Act.*
>
> *30. On examination of the scheme of Rules 53 to 63 which appear in Chapter VI, we are of the opinion that Rule 53 ["**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 purposes mentioned in Chapter VII-A."] reiterates an aspect of the larger prohibition contained in Section 8(c) i.e. the prohibition of import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I to the Rules. The proviso thereto however enables the import into and export out of India on the basis of an import certificate or export authorisation issued under the provisions of Chapter VI. The subsequent rules stipulate the conditions subject to which and the procedure to be followed by which some of the narcotic drugs and psychotropic substances could be imported into India or exported out of India. For example, opium is a narcotic drug by definition under Section 2(xiv) of the Act whose export and import is prohibited under Section 8(c). But Rule 54 ["**54.Import of opium, etc**.—The import of—(i) opium, concentrate of poppy straw, and(ii) morphine, codeine, thebaine, and their salts is prohibited save by the Government Opium Factory; Provided that nothing in this rule shall apply to import of morphine, codeine, thebaine and their salts by manufacturers notified by the Government, for use in manufacture of products to be exported or to imports of small quantities of morphine, codeine and thebaine and their salts not exceeding a total of 1 kilogram during a calendar year for analytical purposes by an importer, after following the procedure under Rule 55 and subject to such conditions as may be specified in the import certificate issued in Form 4-A."(emphasis supplied)] authorises the import of opium by the Government opium factory. <u>The construction such as the one placed on Rule 53 in Rajesh Kumar Gupta case [State of Uttaranchal v. Rajesh Kumar Gupta, (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356] would in our opinion be wholly against the settled canons of statutory interpretation that the subordinate legislation cannot make stipulation contrary to the parent Act</u>.*

*31. Chapter VII deals with psychotropic substances. No doubt Rule 64 ["**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."] once again*

purports to prohibit various operations other than import into or export out of India in psychotropic substances specified in Schedule I for the obvious reason that import and export operations are already covered by Rule 53. Rule 65 authorises the manufacture of psychotropic substances other than those specified in Schedule I to the Rules subject to and in accordance with the conditions of a licence granted under the 1945 Rules. The rule also provides for various other incidental matters. Rule 65-A prohibits the sale, purchase, consumption or use of any psychotropic substances except in accordance with the 1945 Rules.

32. Rule 66 prohibits any person from having in possession any psychotropic substance even for any of the purposes authorised under the 1945 Rules unless the person in possession of such a psychotropic substance is lawfully authorised to possess such substance for any of the purposes mentioned under the 1985 Rules. Persons who are authorised under the 1985 Rules, and the quantities of the material such persons are authorised to possess, are specified under Rule 66(2). They are:

(1) any research institution or a hospital or dispensary maintained or supported by the Government, etc. — Rule 66(2).
(2) individuals where such possession is needed for personal medical use subject of course to the limits and conditions specified — the two provisos to Rule 66(2).

33. Rule 66 reads as follows:

> *"**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 the 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 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:
Provided further that an individual may possess the quantity of exceeding one hundred dosage units at a time but not exceeding three hundred dosage units at a time for his personal long term medical use if specifically prescribed by a Registered Medical Practitioner.
(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."

34. On the above analysis of the provisions of Chapters VI and VII of the 1985 Rules, we are of the opinion, both these chapters contain rules permitting and regulating the import and export of narcotic drugs and psychotropic substances other than those specified in Schedule I to the 1985 Rules subject to various conditions and procedure stipulated in Chapter VI. Whereas Chapter VII deals exclusively with various other aspects of dealing in psychotropic substances and the conditions subject to which such dealing in is permitted. We are of the opinion that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. We are of the clear opinion that neither Rule 53 nor Rule 64 is a source of authority for prohibiting the dealing in narcotic drugs and psychotropic substances, the source is Section 8. Rajesh Kumar Gupta case [State of Uttaranchal v. Rajesh Kumar Gupta, (2007) 1 SCC 355 : (2007) 1 SCC (Cri) 356] in our view is wrongly decided."

(Emphasis supplied)

79. What is discernible from the aforementioned decisions is that, there is no shadow of doubt on the proposition that dealing in psychotropic substances not finding a mention in Schedule I of the NDPS Rules but finding place in the Schedule to the Act, would also constitute an offence under Section 8 of the NDPS Act. Such was the position even before the decision of this Court in ***Sanjeev V. Deshpande*** *(supra)*. The only decision of this Court that laid down an alternate position of law was ***Rajesh Kumar Gupta*** *(supra)* which now stands overruled. It would be preposterous to say that no offence could be said to be made out when an accused deals with substances which are only mentioned under the Schedule to the Act. For then, the entire presence of the Schedule to the Act would have to be considered unnecessary to the scheme of the NDPS Regime. To render an entire Schedule nugatory could not have been the intention of the legislature.

80. What we understand to be the clarification of the position of law in ***Rajesh Kumar Gupta*** *(supra)* and ***Sanjeev V. Deshpande*** *(supra)* is thus:

i. In ***Rajesh Kumar Gupta*** *(supra)*, Chapters VI and VII of the NDPS Rules respectively, were interpretated in such a manner where Rules 53 and 64 of the NDPS Rules respectively, were considered to set the tone for the other rules following in their respective Chapters i.e., that Rules 53 and 64 respectively, were the genus and the other rules were

considered to be species thereof. In other words, since Rules 53 and 64 respectively, only pertain to substances under Schedule I of the Rules, the other rules must also pertain to Schedule I substances only. Therefore, it was declared that it is only the psychotropic substances appended to Schedule I of the Rules which are regulated by the NDPS Rules, and dealing in substances, not finding a mention in Schedule I, would be unregulated and thus, not amount to an offence under Section 8(c).

ii. ***Sanjeev V. Deshpande*** *(supra)* while overruling ***Rajesh Kumar Gupta*** *(supra)* dispelled the idea that Rules 53 and 64 respectively, constituted a genus but instead stated that Rules 53 and 64 respectively, are in the nature of an exception to the general scheme of their respective Chapters. To put it more clearly, that Rules 53 and 64 respectively stated that substances under Schedule I of the Rules cannot be dealt with in any manner whatsoever and the other Rules in the Chapter proceeded to lay down the procedure and conditions under which substances other than those mentioned in Schedule I of the Rules but contained in the Schedule to the Act, could be dealt with. Therefore, if an accused is charged with an offence for dealing with a substance mentioned under the Schedule to the Act and not in Schedule I of the Rules, he would be guilty of an offence under

Section 8(c) if the conditions and procedure laid down under the Rules, other than Rules 53 and 64, are not complied with.

81. However, a detailed and comprehensive analysis of Chapters VI and VII of the NDPS Rules, *inter alia*, makes it clear that the substances mentioned under Schedule I of the Rules are not absolutely prohibited to be dealt in, as stated in ***Sanjeev V. Deshpande*** *(supra)*. They are indeed allowed to be dealt with for the limited purposes as detailed in Chapter VIIA of the NDPS Rules. It goes without saying that in such dealing for the purposes mentioned under Chapter VIIA, persons would have to comply with the set of procedures and conditions to which the other substances are subjected to and strict compliance of all those rules are mandatory considering the high degree of havoc and menace that the substances mentioned in Schedule I to the NDPS Rules can create on public health and societal well-being.

82. The NDPS rules were revamped in the year 2015 *vide* G.S.R. 224(E) dated 25.03.2015 with a view to remove the ambiguity that the phrasing of several rules created. That the psychotropic substances mentioned under Schedule I of the NDPS Rules can also be dealt with but for the restricted and limited purposes enumerated under Chapter VIIA of the Rules and in compliance with the requirements under the other rules, is evident from the language of the rules

which came into effect post 25.03.2015. *To illustrate*, Rule 53 of the NDPS Rules now reads as thus:

> "***53. General Prohibition.*** –
> *Import into and export out of India of the narcotic drugs and psychotropic substances is prohibited except with an import certificate or export authorization issued under the provision of this Chapter;*
>
> *Provided that import into India or export out of India of the narcotic drugs and psychotropic substances specified in Schedule I of these rules shall be for the purpose mentioned in Chapter VIIA*."
>
> (Emphasis supplied)

83. Similarly, at present, Rule 64 of the NDPS Rules reads as follows:

> "***64. Manufacture of psychotropic substances***. –
> *(1) No person shall manufacture any of the psychotropic substances except in accordance with the conditions of a licence granted under the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as the 1945 rules) framed under the Drugs and Cosmetics Act, 1940 (23 of 1940), by an authority in-charge of Drugs Control in a State appointed by the State Government in this behalf:*
>
> *Provided that a licence to manufacture a psychotropic substance specified in Schedule I shall be issued only for the purposes mentioned in Chapter VIIA:*
>
> *Provided further that the authority in charge of the drug control in a State shall consult the Narcotics Commissioner before issuing a licence to manufacture a psychotropic substance specified in Schedule I.*"
>
> (Emphasis supplied)

84. Rule 66 of the NDPS Rules also reads as thus:

> "***66. Possession, etc., of psychotropic substances.*** –
> *(1) No person shall possess any psychotropic substance for any of the purposes covered under 1945 rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these rules:*
>
> *Provided that possession of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in chapter VIIA*."
>
> (Emphasis supplied)

85. In our opinion the pith and substance of the rules essentially remained the same over the years, more particularly pre and post 25.03.2015. It is only the language that has been streamlined in a much more organised manner. Of course, the interpretation of the three-Judge Bench in ***Sanjeev V Deshpande*** *(supra)* of the scheme of Chapters VI and VII of the NDPS Rules respectively would hold the field in so far as the version of the NDPS Rules pre-25.03.2015 is concerned. Judicial propriety demands that we refrain from substituting our own conclusions to the said decision. However, since the rephrasing of the language and re-shuffling of the sub-rules *vide* G.S.R. 224(E) dated 25.03.2015 has clarified the true purport and intention behind the framing of the NDPS Rules, there remains no doubt in our mind that the law post - 25.03.2015 is crystal clear in itself.

d. The provisions of the NDPS Act and its Rules are "in addition to" the D&C Act and the Rules made thereunder.

86. Section 80 of the NDPS Act states that the application of the D&C Act would not be barred and reads as follows:

> "***80. Application of the Drugs and Cosmetics Act, 1940 not barred***.— *The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder*."

87. In **P. Ramanatha Aiyar's** *Advanced Law Lexicon*, the word derogation is defined as "*the partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force*". It is also stated that the word "derogate" is a term of legislation. "Derogation" is partial and indirect abrogation i.e., when a subsequent law reduces the force and application of an older law, the character of the subsequent law is technically said to be derogatory. Therefore, the express language employed herein which states that the NDPS Act is not in derogation of the D&C Act leads to the inference that the enactment of the NDPS Act must not in any way be understood to take away the scope of an offence being also made out under the D&C Act. Furthermore, it is also stated that the provisions of the NDPS Act and its Rules "*shall be in addition to*" the D&C Act or the Rules made thereunder. Therefore, in the reverse scenario, i.e., when an offence under the D&C Act is made out or can potentially be made out, the accused can also be charged or prosecuted for an

offence under the NDPS Act. Any argument to the contrary would be untenable. This is so because the NDPS Act applies in addition to the provisions of the D&C Act. Inevitably, there may arise situations wherein the substance in question in a particular case falls under the ambit of both the NDPS Act and D&C Act. However, the overlap would not necessarily imply that the application of the provisions of the NDPS Act would be at the cost of exclusion of the provisions of D&C Act, or *vice versa*. Section 80 of the NDPS Act must be understood in the context and object behind the coming into force of these two legislations i.e., the NDPS Act and D&C Act respectively, and the distinct purposes that they seek to achieve.

88. In ***Sanjeev V. Deshpande*** *(supra)*, while it was deemed unnecessary to undertake a complete analysis of the implications of Section 80 of the NDPS Act in view of the conclusion arrived at therein, yet it was observed that the provisions of the NDPS Act apply in addition to the provisions of the D&C Act. Furthermore, it was stated that while the D&C Act deals with various operations of manufacture, sale, purchase etc. of drugs generally, the NDPS Act deals with a more specific class of drugs and is therefore, a special law on the subject. The relevant observations are reproduced hereinbelow:

> *"35. In view of our conclusion, the complete analysis of the implications of Section 80 ["**80.Application of the Drugs and Cosmetics Act, 1940 not barred**.—The provisions of this Act or the Rules made thereunder shall be in addition to, and not in*

derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the Rules made thereunder."] of the Act is not really called for in the instant case. It is only required to be stated that essentially the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc. of drugs generally whereas the Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of the 1940 Act."

(Emphasis supplied)

89. The object of the NDPS Act and D&C Act, respectively was reiterated in ***State of Punjab v. Rakesh Kumar*** reported in **(2019) 2 SCC 466.** Herein, several respondent-accused were convicted for the offence committed either under Section 21 or Section 22 of the NDPS Act for the bulk possession of "manufactured drugs" without any valid authorisation. The High Court allowed the applications seeking suspension of sentence, preferred by the respondent-accused and directed that they be released on bail pending the final disposal of the appeals before it. In doing so, it was observed by the High Court that in cases of manufactured drugs, be it containing narcotic drugs or psychotropic substances, if manufactured by a manufacturer, the same must be tried if a violation has been committed, under the D&C Act and not under the NDPS Act, except in cases where the substance is in a loose form i.e., powder, liquid etc. This Court disagreed with the High Court that the respondent-accused could only be prosecuted for an offence under the D&C Act despite there being

a *prima facie* violation of Section 8 of the NDPS Act. In opining so, the decision elaborated on the following aspects:

i. ***First,*** that the objectives behind the NDPS Act and D&C Act are different. It was opined that the former is a special law enacted with an object to control and regulate the operations relating to narcotic drugs and psychotropic substances. Whereas, the latter was enacted specifically to prevent substandard drugs and to maintain high standards of medical treatment. It intended to curtail the menace of adulteration of drugs and also of the production, manufacture, distribution and sale of spurious and substandard drugs. In short, while the D&C Act brings within its scope drugs which are intended to be used for therapeutic or medicinal usage, the NDPS Act intends to curb and penalise the usage of drugs that are utilized for intoxication or for the purpose of inducing a stimulant effect. The relevant observations are as thus:

> "*7. At the outset it is essential to note the objectives of the two legislations before us i.e. the Drugs and Cosmetics Act, 1940 and the NDPS Act. The Drugs and Cosmetics Act, 1940 was enacted to specifically prevent substandard drugs and to maintain high standards of medical treatment (Chimanlal Jagjivan Das Sheth v. State of Maharashtra [Chimanlal Jagjivan Das Sheth v. State of Maharashtra, AIR 1963 SC 665 : (1963) 1 Cri LJ 621]). The Drugs and Cosmetics Act, 1940 was mainly intended to curtail the menace of adulteration of drugs and also of production, manufacture, distribution and sale of spurious and substandard drugs. On the other hand, the NDPS Act is a special law enacted by Parliament with an object to control and regulate the operations relating to narcotic drugs and psychotropic substances. After analysing the objectives of*

both the Acts, we can safely conclude that while the Drugs and Cosmetics Act deals with drugs which are intended to be used for therapeutic or medicinal usage, on the other hand, the NDPS Act intends to curb and penalise the usage of drugs which are used for intoxication or for getting a stimulant effect."

(Emphasis supplied)

ii. ***Secondly***, by relying on the decision in ***Sanjeev V. Deshpande*** *(supra)*, it was reiterated that Section 80 of the NDPS Act does not bar the application of the D&C Act and instead states that the provisions of the NDPS Act can be made applicable in addition to that of the provisions of the D&C Act. The NDPS Act should not be read in exclusion of the D&C Act. This Court took the view that since it is the prerogative of the State to prosecute the offender in accordance with law, the respondent-accused could be charged under Sections 21 or 22 of the NDPS Act respectively, considering that their actions amounted to a *prima facie* violation of Section 8 of the NDPS Act. The relevant observations are as follows:

"*13. However, we are unable to agree on the conclusion reached by the High Court for reasons stated further. First, we note that Section 80 of the NDPS Act, clearly lays down that application of the Drugs and Cosmetics Act is not barred, and provisions of the NDPS Act can be applicable in addition to that of the provisions of the Drugs and Cosmetics Act. The statute further clarifies that the provisions of the NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940. This Court in Union of India v. Sanjeev V. Deshpande [Union of India v. Sanjeev V. Deshpande, (2014) 13 SCC 1 : (2014) 5 SCC (Cri) 496] , has held that : (SCC p. 16, para 35)*

> *"35. ... essentially the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc. of drugs generally whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further, the provisions of the Act operate in addition to the provisions of the 1940 Act."*
>
> *(emphasis supplied)*
>
> *14. The aforesaid decision in Sanjeev V. Deshpande case [Union of India v. Sanjeev V. Deshpande, (2014) 13 SCC 1 : (2014) 5 SCC (Cri) 496] further clarifies that, the NDPS Act, should not be read in exclusion to the Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law. In the present case, since the action of the respondent-accused amounted to a prima facie violation of Section 8 of the NDPS Act, they were charged under Section 22 of the NDPS Act.*
>
> *15. In light of the above observations, we find that the decision rendered by the High Court holding that the respondent-accused must be tried under the Drugs and Cosmetics Act, 1940 instead of the NDPS Act, as they were found in possession of the "manufactured drugs", does not hold good in law. [...]*".
>
> (Emphasis supplied)

90. On a conspectus of the foregoing discussion on the scheme of the NDPS Act and its rules along with the D&C Act and the rules made thereunder, the position of law can be succinctly stated as follows:

i. A bare reading of Section 2(xxiii) of the NDPS Act defining a "psychotropic substance" would indicate that all the items listed in the Schedule to the Act along with its salts and preparations fall within

the purview of "psychotropic substance". The term "psychotropic substance" mentioned in Section 8 must be seen & understood in light of Section 2(xxiii) which refers to the Schedule to the Act and all the psychotropic substances mentioned therein.

ii. Section 8(c) while prohibiting the "dealing in" of all psychotropic substances mentioned under the Schedule to the Act, carves out an exception i.e., provides for a situation wherein the dealing in of psychotropic substances would not amount to an offence. However, those conditions forming part of the exception carved out under Section 8 must be read conjointly and not individually. In other words, for the accused to take the plea that his dealing in the narcotic drug or psychotropic substance does not constitute an offence under Section 8, it must be proved that the drug or substance was being dealt with (a) for medical or scientific purposes **AND**; (b) in the manner and to the extent provided by the provisions of the NDPS Act or the NDPS Rules or the orders made thereunder **AND**; (c) in accordance with the terms and conditions of the licence, permit or authorisation, if any, required under the provisions of the NDPS Act or the NDPS Rules or the orders made thereunder.

iii. The NDPS Rules, 1985 have been brought into being by the Central Government in exercise of the powers under Sections 9 and 76 of the

NDPS Act, respectively. The underlying object of the NDPS rules is to "*permit and regulate*" certain activities for carrying out the purposes of the NDPS Act and not to "prohibit" those activities. The NDPS rules must not be understood as laying down standards different from or inconsistent with the substantive provisions of the NDPS Act, especially Section 8 and the Schedule to the NDPS Act.

iv. Chapter VI of the NDPS Rules, *inter alia*, states that the import into and export out of India of all psychotropic substances, including those only mentioned under the Schedule to the Act, must be accompanied by a valid import certificate and export authorisation. However, the import and export of substances enumerated in Schedule I of the Rules is restricted to a pre-determined set of purposes as explained under Chapter VIIA, irrespective of having obtained an import certificate or export authorisation under the other rules of this Chapter.

v. Chapter VII indicates that the manufacture of all psychotropic substances, including those mentioned only under the Schedule to the Act must be in accordance with the conditions of licence issued under the D&C Rules. Despite there being a general rule absolutely prohibiting the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of any of the psychotropic substances which find mention in Schedule I appended

to the Rules, still the above activities can be done *vis-á-vis* the substances mentioned in Schedule I appended to the Rules, provided such activities are in accordance with other provisions of the Chapter which generally apply to all psychotropic substances, and for the limited purposes mentioned under Chapter VIIA.

vi. The manufacture of all psychotropic substances mentioned under the Schedule to the Act, and those mentioned under Schedule I of the Rules (provided they are manufactured only for the purposes elaborated under Chapter VIIA), in violation of the conditions of licence of manufacture issued under the D&C Act and its rules would amount to a contravention of Rule 65 of the NDPS Rules and thereby Section 8 of the NDPS Act itself. In other words, due to the operation of Rule 65, a violation of the condition of licence under the D&C Act read with its Rules would *ipso facto* tantamount to a violation of the NDPS Act read with its Rules.

vii. Furthermore, no person shall possess any psychotropic substance, including those mentioned only under the Schedule to the Act for any of the purposes covered by the D&C Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under the NDPS rules. Therefore, Schedule I substances can be possessed only for the purposes mentioned under Chapter VIIA. All

other substances mentioned only under the Schedule to the Act can be possessed for the purposes mentioned under Chapter VIIA and also for the purposes falling under the broad umbrella of "medical or scientific purposes" as mentioned under Section 8 of the NDPS Act. The above is in addition to the fulfilment of the requirements under the D&C Rules.

viii. The underlying idea that resonates throughout the NDPS rules is that dealing in any of the psychotropic substances mentioned under Schedule I of the NDPS Rules must strictly be in accordance with the NDPS Rules **AND ONLY** for the purposes enumerated under Chapter VIIA of the NDPS Rules. The substances not figuring under Schedule I of the Rules but listed in the Schedule to the Act must also abide by the requirements cast upon by the NDPS Rules. The difference as regards these substances, however, is that while they may be dealt with for the purposes enumerated under Chapter VIIA of the NDPS Rules, they can also be dealt with for other "medical and scientific purposes". Whether the accused has dealt with it within the confines of the expression "medical or scientific purposes" would be determined on the facts and circumstances of each case.

ix. Therefore, the substances under Schedule I to the Rules are more strictly restricted and the remaining psychotropic substances under

the Schedule to the Act are more leniently restricted. The different levels in restriction could be seen as the primary reason behind providing two different schedules, i.e., one under the Act and another under the Rules.

x. Several decisions of this Court including ***Hussain*** *(supra)*, ***Ouseph alias Thankachan*** *(supra)*, ***Ravindran alias John*** *(supra)*, ***Sanjay Kumar Kedia*** *(supra)*, ***D. Ramakrishnan (supra)*** and ***Sanjeev V. Deshpande*** *(supra)* have held that an offence under Section 8 of the NDPS Act can be made out even in respect of substances only mentioned under the Schedule to the NDPS Act and absent under Schedule I of the NDPS Rules. The outlier amongst these decisions was ***Rajesh Kumar Gupta*** *(supra)* which was subsequently overruled in ***Sanjeev V. Deshpande*** *(supra).*

xi. To say that no offence would be made out in a case where an accused deals with a substance mentioned only under the Schedule to the Act, would have the consequence of rendering the entire Schedule to the Act useless, unnecessary and nugatory.

xii. ***Rajesh Kumar Gupta*** *(supra)* assumed that the prohibitory power could only be traced to Rules 53 and 64 of the NDPS Rules respectively, and stated that Rules 53 and 64 of the NDPS Rules respectively, were a genus and the other rules following in their

respective Chapters were species thereof. Therefore, since Rules 53 and 64 respectively, only related to the substances listed under Schedule I of the Rules, it was held that the dealing in of substances not finding a mention in Schedule I of the Rules and only listed under the Schedule to the Act, would be unregulated by the Rules and thus, would not amount to an offence under Section 8(c).

xiii. On the other hand, ***Sanjeev V. Deshpande*** *(supra)* overruled ***Rajesh Kumar Gupta*** *(supra)* by explaining that it is Section 8(c) of the NDPS Act which prohibits various activities with respect to psychotropic substances and the source of this prohibitory power cannot be attributed to Rules 53 and 64 respectively. Rules 53 and 64 are in the nature of an exception to the general scheme of the NDPS Rules. While Rules 53 and 64 state that the substances under Schedule I of the Rules cannot be dealt with in any manner, the other substances i.e., those mentioned under the Schedule to the Act, are also regulated under the other rules in the respective Chapters of the NDPS Rules.

xiv. However, what we understand as also being the essence of the scheme of the NDPS Rules is that, it does not absolutely prohibit the dealing in of the substances mentioned under Schedule I of the Rules as held in ***Sanjeev V. Deshpande*** *(supra)*. These substances figuring in Schedule I of the Rules can also be dealt with but only for the limited

purposes mentioned under Chapter VIIA of the NDPS Rules. This is evident from the re-phrasing of the NDPS Rules which was effected on 25.03.2015, which according to us, has not changed the meaning of the Rules but only altered its language.

xv. Section 80 states that the provisions of the NDPS Act or the Rules made thereunder shall be in addition to, and not in derogation of the D&C Act and the Rules made thereunder. Therefore, when an offence under the D&C Act is made out or can potentially be made out, the accused can also be charged or prosecuted for an offence under the NDPS Act or *vice-versa*. The object sought to be achieved under both the legislations is also distinct i.e. the NDPS Act is a special law enacted to regulate the operations relating to narcotic drugs and psychotropic substances with a view to curb and penalise the usage of drugs by persons for intoxication etc., whereas the D&C Act was enacted to prevent substandard, adulterated and spurious drugs from entering the medical market and to maintain high standards in medical treatment. Hence, offences under both the enactments can also be said to have been constituted simultaneously, where the circumstances so require.

ii. Whether the decision in *Sanjeev V. Deshpande (supra)* should operate with prospective effect?

a. An overruling decision generally operates retrospectively.

91. The declaration of a statute dealing with substantive rights, by the legislature, is considered to be prospective unless it is expressly or by necessary implication made to have retrospective operation. The legal maxim "*Nova Constitutio Futuris Forman Imponere Debet, Non Praeteritis"* indicating that a new law ought to regulate what is to follow and not the past, carries with it a presumption of prospectivity and this presumption is generally said to operate unless the contrary is shown by an express provision in the statute or if the retrospectivity is otherwise discernible through necessary implication. This is because such statutes would have the consequence of affecting vested rights, impose new burdens or impair existing obligations. However, when a decision rendering an opinion as regards the interpretation of a penal provision is subsequently overruled by the decision of a larger bench, the consequence of the overruling is starkly different and by default, retrospective. This is because it is settled law that the law declared by this Court is retrospective and is normally assumed to be the law from the inception.

92. The operation of a newly enacted statute or rule must not be confused with the effect of a judgment. A judgement or decision which interprets a statute or provision thereof declares the meaning of the statute as it should be construed from the date of its enactment. In other words, the judgment declares what the legislature had said at the time when the law was promulgated and therefore, it has retrospective effect. On the contrary, it is the statute or the rule which is presumed to be prospective unless expressly made retrospective. What follows from the same, is that a decision or judgment enunciating a principle of law is applicable to all cases irrespective of the stage of pendency before different forums since what has been enunciated is the meaning of the law which existed from the inception of the concerned statute or provision. What has been declared to be the law of the land must be held to have always been the law of the land. This conclusion also stems from the rationale that the duty of the court is not to "*pronounce a new law but to maintain and expound the old one*". The judge rather than being the creator of the law, is only its discoverer.

93. This Court in ***Sarwan Kumar and Another v. Madan Lal Aggarwal*** reported in (**2003) 4 SCC 147**, opined that when this Court interprets an existing law while overruling the interpretation assigned to it earlier, it cannot be said that a new law is laid down. The declaration of law relates back to the law itself. In other words, it would be deemed that the law was never otherwise. Herein, a 5-

judge bench of this Court in ***Gian Devi Anand v. Jeevan Kumar and Others*** reported in **(1985) 2 SCC 683** had held that the rule of heritability extends to the statutory tenancy of a commercial premises as much as to a residential premises under the Delhi Rent Control Act, 1958**.** In light of the same, the question for determination in ***Sarwan Kumar*** *(supra)* was whether a decree for ejectment which was passed by a civil court *qua* a commercial tenancy on the basis that the tenancy was not heritable, before the declaration of law in ***Gian Devi Anand*** *(supra)*, was executable or not? By stating that the jurisdiction of the civil court to pass the decree for ejectment was barred and that the decree obtained by the decree-holder cannot be executed owing to it being a nullity and *non-est*, this Court observed as follows:

> *15. [...] The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship on those who had trusted to its existence. Invocation of the doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court. This Court while deciding Gian Devi Anand case [(1985) 2 SCC 683 : 1985 Supp (1) SCR 1] did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in Gian Devi Anand case [(1985) 2 SCC 683 : 1985 Supp (1) SCR 1] would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand case [(1985) 2 SCC 683 :*

1985 Supp (1) SCR 1] or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation, the finding recorded by the High Court that the rule laid down in Gian Devi Anand case [(1985) 2 SCC 683 : 1985 Supp (1) SCR 1] by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous.

20. [...] This Court in Gian Devi Anand case [(1985) 2 SCC 683 : 1985 Supp (1) SCR 1] did not lay down any new law but only interpreted the existing law which was in force. As was observed by this Court in Lily Thomas case [(2000) 6 SCC 224 : 2000 SCC (Cri) 1056] the interpretation of a provision relates back to the date of the law itself and cannot be prospective of the judgment. When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. In Gian Devi case [(1980) 17 DLT 197] the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled being erroneous. Interpretation given by the Delhi High Court was not legal. ***The interpretation given by this Court declaring that the commercial tenancies heritable would be the law as it stood from the beginning as per the interpretation put by this Court. It would be deemed that the law was never otherwise. Jurisdiction of the civil court has not been taken away by the interpretation given by this Court. This Court declared that the civil court had no jurisdiction to pass such a decree. It was not a question of taking away the jurisdiction; it was the declaration of law by this Court to that effect****. The civil court assumed the jurisdiction on the basis of the interpretation given by the High Court in Gian Devi case [(1980) 17 DLT 197] which was set aside by this Court.*

(Emphasis supplied)

94. While addressing the issue of the temporal and retrospective effect of a judicial decision and declaring that a tribunal or court is bound by a higher court's decision on the point in issue, irrespective of whether it is declared either prior

to or subsequent to the order which is sought to be called into question by a party, this Court in ***Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stick Exchange Limited*** reported in **(2008) 14 SCC 171** stated that a judicial decision acts retrospectively by placing reliance on the Blackstonian theory. According to this theory, it is not the function of the court to pronounce a "new rule" but to maintain and expound the "old one". Therefore, if the subsequent decision alters or overrules the earlier one, it cannot be said to have made a new law. The correct principle of law is just discovered and applied retrospectively. In other words, if in a given situation an earlier decision of the court operated for quite some time and it is overruled by a subsequent decision, the decision rendered subsequently would have retrospective effect and would serve to clarify the legal position which was not clearly understood earlier. Any transaction would then be covered by the law declared by the overruling decision. The overruling is generally retrospective with the only caveat being that matters that are res judicatae or accounts that have been settled in the meantime would not be disturbed. The relevant observations made by this Court are reproduced hereinbelow:

> "*35. In our judgment, it is also well settled that a judicial decision acts retrospectively.* ***According to Blackstonian theory, it is not the function of the court to pronounce a "new rule" but to maintain and expound the "old one". In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only***

discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

36. Salmond in his well-known work states:

*"**[T]he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision**. **The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime**."*

(Emphasis supplied)

b. The intention to make the decision prospectively applicable or the application of the doctrine of "prospective overruling" must be express and clear.

95. Resorting to the doctrine of "prospective overruling" is therefore, an exception to the normal rule that a judgement or decision applies retrospectively and to the general rule of doctrine of precedent. The application of the doctrine is based on the philosophy that "*The past cannot always be erased by a new judicial declaration*". That the Court can contemplate giving prospective application to a law declared by it, stems from the premise that the Court is neither required to apply a decision retrospectively nor is it prohibited from applying it retrospectively. The merits and demerits of retrospective or

prospective application is examined and the doctrine is applied wherever appropriate and necessary. This is precisely why the express declaration by a court that its decision is prospectively applicable is a requisite condition. Prospectivity as a concept cannot be considered to be inhered in all situations since the intention to attribute prospectivity to a decision must be limpid and clear. The same has been reiterated in a catena of decisions by this Court.

96. That there is no prospective overruling unless it is so indicated expressly and in the clearest possible terms was laid down by this Court in ***P.V. George and Others v. State of Kerala and Others*** reported in **(2007) 3 SCC 557.**

> "*19. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto.*
>
> *xxx xxx xxx*
>
> *25. In service matters, this Court on a number of occasions have passed orders on equitable consideration. But the same would not mean that whenever a law is declared, it will have an effect only because it has taken a different view from the earlier one. In those cases it is categorically stated that it would have prospective operation.*
>
> *xxx xxx xxx*
>
> *29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective*

operation or not. ***The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically.*** *The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf*."

(Emphasis supplied)

97. In another decision of this Court in ***B.A. Linga Reddy and Others v. Karnataka State Transport Authority and Others*** reported in **(2015) 4 SCC 515**, it was reiterated that in the absence of a declaration that the decision would operate prospectively, it must be given retrospective effect. The relevant observations are as thus:

"34. The view of the High Court in Ashrafulla [Karnataka SRTC v. Ashrafulla, Writ Appeal No. 403 of 1988, order dated 21-7-1988 (KAR). For order, see Karnataka SRTC v. Ashrafulla Khan, (2002) 2 SCC 560 at pp. 565-66, para 3] has been reversed by this Court. The decision is of retrospective operation, as it has not been laid down that it would operate prospectively; more so, in the case of reversal of the judgment. This Court in P.V. George v. State of Kerala [(2007) 3 SCC 557 : (2007) 1 SCC (L&S) 823] held that the law declared by a court will have a retrospective effect if not declared so specifically. [...]

35. In Ravi S. Naik v. Union of India [1994 Supp (2) SCC 641] , it has been laid down that there is retrospective operation of the decision of this Court. The interpretation of the provision becomes effective from the date of enactment of the provision. In M.A. Murthy v. State of Karnataka [(2003) 7 SCC 517 : 2003 SCC (L&S) 1076] , it was held that the law declared by the Supreme Court is normally assumed to be the law from inception. Prospective operation is only exception to this normal rule. [...]"

(Emphasis supplied)

98. In yet another decision of this Court in ***Manoj Parihar and Others v. State of Jammu and Kashmir and Others*** reported in **(2022) 14 SCC 72**, where the bench comprised of one of us (J.B. Pardiwala, J.), it was opined that the doctrine of prospective overruling must be exercised in explicit terms and therefore, the law declared by this Court would have a retrospective effect unless stated otherwise. The observations are reproduced as thus:

> *"26. What was done in Bimlesh Tanwar [Bimlesh Tanwar v. State of Haryana, (2003) 5 SCC 604 : 2003 SCC (L&S) 737] was actually a declaration of law. Therefore, the same will have retrospective effect. In P.V. George v. State of Kerala [P.V. George v. State of Kerala, (2007) 3 SCC 557 : (2007) 1 SCC (L&S) 823] , this Court held that "the law declared by a court will have retrospective effect, if not otherwise stated to be so specifically".*
>
> *27. This Court was conscious of the fact, as could be seen from para 19 of the Report in P.V. George [P.V. George v. State of Kerala, (2007) 3 SCC 557 : (2007) 1 SCC (L&S) 823] , that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. But still this Court held that the power to apply the doctrine of prospective overruling (so as to remove the adverse effect) must be exercised in the clearest possible term.*
>
> *28. Therefore, it is clear that anything done as a consequence of the decision of this Court in P.S. Ghalaut [P.S. Ghalaut v. State of Haryana, (1995) 5 SCC 625 : 1995 SCC (L&S) 1270] , cannot stand since this Court did not apply the doctrine of prospective overruling in Bimlesh Tanwar [Bimlesh Tanwar v. State of Haryana, (2003) 5 SCC 604 : 2003 SCC (L&S) 737] in express terms. [...]"*
>
> (Emphasis supplied)

c. The doctrine of "Prospective Overruling" and factors which may lead to the application thereof.

99. Prospective Overruling which was initially a doctrine familiar to American Jurisprudence was applied by this Court for the first time in ***C. Golak Nath and Others v. State of Punjab and Another*** reported in **AIR 1967 SC 1643**. By setting out certain limits for the application of this doctrine, it was laid down that the doctrine of prospective overruling can be invoked only in matters arising under the Constitution; that it could be applied only by this Court since it has the constitutional jurisdiction to declare the law binding on all courts in the country; and that the scope of the retroactive operation of the law which has been declared in supersession of its earlier decision(s) would be left to the Court's discretion to be moulded in accordance with the justice of the cause or matter before it. Over the period of time, this doctrine has been extended to the interpretation of ordinary statutes as well. Furthermore, the doctrine has also been applied in situations wherein the Court has dealt with the issue or the question of law for the first time. Therefore, it can be said that case-law trajectory has seen both the prospective declaration and the prospective overruling of law.

100. This Court in ***Baburam v. C.C.Jacob and Others*** reported in **(1999) 3 SCC 362** elaborated on the reasons which necessitate the prospective declaration of

law by this Court, by stating that the object would be to avoid the reopening of settled issues, to prevent the multiplicity of proceedings, to curb uncertainty in law and thwart avoidable litigation. It was stated that, on the application of this doctrine, it is deemed that all actions taken contrary to the declaration of law but prior to the date of the declaration, are validated. The subordinate forums which are legally bound to apply the declaration of law made by this Court are also required to apply such a dictum to cases which would arise in future only. The pertinent observations made in the decision are reproduced hereinbelow:

> *"4. We are unable to agree with this view of the Tribunal. It is to be noted that the prospectivity given to Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] was obviously on the ground that there was a doubt in regard to the position of law until the same was clarified by this Court in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . The decision of the DPC was taken in June 1993; much prior to the judgment in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . It is only pursuant to the decision of the DPC, the appellant came to be promoted on 27-6-1994 which is also a date prior to the delivery of the judgment in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . In our opinion, the prospectivity was given to Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] only to see that the status prevailing prior to the judgment in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] should not be disturbed.*
>
> *5.* ***The prospective declaration of law is a devise innovated by the Apex Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a devise adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest.***

> ***Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty-bound to apply such dictum to cases which would arise in future only. In matters where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law****. In the instant case, both decisions of the DPC as well as the appointing authority being prior to the judgment in Sabharwal case [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] we are of the opinion that the Tribunal was in error in applying this decision. For this reason, these appeals succeed and are hereby allowed; setting aside the orders and directions made by the Tribunal in OAs Nos. 186 of 1994 and 961 of 1995."*
>
> (Emphasis supplied)

101. However, partly differing from the interpretation given in ***Baburam*** *(supra)*, the Constitutional Bench of this Court in ***Somaiya Organics (India) Ltd. and Another v. State of U.P. and Another*** reported in **(2001) 5 SCC 519** had clarified that the application of the doctrine of prospective overruling would not have the effect of validating an invalid law. Therein, initially, a seven-judge bench of this Court in ***Synthetics and Chemicals Ltd. and Others v. State of U.P. and Others*** reported in **(1990) 1 SCC 109,** held that the provisions of State enactments permitting the levy of excise duty in the form of vend fee must be struck down prospectively from the date of its judgment i.e., from 25.10.1989. There was, however, some confusion on whether the State was entitled to collect the taxes in respect of the period prior to 25.10.1989 or not. As per the majority, prospective overruling, despite the terminology is only a recognition of the principle that the court moulds the relief claimed in order to meet the

justice of the case, more particularly justice not in its logical but in its equitable sense. Prospective overruling could be seen as a method which was evolved by the courts to adjust the competing rights of the parties so as to save transactions, whether statutory or otherwise, that were effected by the earlier law. Therefore, it was held that it would not be right to say that upon applying the doctrine of prospective overruling, an invalid law has been held to be valid during the past period. All that is done is that the declaration of invalidity of the legislation is directed to take effect from a future date. In the facts of the case, it was elaborated that what was intended was that the status quo as on 25.10.1989 be maintained as regards the actual payment or levy concerned. Hence, what had gone into the coffers of the Government with or without any strings attached, was to remain with it and what was not received was also not to be later realised by the Government. The relevant observations are reproduced hereinbelow:

> *"27. In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case — justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it". In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do "complete justice".*
>
> ***28.** Given this constitutional discretion, it was perhaps unnecessary to resort to any principle of prospective overruling, a view which was expressed in Narayanibai v. State of Maharashtra [(1969) 3 SCC 468] at p. 470 and in Ashok Kumar Gupta v. State of U.P. [(1997) 5 SCC 201 : 1997 SCC (L&S)*

1299] In the latter case, while dealing with the "doctrine of prospective overruling", this Court said that it was a method evolved by the courts to adjust competing rights of parties so as to save transactions "whether statutory or otherwise, that were effected by the earlier law". According to this Court, it was a rule

> *"of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law".*

Ultimately, it is a question of this Court's discretion and is, for this reason, relatable directly to the words of the Court granting the relief.

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33. [...] These observations are in consonance with the directions given in para 89 of the judgment in second Synthetics case [(1990) 1 SCC 109] and applying the said principles to the present appeals the only conclusion which can be arrived at is that this Court intended the status quo as on 25-10-1989 to be maintained as regards actual payment or levy was concerned. What had gone to the coffers of the Government with or without any strings attached, was to remain with it and what was not received could not be realised by the Government.

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36. It is true that the effect of a legislation without legislative competence is that it is non est. (See Behram Khurshid Pesikaka v. State of Bombay [(1954) 1 SCC 240 : AIR 1955 SC 123 : (1955) 1 SCR 613] at SCR pp. 652, 653, R.M.D. Chamarbaugwalla v. Union of India [AIR 1957 SC 628 : 1957 SCR 930] at p. 940, M.P.V. Sundararamier & Co. v. State of A.P. [AIR 1958 SC 468 : 1958 SCR 1422] at SCR p. 1468 and Mahendra Lal Jaini v. State of U.P. [AIR 1963 SC 1019 : 1963 Supp (1) SCR 912] at SCR pp. 937-41.)

> *37. Nevertheless a law enacted without legislative competence remains on the statute-book till a court of competent jurisdiction adjudicates thereon and declares it to be void. When the court declares it to be void it is only then that it can be said that it is non est for all purposes. In Synthetics and Chemicals case [(1990) 1 SCC 109] the invalidity of the provisions was a declaration under Article 141 of the Constitution.* ***It was for doing complete justice that the court in exercise of its jurisdiction under Article 142 moulded the relief in such a way as to give effect to its declaration prospectively. It is not possible to accept that such an order of prospective overruling is contrary to law. An invalid law has not been held to be valid. All that has happened is that the declaration of invalidity of the legislation was directed to take effect from a future date****."*
>
> (Emphasis supplied)

102. In a concurring opinion, Ruma Pal, J., while responding to the argument that the court cannot breathe life into a dead or invalid statute up to the date of its judgment by subscribing to prospectivity, stated that such a contention proceeds on a misunderstanding of the effect of prospective overruling. It was opined that when the doctrine is applied, the Court must not be seen to be authorising or validating something that had been declared to be illegal or void, nor must the decision be construed as imbuing the legislature with competence to impose the levy up until the law was declared to be invalid. The relevant observations are as follows:

> *"45. One of the arguments of the appellant as noted by my learned brother was that the Court in Synthetics case [(1990) 1 SCC 109] by resorting to prospective overruling had in fact sought to uphold a law up to the period of the judgment which law had held to have been passed without competence. It is submitted that the finding that the States were not competent to levy tax on industrial alcohol meant that the State Acts were non est and that the Court could not*

by giving prospective effect to its judgment breathe life into a dead statute up to the date of the judgment. It was also contended by the appellant that even under Article 142, the Court could not whittle down or act in derogation of any constitutional provision. By declaring that the statute was valid up to the date of the judgment, according to the appellant, the specific constitutional provisions, namely, Article 246 and Article 245 were infringed. Reliance has been placed on the decision of this Court in Prem Chand Garg v. Excise Commr., U.P. [AIR 1963 SC 996 : 1963 Supp (1) SCR 885] and Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] .

46. The argument of the appellant proceeds on a misunderstanding of the effect of prospective overruling. As has been elaborately stated in my learned brother's judgment, by prospective overruling the court does not grant the relief claimed even after holding in the claimant's favour. In this case, the Court held that the statutory provision imposing vend fee was invalid. Strictly speaking, this would have entitled the appellant to a refund from the respondents of all amounts collected by way of vend fee. But because, as stated in Synthetics [(1990) 1 SCC 109] decision itself, over a period of time imposts and levies had been imposed by virtue of the earlier decision and that the States as well as the petitioners and manufacturers had adjusted their rights and their positions on that basis, this relief was denied. ***The Court did not, by denying the relief, authorise or validate what had been declared to be illegal or void nor did it imbue the legislature with competence up to the date of the judgment****."*

(Emphasis supplied)

103. Therefore, the court does not make legal, something that is illegal, for the past period by invoking the doctrine of prospective overruling. On the contrary, upon giving due consideration to what has been expounded in ***Somaiya Organics*** *(supra)*, it is clear that the idea behind the invocation of the doctrine is to meet the justice of each case in the most practical and equitable sense. In

addition to this, the doctrine also seeks to adjust and balance the competing rights of all the parties involved i.e., parties who on one hand, had acted solely on the basis of an invalid law or an overruled decision and altered their respective rights and positions, and on the other, the parties who had brought a successful case in establishing that the law or decision which existed in operation was invalid. To prevent the chaotic unscrambling of actions done in the past, a middle-ground is reached by postponing the decision declaring the invalidity to a particular date while keeping in mind the larger interest of doing complete justice. That ensuring "complete justice" in the most equitable way is the true essence of the doctrine is also evident from the fact that this Court also has, on several occasions, prescribed the limits of retroactivity of the law declared by it.

104. Such a demarcation of the limits of retroactivity was done in ***Kailash Chand Sharma v. State of Rajasthan and Others*** reported in **(2002) 6 SCC 562**, wherein the issue was as regards the grant of bonus marks in the recruitment process for Primary School Teachers in Zila Parishads solely to applicants belonging to the district and rural areas of certain specified districts and, whether the same would be violative of Articles 14 and 16 of the Constitution respectively. By relying on the Full Bench decision of the High Court dated 21.10.1999 rendered in ***Deepak Kumar Suthar v. State of Rajasthan*** reported

in **(1999) 2 Raj LR 692 (FB)**, the impugned Full Bench decision dated 18.11.1999 and another impugned Division Bench decision of the High Court reiterated that, providing any form of advantage or weightage in public employment in any State service, would not be permissible on the ground of place of birth or residence or, on the ground of being a resident of an urban area or rural area. This Court while agreeing with the impugned decisions had observed that the legality of the selection process which included the addition of bonus marks could not have been seriously doubted either by the appointing authorities or by the candidates, in view of the judicial precedents which operated at the relevant time. A cloud of doubt was cast on the said practice only at a time when the selection process was completed and the results were declared or about to be declared. Therefore, under such circumstances, it was considered proper to apply the impugned judgment dated 18.11.1999 rendered by the Full Bench of the High Court prospectively. Such a recourse was also considered appropriate considering that none of the appointed or selected candidates were made parties to the respective writ petitions before the High Court. Therefore, this Court thought fit to not implement the Full Bench decision of the High Court, which treaded a new path, to the detriment of the candidates who were already appointed. With a view to balance the competing claims, the relief was confined only to the petitioners who were affected by the grant of bonus marks and who had moved the High Court on or before

17.11.1999. Therefore, the appointments made on or after 18.11.1999 was subject to the claims of the writ petitioners i.e., if upon a fresh consideration of the candidature of the writ petitioners as against those candidates who were appointed on or after 18.11.1999, the writ petitioners were found to have had superior merit, they would be offered appointments even by displacing the candidates appointed on or after 18.11.1999, if necessary. In other words, only for the petitioners who had moved the High Court prior to 18.11.1999, retrospective benefit of the Full Bench decision was given. Otherwise, the appointments made up to 17.11.1999 were not to be reopened or reconsidered. However, the aforesaid relief was tailored with a clear disclaimer that it was moulded in view of the special facts and circumstances of the case and while acting within the jurisdiction conferred upon this Court under Article 142 of the Constitution. The relevant observations are reproduced hereinbelow:

> "*42. [...] In the present case, the legality of the selection process with the addition of bonus marks could not have been seriously doubted either by the appointing authorities or by the candidates in view of the judicial precedents. A cloud was cast on the said decisions only after the selection process was completed and the results were declared or about to be declared. It is, therefore, a fit case to apply the judgment of the Full Bench rendered subsequent to the selection prospectively. One more aspect which is to be taken into account is that in almost all the writ petitions the candidates appointed, not to speak of the candidates selected, were not made parties before the High Court. Maybe, the laborious and long-drawn exercise of serving notices on each and every party likely to be affected need not have been gone through. At least, a general notice by newspaper publication could have been sought for or in the alternative, at least a few of the last candidates selected/appointed could have been put on notice; but,*

that was not done in almost all the cases. That is the added reason why the judgment treading a new path should not as far as possible result in detriment to the candidates already appointed. We are not so much on the question whether the writ petitioners were legally bound to implead all the candidates selected/appointed during the pendency of the petitions having regard to the fact that they were challenging the notification or the policy decision of general application; but, we are taking this fact into consideration to lean towards the view of the High Court that its judgment ought to be applied prospectively, even if the non-impleadment is not a fatal flaw.

43. Prospectivity to what extent is the next question.[...]

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46. Having due regard to the rival contentions adverted to above and keeping in view the factual scenario and the need to balance the competing claims in the light of acceptance of prospective overruling in principle, we consider it just and proper to confine the relief only to the petitioners who moved the High Court and to make appointments made on or after 18-11-1999 in any of the districts subject to the claims of the petitioners. Accordingly, we direct:

> *1. The claims of the writ petitioners should be considered afresh in the light of this judgment vis-à-vis the candidates appointed on or after 18-11-1999 or those in the select list who are yet to be appointed. On such consideration, if those writ petitioners are found to have superior merit in case the bonus marks of 10% and/or 5% are excluded, they should be offered appointments, if necessary, by displacing the candidates appointed on or after 18-11-1999.*
>
> *2. The appointments made up to 17-11-1999 need not be reopened and reconsidered in the light of the law laid down in this judgment. [...]*

47. Before parting, we must say that we have moulded the relief as above on a consideration of special facts and circumstances of this case acting within the framework of powers vested in this Court under Article 142 of the Constitution. Insofar as the relief has been

granted or modified in the manner aforesaid, this judgment may not be treated as a binding precedent in any case that may arise in future."

(Emphasis supplied)

105. Therefore, the birth of the doctrine of prospective overruling, although not indigenous to India, yet has been well entrenched in Indian jurisprudence. As a default rule, any judgment deciding a question of law would be retrospective and would apply to the factual situation in the background of which such a decision is rendered. However, it is only when the hardship is too great that such a retrospective operation is withheld. Broadly, the doctrine has been applied in order to not unsettle everything that was undertaken in the past either on account of an existing law/rule or a decision of the court. The object is to ensure a smooth transition of the law and not disturb matters that have attained finality. Time and again, it has been reiterated that prospective overruling is an accepted doctrine as an extended facet of stare decisis. The doctrine has been invoked under several different subject-matters, for several reasons, each unique to the facts and circumstances of particular case.

106. In ***Managing Director, ECIL, Hyderabad and Others v. B. Karunakar and Others*** reported in **(1993) 4 SCC 727,** a constitutional Bench of this Court was concerned with whether a delinquent employee is entitled to a copy of the enquiry report of the enquiry officer, before the disciplinary authority takes a

decision on the guilt of the delinquent, especially when the enquiry officer is someone other than the disciplinary authority. By declaring that such a right is available to the delinquent employee and the same being denied would amount to depriving him of reasonable opportunity and violate his rights under Articles 14 and 21 of the Constitution respectively, along with the principles of natural justice, this Court affirmed the decision of this Court in ***Union of India and Others v. Mohd. Ramzan Khan*** reported in **(1991) 1 SCC 588**. ***Mohd. Ramzan Khan*** *(supra)* contained a declaration that its decision would apply prospectively i.e., to orders of punishment passed after the date of its decision on 20.11.1990. In other words, the law laid down in ***Mohd. Ramzan Khan*** *(supra)* was not applicable to the orders of punishment passed before the aforesaid date notwithstanding the fact that the proceedings arising out of the same were pending in courts even after that date. Such pending proceedings were to be decided in accordance with the law prevalent prior to the said date.

107. While holding so, it was stated that courts can make the law laid down by them prospective in operation to prevent the unsettlement of settled positions, to prevent administrative chaos and to meet the ends of justice. The law on the subject being in a state of flux was also a factor that was emphasized to a large extent. In ***B. Karunakar*** *(supra)*, the authorities all over the country had proceeded on the basis that there was no need to furnish a copy of the report of

the enquiry officer to the delinquent employee and innumerable employees were also punished as a result of those proceedings. There were some cases wherein the orders of punishment had become final and in some others, the matters were pending in courts at different stages. Reopening all those disciplinary proceedings would have resulted in grave prejudice to the administration which was considered as far outweighing the benefit which would potentially accrue to the employees concerned if the disciplinary proceedings were allowed to be disturbed. Therefore, on a holistic perspective and giving due regard to both administrative reality and public interest, it was considered necessary that the prospectivity given to the decision in ***Mohd. Ramzan Khan*** *(supra)* not be disturbed. The relevant observations of the majority opinion are reproduced hereinbelow:

> *"34. [...] It is now well settled that the courts can make the law laid down by them prospective in operation to prevent unsettlement of the settled positions, to prevent administrative chaos and to meet the ends of justice. In this connection, we may refer to some well-known decisions on the point.*
>
> *43. [...] It has, therefore, to be accepted that at least till this Court took the view in question in Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] the law on the subject was in a flux. Indeed, it is contended on behalf of the appellants/petitioners before us that the law on the subject is not settled even till this day in view of the apparent conflict in decisions of this Court. The learned Judges who referred the matter to this Bench had also taken the same view. We have pointed out that there was no contradiction between the view taken in Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] and the view taken by this Court in the earlier cases and the reliance placed on K.C. Asthana*

case [(1988) 3 SCC 600 : 1988 SCC (L&S) 869] to contend that a contrary view was taken there was not well-merited. It will, therefore, have to be held that notwithstanding the decision of the Gujarat High Court in N.N. Prajapati case [(1985) 2 GLR 1406] and of the Central Administrative Tribunal in Premnath K. Sharma case [(1988) 6 ATC 904 : (1988) 3 SLJ (CAT) 449] and of the other courts and tribunals, the law was in an unsettled condition till at least November 20, 1990 on which day the Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] was decided. Since the said decision made the law expressly prospective in operation the law laid down there will apply only to those orders of punishment which are passed by the disciplinary authority after November 20, 1990. This is so, notwithstanding the ultimate relief which was granted there which, as pointed out earlier, was per incuriam. No order of punishment passed before that date would be challengeable on the ground that there was a failure to furnish the enquiry report to the delinquent employee. The proceedings pending in courts/tribunals in respect of orders of punishment passed prior to November 20, 1990 will have to be decided according to the law that prevailed prior to the said date and not according to the law laid down in Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] . This is so notwithstanding the view taken by the different benches of the Central Administrative Tribunal or by the High Courts or by this Court in R.K. Vashisht case [1993 Supp (1) SCC 431 : 1993 SCC (L&S) 153 : (1993) 23 ATC 444 (II)] .

44. The need to make the law laid down in Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] prospective in operation requires no emphasis. As pointed out above, in view of the unsettled position of the law on the subject, the authorities/managements all over the country had proceeded on the basis that there was no need to furnish a copy of the report of the enquiry officer to the delinquent employee and innumerable employees have been punished without giving them the copies of the reports. In some of the cases, the orders of punishment have long since become final while other cases are pending in courts at different stages. In many of the cases, the misconduct has been grave and in others the denial on the part of the management to furnish the report would ultimately prove to be no more than a technical mistake. To reopen all the disciplinary proceedings now would result in grave prejudice to administration

which will far outweigh the benefit to the employees concerned. Both administrative reality and public interests do not, therefore, require that the orders of punishment passed prior to the decision in Mohd. Ramzan Khan case [(1991) 1 SCC 588 : 1991 SCC (L&S) 612 : (1991) 16 ATC 505] without furnishing the report of the enquiry officer should be disturbed and the disciplinary proceedings which gave rise to the said orders should be reopened on that account. Hence we hold as above."

(Emphasis supplied)

108. The minority opinion rendered by K. Ramaswamy, J., also illustrated the circumstances and the potential reasons due to which the doctrine of prospective overruling may be resorted to. It was opined that under constitutional law, retrospective operation of an overruling judgment is neither required nor prohibited. The decision as regards retrospectivity or prospectivity must depend on the facts and circumstances of each case, as also the nature and purpose which the overruling decision seeks to serve. Other relevant factors which must be taken account of include the justifiable reliance which has been placed by the administration on the overruled decision, the ability to effectuate the new rule adopted in the overruling case without doing injustice and whether the likelihood of its retrospective operation substantially burdens the administration of justice. Prior history of the rule in question, its purpose and effect and whether the retroactive operation will accelerate or retard its operation are also significant considerations. The relevant observations are reproduced as thus:

"*66. When judicial discretion has been exercised to establish a new norm, the question emerges whether it would be applied retrospectively to the past transactions or prospectively to the transactions in future only. [...]*

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73. It would, thus, be clear that the Supreme Court of the United States of America has consistently, while overruling previous law or laying a new principle, made its operation prospective and given the relief to the party succeeding and in some cases given retrospectively and denied the relief in other cases. As a matter of constitutional law retrospective operation of an overruling decision is neither required nor prohibited by the Constitution but is one of judicial attitude depending on the facts and circumstances in each case, the nature and purpose the particular overruling decision seeks to serve. The court would look into the justifiable reliance on the overruled case by the administration; ability to effectuate the new rule adopted in the overruling case without doing injustice; the likelihood of its operation whether substantially burdens the administration of justice or retards the purpose. All these factors are to be taken into account while overruling the earlier decision or laying down a new principle. The benefit of the decision must be given to the parties before the Court even though applied to future cases from that date prospectively would not be extended to the parties whose adjudication either had become final or matters are pending trial or in appeal. [...] This Court would adopt retroactive or non-retroactive effect of a decision not as a matter of constitutional compulsion but a matter of judicial policy determined in each case after evaluating the merits and demerits of the particular case by looking to the prior history of the rule in question, its purpose and effect and whether retroactive operation will accelerate or retard its operation. The reliance on the old rule and the cost of the burden of the administration are equally germane and be taken into account in deciding to give effect to prospective or retrospective operation."

(Emphasis supplied)

109. Following the spirit of the discussion in ***B. Karunakar*** *(supra)*, this Court has invoked the doctrine of prospective overruling only when it has been appropriate and absolutely necessary to do so. In ***K. Madhava Reddy and Others v. State of Andhra Pradesh and Others*** reported in **(2014) 6 SCC 537,** it was observed that the doctrine of prospective overruling was a rule of judicial craftsmanship laced with pragmatism and judicial statesmanship which intends to serve as an useful tool, ensuring the smooth transition of the operation of law, without unduly affecting the rights of the people who acted upon the law which existed or operated previously. In the facts of the case, it was observed that the reversion of the petitioner to their parent cadre was bound to have a cascading effect which would prejudice several persons who are not even parties before the Court. The relevant observations are as follows:

> "*16. The "doctrine of prospective overruling" was, observed by this Court as a rule of judicial craftsmanship laced with pragmatism and judicial statesmanship as a useful tool to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law that operated prior to the date of the judgment overruling the previous law.*
>
> *xxx xxx xxx*
>
> *22. [...] Such being the position reverting these officers at this distant point of time, to the posts of Senior Stenographers in their parent cadre does not appear to us to be either just, fair or equitable especially when upon reversion the State does not propose to promote them to the higher positions within their zone/cadre because such higher posts are occupied by other officers, most if not all of whom are junior to the petitioners and who may have to be reverted to make room for the petitioners to*

hold those higher posts. Reversion of the petitioners to their parent cadre is therefore bound to have a cascading effect, prejudicing even those who are not parties before us.

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24. In the result, we allow these appeals, set aside the orders passed by the High Court and hold that while GOMs Nos. 14 and 22 have been rightly declared to be ultra vires of the Presidential Order by the State Administrative Tribunal, the said declaration shall not affect the promotions and appointments made on the basis of the said GOMs prior to 7-11-2001, the date when Jagannadha Rao [V. Jagannadha Rao v. State of A.P., (2001) 10 SCC 401 : 2002 SCC (L&S) 872] was decided by this Court. The parties are left to bear their own costs."

(Emphasis supplied)

110. On the other hand, in ***Justice Chandrashekaraiah (Retired) v. Janekere C. Krishna and Others*** reported in **(2013) 3 SCC 117** while holding that the appointment of the Upa-Lokayukta made in the absence of any consultation with the Chief Justice was *void ab-initio*, the Court refused to apply the principle of prospective overruling to save the appointment in question. It was stated that there was no overwhelming reason to save the appointment from attack and the defence that such were the appointments made in the past would be of no avail since merely because a wrong had been committed several times in the past, would not mean that it must be allowed to persist, otherwise the wrong would never be corrected. The relevant observations of this Court are reproduced hereinbelow:

"*156. It was submitted that the practice followed for the appointment of the Upa-Lokayukta in the present case is the same or similar to the practice followed in the past and, therefore, this Court should not interfere with the appointment already made. If at all interference is called for, the doctrine of "prospective overruling" should be applied.*

157. I am not inclined to accept either contention. Merely because a wrong has been committed several times in the past does not mean that it should be allowed to persist, otherwise it will never be corrected. The doctrine of "prospective overruling" has no application since there is no overwhelming reason to save the appointment of the Upa-Lokayukta from attack. As already held, in the absence of any consultation with the Chief Justice, the appointment of Justice Chandrashekaraiah as an Upa-Lokayukta is void ab initio. However, this will not affect any other appointment already made since no such appointment is under challenge before us."

(Emphasis supplied)

111. Yet another decision of this Court in ***Union of India v. I.P. Awasthi and Others*** reported in **(2015) 17 SCC 340** took the view that it would not be appropriate to apply the doctrine of prospective overruling when a large number of parties are not affected. The doctrine was stated to have been evolved to avoid confusion in matters where a large number of parties have settled their affairs on account of the overruled law. Since larger public interest was not involved in the facts of the case, this Court refrained from applying the said doctrine and struck down the amended rule retrospectively. The relevant observations are reproduced as thus:

"3. *There is no doubt that this Court has evolved the doctrine of prospective overruling in order to avoid confusion in matters where large number of parties have settled their affairs by the law which stood before the overruling was done by this Court. We are, however, unable to accede to the request made by the learned counsel for the appellants for two reasons. First, we are informed at the Bar that the amendment to the Rules was made in the year 1992 and CAT set aside the amendment in the year 2000. During this period, there were only 12 promotions that were granted under the amended Rules. As a consequence of the order of CAT being upheld by the judgment [Union of India v. I.P. Awasthi, WP (C) No. 5460 of 2001, order dated 5-2-2002 (Del)] of the High Court under challenge, it is only 12 cases which have to be reopened. We are not, therefore, satisfied that large public interest is likely to be affected by permitting the amended Rule being struck down retrospectively from the date on which it was amended. Second, the doctrine of prospective overruling pertains only to the powers of this Court. As far as CAT is concerned, we doubt that there is any such doctrine available for exercise of its powers. For both reasons, we decline the suggestion made.*"

(Emphasis supplied)

112. In ***Union of India and Another v. Ganpati Dealcom Private Limited*** reported in **(2023) 1 SCC 315**, it was succinctly explained that the application of the doctrine is only a limited exception and must be resorted to when substantial actions have been undertaken under the invalid laws such that going back to the original position would be next to impossible and observed as thus:

"*66. At this stage, we may only note that when a court declares a law as unconstitutional, the effect of the same is that such a declaration would render the law not to exist in the law books since its inception. It is only a limited exception under constitutional law, or when substantial actions have been undertaken under such unconstitutional laws that going back to*

the original position would be next to impossible. In those cases alone, would this Court take recourse to the concept of "prospective overruling"."

(Emphasis supplied)

113. Therefore, it is clear as a noon day that the invocation of the doctrine of prospective overruling or the attribution of prospectivity to a decision must not be resorted to in a routine manner without the Court satisfying itself that the circumstances demand such a solution, both to do complete justice to the matter at hand and also to reorient the law in the right direction without creating widespread chaos and disruption. By employing the doctrine of prospective overruling, the matter pending before different forums would still be governed under the old law or the overruled decision. In simpler words, the pending cases would not be affected by the new declaration of law. In the absence of this the Court applying this doctrine, all pending matters and future cases would automatically and inescapably be governed by the law declared in the overruling decision. In certain situations, it might be preferable on a holistic consideration of several competing interests and factors to invoke the doctrine of prospective overruling and therefore, it could be said that the ambit of the doctrine is co-extensive with the equity of a situation to prevent the intrusion into matters which have already been settled or have attained finality. The principle involves giving effect to the new law laid down from a prospective date, ordinarily from the date of the judgement of the overruling decision.

d. It would be open for another bench to subsequently decide on the application of the doctrine of prospective overruling to a past decision.

114. Another pertinent question for the purpose of our discussion would be, whether the prospective operation of a particular decision delivered in the past can be decided subsequently by a different bench, which is concerned with the same question of law, especially when the previous decision is silent on the question of prospectivity or retrospectivity. There has been some debate as to whether this would amount to a review of the said decision under a non-review jurisdiction.

115. In ***Saurabh Chaudri (Dr.) and Others v. Union of India and Others*** reported **(2004) 5 SCC 618**, a constitutional Bench of this Court decided on the issue of the temporal operation of a judgment already declared. Here, several applications were filed seeking clarifications and directions for implementing the judgment of a Coordinate Bench of this Court in ***Saurabh Chaudri v. Union of India*** reported in **(2003) 11 SCC 146** which concluded that for post-graduate (PG) admission to medical colleges, the all-India quota must be increased from 25% to 50%. The aforesaid decision was rendered on 04.11.2003 but was silent both on whether it would be applicable to the process of admissions which had already commenced or if it would have prospective application. In a majority opinion, it was declared that the judgement of the Coordinate Bench in ***Saurabh***

Chaudri *(supra)* delivered on 04.11.2003 would be implemented prospectively from the academic year 2005-06 since the entire admission procedure for the academic year 2004-05 was already planned on the basis of the 25% all-India quota. However, S.B. Sinha, J in his minority opinion was of the view that the decision must be implemented from the academic year 2004-05 itself since the examinations were conducted much after the rendition of the judgment on 04.11.2003 and any action taken contrary to the decision thereto must be considered to be taken by the appropriate authorities at their own peril. The relevant observations made by this Court, in its majority opinion, is as follows:

> "*5. In our opinion, it would be appropriate to hold and direct the decision in Saurabh Chaudri case [(2003) 11 SCC 146] being made applicable only prospectively and thus exclude from the operation thereof the process of admission which had already commenced and was nearing finalisation when the judgment came to be pronounced.*
>
> *6. Accordingly, it is directed that the allotment of seats under the all-India quota, the process as to which had commenced pursuant to the advertisement dated 16-9-2003 shall remain confined to 25% only. [...]*
>
> (Emphasis supplied)

116. S.B. Sinha, J., in his minority opinion had agreed with the general proposition that the declaration of law by reason of a judgment may affect the rights of parties retrospectively. Having said so, he expressed serious doubt as to whether a Constitution Bench can modify the judgment of another Constitution Bench for the purpose of declaring the former to have prospective effect, even

under the exercise of Article 142 of the Constitution. Such an exercise of the jurisdiction under Article 142, in his opinion, would only be appropriate during the rendition of the judgment and not thereafter. If a different view than the one arrived at in the initial judgement is sought to be taken, then it is the review jurisdiction which must be invoked. S.B. Sinha, J., went on to observe that if the decision of the initial judgment can be given effect to, then a direction which would run contrary to that ratio must not be issued subsequently. It was in this context that he opined that, a prayer seeking the prospective declaration of a decision which has already been made would amount to asking for a review and that would not be permissible. Therefore, according to him, the decision delivered on 04.11.2003 could not have been given effect to, prospectively, from the academic year 2005. The relevant observations are as follows:

> *"20. By reason of a judgment, as is well known, a law is declared. Declaration of such law may affect the rights of the parties retrospectively. Prospective application of a judgment by the court must, therefore, be expressly stated.[...]*
>
> *xxx xxx xxx*
>
> *32. A statute is applied prospectively only when thereby a vested or accrued right is taken away and not otherwise. (See S.S. Bola v. B.D. Sardana [(1997) 8 SCC 522] .) A judgment rendered by a superior court declaring the law may even affect the right of the parties retrospectively.*
>
> *xxx xxx xxx*
>
> *34. Furthermore, it is extremely doubtful whether a Constitution Bench can modify a judgment rendered by a different Constitution Bench even in exercise of its jurisdiction under Article 142 of the*

Constitution of India. The jurisdiction of this Court under Article 142 of the Constitution of India must be applied at the time of rendition of the judgment and not thereafter. After a judgment is rendered the Court can only exercise its power of review, if it intends to take a different view from the one rendered in the main judgment. Review of the judgment cannot be granted in the garb of a clarification. (See Delhi Admn. v. Gurdip Singh Uban [(2000) 7 SCC 296] .)

35. Furthermore, an order of review or modification of a judgment should not also ordinarily be passed at the behest of the applicants who are not parties to the writ petition. [...]

36. We must notice that it is not a case of the Union of India that the judgment in Saurabh Chaudri [(2003) 11 SCC 146] cannot be given effect to even at this stage. If it can be given effect to the Court should not issue a direction which would run contrary to the ratio laid down by this Court in the main judgment, particularly when the examinations had been held much after the rendition of the judgment. Asking the Court to apply the judgment of this Court with prospective effect would amount to asking for a review and, thus, the same cannot be permitted to be achieved by filing an application for clarification.

37. Application for clarification/modification filed by the Union of India is based on wholly wrong premise. A judgment, as is well known, must be read as a whole. So read it is evident that declaration of law has clearly been made therein. There does not exist any ambiguity requiring clarification.

38. Therefore, I respectfully dissent with the opinion of Brother Lahoti, J. I am of the view that no case has been made out for applying the judgment in Saurabh Chaudri [(2003) 11 SCC 146] from the academic year 2005."

(Emphasis supplied)

117. It must be noted that the majority opinion in ***Saurabh Chaudri*** *(supra)* which was inclined towards declaring the previous judgment prospectively applicable, was given when several IAs were filed seeking clarifications in or modification

of the judgment which was already rendered in the same matter on 04.11.2023. It was not an occasion where an altogether different bench was tasked with deciding on the prospective applicability of a previous decision rendered by a completely different bench. This question was, however, directly in issue before a three-judge bench of this Court in ***Jarnail Singh and Others v. Lachhmi Narain Gupta and Others*** reported in **(2022) 10 SCC 595.** Herein, one of the issues was whether the judgment in ***M. Nagaraj v. Union of India*** reported in **(2006) 8 SCC 212** could be said to operate prospectively. ***M. Nagaraj*** *(supra)* upheld the constitutional validity of Article 16(4-A) subject to the State collecting quantifiable data showing inadequate representation. The law laid down therein applied from 17.06.1995 i.e., the date on which Article 16(4-A) came into force. While agreeing with the contention that the decision in ***M. Nagaraj*** *(supra)* must be given prospective effect from the date of its decision on 19.10.2006, the Court referred to the US Supreme Court decision in ***Victor Linkletter v. Victor G. Walker*** reported in **1965 SCC OnLine US SC 126** where an earlier judgement of the US Supreme Court in ***Mapp v. Ohio*** reported in **367 U.S. 643** was declared to be prospective in operation after considering the consequences that will ensue with its retrospective operation. With a view to avoid any confusion, and also to prevent the debilitating effect that it would have had on a very large number of employees, the Court declared that a prior judgment of this Court can be made prospectively applicable by a

different or even a smaller bench of this Court subsequently, in exercise of the power to do complete justice under Article 142. Furthermore, it was held that it would not be an absolute rule that prospective overruling or the prospective operation of a decision must be declared only by the bench which has rendered the decision in question. The contrary view taken by this Court in ***M.A. Murthy v. State of Karnataka*** reported in **(2003) 7 SCC 517** that there shall be no prospective overruling unless indicated in the "particular decision" was declared to be *obiter* and not binding. Therefore, the three-judge bench in ***Jarnail Singh*** *(supra)* declared the decision of the five-judge Constitution Bench in ***M. Nagaraj*** *(supra)* to have prospective operation. The relevant observations are as thus:

> *"62. This Court in Golak Nath [Golak Nath v. State of Punjab, (1967) 2 SCR 762 : AIR 1967 SC 1643] and Ashok Kumar Gupta [Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201 : 1997 SCC (L&S) 1299] , referred to above, has laid down that Article 142 empowers this Court to mould the relief to do complete justice. To conclude this point, the purpose of holding that M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] would have prospective effect is only to avoid chaos and confusion that would ensue from its retrospective operation, as it would have a debilitating effect on a very large number of employees, who may have availed of reservation in promotions without there being strict compliance of the conditions prescribed in M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] . Most of them would have already retired from service on attaining the age of superannuation. The judgment of M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] was delivered in 2006, interpreting Article 16(4-A) of the Constitution which came into force in 1995. As making the principles laid down in M. Nagaraj [M. Nagaraj v. Union of*

India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] effective from the year 1995 would be detrimental to the interests of a number of civil servants and would have an effect of unsettling the seniority of individuals over a long period of time, it is necessary that the judgment of M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] should be declared to have prospective effect."

(Emphasis supplied)

e. Applicability or non-applicability of doctrine of prospective overruling in criminal matters, so far.

118. As repeatedly discussed in the aforesaid parts of this judgment, the doctrine of prospective overruling was designed to prevent the unravelling of past transactions and the re-opening of matters which have already attained finality. In so far as the applicability of the doctrine or a rationale similar to it, to matters pertaining to criminal law are concerned, this Court has in the past held that acquittals granted on the basis of the earlier position/interpretation of law must not be interfered with.

119. In ***State of Kerala and Others v. Alassery Mohammed and Others*** reported in **(1978) 2 SCC 386**, the issue pertained to whether non-compliance with the requirement of Rule 22 of the Prevention of Food Adulteration Rules, 1955 would vitiate the entire trial and the conviction recorded therein. While this Court's decision in ***Rajal Das Guru Namal Pamanani v. State of Maharashtra*** reported in **(1975) 3 SCC 375** held that the quantities mentioned under the said rule are required for a correct analysis and any shortage in the said quantity is

not permitted by the Statute, however, ***Alassery*** *(supra)* held that if the quantity sent to the Public Analyst, even though less than prescribed, is sufficient and enables the Public Analyst to make a correct analysis, then merely because the quantity sent was not in strict compliance with the Rule will not result in the nullification of the report and obliterate its evidentiary value. This was held by keeping in mind that it would endanger public health to acquit offenders on technical grounds which have no substance. However since ***Pamanani*** *(supra)* had held the field for a significant time and several prosecutions had resulted in acquittals in the meantime, the Court found it fit to dispose of the appeals by only laying down the correct proposition of law. Neither were the acquittals of any of the respondents set aside nor were their cases sent back to the Courts below. The relevant observations are reproduced hereinbelow:

> *17. [...] But taking the totality of the facts and circumstances of each case, and specially the fact that Pamanani case has held the field for about three years by now, we did not feel that justice required that we should interfere with the orders of acquittal in these cases and send some cases back to the High Court while deciding other ourselves by recording orders of conviction. Rule 22-B clarifying the law has also been introduced as late as December, 1977 although Pamanani case was decided in December, 1974. We were informed at the Bar, and so far we are aware, rightly too, that for non-compliance with the requirements of Rule 22, many cases in different States had ended in acquittal. Decision in many of them became final and only a few could be brought to this Court. Each one of the Food Inspectors concerned had failed in discharging his duty strictly in accordance with the requirements of the law, and, in such a situation, after great harassment, long delay, and expenses which the respondents had to incur, they should not be punished by this Court.*

18. In the three Kerala cases Mr S.V. Gupte appearing with Mr K.R. Nambiar and Mr Sudhakaran stated before us that the State was interested more in the correct enunciation of the law than in seeing that the respondents in these appeals are convicted. They were not anxious to prosecute these matters to obtain ultimate conviction of the respondents. A large number of the other appeals are by the Municipal Corporation of Delhi for whom the Attorney General appeared assisted by Mr B.P. Maheshwari. Although a categorical stand was not taken on behalf of the appellants in these appeals as the one taken in the Kerala cases, eventually, the learned Attorney General did not seriously object to the course indicated by us. In the few Bombay appeals M/s V.S. Desai and M.N. Shroff showed their anxiety for obtaining ultimate convictions of the offenders, but we do not find sufficient reason for passing a different kind of order in the Bombay appeals. In similar situations in the case of State of Bihar v. Hiralal Kejriwal [AIR 1960 SC 47 : (1960) 1 SCR 726 : 1960 Cri LJ 150] this Court refused to exercise its discretionary jurisdiction under Article 136 of the Constitution and did not order the continuance of the criminal proceeding any further. In Food Inspector, Calicut Corporation v. Cherukattil Gopalan [(1971) 2 SCC 322 : 1971 SCC (Cri) 522 : 1971 Supp SCR 721] this Court said at p. 730 :

> *"But in view of the fact that the appellant has argued the appeal only as a test case and does not challenge the acquittal of the respondents, we merely set aside the order and judgment of the High Court. But we may make it clear that apart from holding the respondents technically guilty, we are not setting aside the order of acquittal passed in their favour."*

19. <u>For the reasons stated above, we dispose of these appeals by merely laying down the correct proposition of law but do not make any consequential orders setting aside the acquittal of any of the respondents or sending back the cases to the courts below or convicting any of them by an order of this Court</u>."

(Emphasis supplied)

120. In ***Alassery*** *(supra)*, there was no mention of the doctrine of prospective overruling being applied to the facts of the case. What was done was that the

Court refrained from setting aside the acquittals of any of the respondents therein or sending their cases back for re-trial to the appropriate court or convicting any of the respondents therein by an order of the Court itself. However, there was no mention as regards matters which may have been pending before a trial court and which required a consideration of this issue. This may have been so because Rule 22-B which was introduced three years after the decision in ***Pamanani*** *(supra)* clarified the position of law laid down in ***Pamanani*** *(supra)* by stating that "*Notwithstanding anything contained in Rule 22, the quantity of sample sent for analysis shall be considered as sufficient unless the public analyst or the Director reports to the contrary".* Therefore, it was more likely that all the pending matters came to be instituted only after Rule 22-B was introduced and there remained no doubt on the position of law since. Therefore, this Court confined itself to making an observation relating to the acquittals alone i.e., that the acquittals would not be interfered with. However, if in case, there existed a matter, instituted before the trial court, before Rule 22-B came into being and was concerned with the same question, the decision in ***Alassery*** *(supra)* could be said to have been applicable to it retrospectively.

121. The applicability or discussion relating to the doctrine of prospective overruling can be noticed in a few other matters under the criminal arena, though

prominently on matters pertaining to procedural law. In ***Ramesh Kumar Soni v. State of Madhya Pradesh*** reported in **(2013) 14 SCC 696,** the Court was concerned with an amendment changing the triability of certain offences i.e., from the Judicial Magistrate First Class to the Court of Session and its effect on the cases pending trial or pending investigation. This Court had held that any amendment shifting the forum of the trial had to be, on principle, retrospective in nature in the absence of any indication to the contrary in the Amendment Act. This retrospective operation of amendments relating to procedure would be subject to the exception that the earlier procedure which was correctly adopted and which led to the proceedings being concluded under the old law cannot be reopened for the purpose of applying the new procedure. Furthermore, it was also reiterated that an accused does not possess a "vested right of forum" for his trial. However, the decision of a Full Bench of the Madhya Pradesh High Court in ***Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, In re,*** reported in (**2008) SCC OnLine MP 185** had opined that all the cases which were pending before the Judicial Magistrate as on 22.02.2008 i.e., the date of the amendment, would remain unaffected by the Amendment. Therefore, the Full Bench of the High Court directed that all the cases which were pending before the Judicial Magistrate and had already been committed to the Court of Session due to the coming into force of the amendment, to be

sent back to the Judicial Magistrate. This Court in ***Ramesh Kumar Soni*** *(supra)* disagreed and overruled the decision of the Full Bench but only prospectively. This was done because the trial of the cases that were sent back from the Sessions Court to the Judicial Magistrate under the orders of the Full Bench may have also been concluded or may be at an advanced stage. Therefore, any change of forum at that stage would have caused unnecessary and avoidable hardship to the accused if they were transferred again to the Court of Sessions in light of the conclusion that an amendment to procedural law would operate retrospectively. The relevant observations are reproduced hereinbelow:

> "*21. The upshot of the above discussion is that the view taken by the Full Bench [Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, In re, (2008) 3 MPLJ 311] holding the amended provision to be inapplicable to pending cases is not correct on principle. The decision rendered by the Full Bench [Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, In re, (2008) 3 MPLJ 311] would, therefore, stand overruled but only prospectively. We say so because the trial of the cases that were sent back from the Sessions Court to the Court of the Magistrate, First Class under the orders of the Full Bench [Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, In re, (2008) 3 MPLJ 311] may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us.*
>
> *xxx xxx xxx*
>
> *27. The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the*

Madhya Pradesh High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision."

(Emphasis supplied)

122. On a conspectus of the aforesaid discussion on the doctrine of prospective overruling, the following can be summarised:

i. The default rule is that the overruling of a decision generally operates retrospectively. This is because a judgement which interprets a statute or provision declares the meaning of the statute as it should have been construed from the date of its enactment and what has been declared to be the law of the land must be held to have always been the law of the land. This rationale also stems from the Blackstonian rule that the duty of the court is not to "*pronounce a new law but to maintain and expound the old one*". The judge rather than being the creator of the law, is only its discoverer. Therefore, if a subsequent decision alters or overrules the earlier one, it cannot be said to have made a new law. The correct principle of law is just discovered and applied retrospectively.

ii. Since resorting to the doctrine of "prospective overruling" is an exception to the normal rule that a judgement or decision applies retrospectively and to the general rule of doctrine of precedent, an express declaration by the court that its decision is prospectively

applicable is absolutely necessary. Prospectivity as a concept cannot be considered to be inhered in situations since the intention to attribute prospectivity to a decision must be limpid and clear.

iii. In ***Jarnail Singh*** *(supra)* this Court took the view that even if the overruling decision does not indicate that its decision is to apply with prospective effect, a different or even a smaller bench of this Court, subsequently, can declare that the doctrine of prospective overruling must be applied to the prior judgment of this Court, in exercise of the power under Article 142 to do complete justice to the matter at hand.

iv. In ***Baburam*** *(supra)*, this Court was of the view that, on the application of the doctrine of prospective overruling, it is deemed that all actions taken contrary to the declaration of law but prior to the date of the declaration, are validated. However, ***Somaiya Organics*** *(supra)* clarified that the application of the doctrine of prospective overruling would not have the effect of validating an invalid law. All that is done is that the declaration of invalidity of the legislation is directed to take effect from a future date. To prevent the chaotic unscrambling of actions done in the past, a middle-ground is reached by postponing the decision declaring invalidity to a particular date, in the interest of doing complete justice. Thus, ensuring that "complete justice" is done in the most equitable way is the true essence of the doctrine and this is also evident

from the fact that this Court has, on several occasions, prescribed the limits to the retroactivity of the law declared by it.

v. The evolution of the doctrine of prospective overruling, although not indigenous to India, yet has been well entrenched in Indian jurisprudence. As a default rule, any judgment deciding a question of law would be retrospective and would also apply to the factual situation in the background of which such a decision is rendered. However, it is only when the hardship is too great that such a retrospective operation is withheld. Broadly, the doctrine is being applied with a view to not unsettle everything that was undertaken in the past either on account of an existing law/rule or due to the decision of a court. The object is to ensure a smooth transition of the law and not disturb matters that have attained finality. Time and again, it has been reiterated that prospective overruling is an accepted doctrine as an extended facet of stare decisis. The doctrine involves giving effect to the new law laid down from a prospective date, ordinarily from the date of the judgement of the overruling decision. Sometimes, while declaring that a decision would be prospectively applicable, courts have granted limited relief to the parties or petitioners in question retrospectively.

vi. There are several factors or considerations which may weigh with the court before the doctrine of prospective overruling is applied. Some

broad considerations include – to meet the ends of justice, prevent the unsettlement of settled positions, mitigate any administrative chaos keeping in mind the pragmatic realities, curb any uncertainty in law, thwart avoidable litigation, safeguard public interest and preserve the avowed object and purpose that is embodied in the overruling decision. The possibility of impact on a large number of parties or individuals, the impossibility of restoring the original and correct position of law, the existence of an overwhelming reason favouring prospectivity or where the law on the subject been in a state of flux for a significant period of time are also relevant. Therefore, the legitimate or justifiable reliance by a party or administration in good faith on the overruled decision, the ability to effectuate the new rule adopted in the overruling case without doing injustice, the likelihood of implementing its retrospective operation without substantially burdening the administration of justice, the prior history of the rule in question, its purpose and effect and whether the retroactive operation will accelerate or retard its operation, etc., are all significant considerations which are to be kept in mind before the doctrine of prospective overruling may be resorted to. Obviously, if one or more of the factors illustrated above are competing with each other i.e., one favours retrospectivity and the other favours prospectivity,

the competing considerations must be sought to be balanced to arrive at a reasonable conclusion.

vii. Therefore, the invocation of the doctrine of prospective overruling or the attribution of prospectivity to a decision must not be resorted to in a routine manner without the court satisfying itself that the circumstances demand such a solution, both to do complete justice to the matter at hand and also to reorient the law in the right direction without creating widespread chaos and disruption. In certain situations, it might be preferable on a holistic consideration of several competing interests and factors to invoke the doctrine of prospective overruling and therefore, it could be said that the ambit of the doctrine is co-extensive with the equity of a situation. If the doctrine of prospective overruling is applied, pending cases would not be affected by the new declaration of law. In the absence of the court applying this doctrine, however, all pending matters and future cases would automatically and inescapably be governed by the law declared in the overruling decision.

viii. In the realm of criminal law, the question of prospective or retrospective declaration of a law/decision has been comparatively rare. In ***Alassery Mohammed*** *(supra)*, this Court held that since ***Pamanani*** *(supra)* had held the field for a significant time and several prosecutions had resulted in acquittals in the meantime, the appeals would be disposed of by only

laying down the correct proposition of law. Neither were any acquittals disturbed nor were any of the matters remanded to the Courts below. The decision did not expressly apply the doctrine of prospective overruling. Therefore, it could reasonably be stated that the decision was retrospectively applicable to pending matters (if any) which had not yet resulted in an acquittal and which was instituted when ***Pamanani*** *(supra)* held the field or in other words, was instituted before Rule 22-B clarified the position of law.

ix. One another decision on the doctrine of prospective overruling which pertains to criminal law was rendered in ***Ramesh Kumar Soni*** *(supra).* Herein, this Court overruled the decision of the Full Bench of the High Court prospectively, by stating that any change of forum at this stage would cause unnecessary and avoidable hardship to the accused if they were transferred again in light of the conclusion arrived at in ***Ramesh Kumar Soni*** *(supra).*

123. In light of the elaborate discussion hereinabove, we do not find it necessary, in the facts and circumstances of the matter at hand, to exercise the powers available to us and declare the decision given in ***Sanjeev V. Deshpande*** *(supra)* to be prospectively applicable. We have decided so because there exists no overwhelming reason for us to apply the doctrine of prospective overruling. On

the other hand, in order to meet the ends of justice and with a view to ensure that public interest is safeguarded and to give effect to the salutary object behind the enactment of the NDPS Act, the decision must necessarily be retrospectively applicable. This Court in ***Sanjeev V. Deshpande*** *(supra)*, perhaps, did not think fit to confine or restrict its interpretation of Section 8 of the NDPS Act to future cases only. This is evinced from the fact that whilst overruling ***Rajesh Kumar Gupta*** *(supra)*, it deliberately chose not to discuss the doctrine of prospective overruling let alone resort to it. This conspicuous silence in ***Sanjeev Deshpande*** *(supra)* as regards the prospective or retrospective effect of overruling ***Rajesh Kumar Gupta*** *(supra)* has to be borne in mind and given due deference. As a natural corollary to the aforesaid, we see no reason why we should deviate from the default rule of retrospectivity and instead, resort to the doctrine of prospective overruling. Therefore, pending cases, if any, which were instituted before the decision of this Court in ***Sanjeev V. Deshpande*** *(supra)* would also be governed by the law as clarified by it.

f. Article 20(1) considerations on the retrospective applicability of the decision in *Sanjeev V. Deshpande (supra).*

124. Article 20(1) of the Constitution of India reads that – "*No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence*, *nor be subjected to a penalty*

greater than that which might have been inflicted under the law in force at the time of the commission of the offence.". It is therefore, set in stone under the constitutional principles of our legal system that it would be absolutely impermissible for an accused to be convicted of an offence under any Act, if his act was not an offence at the time during which it was committed. Herein, the import of the words "*law in force at the time of the commission*" is especially important. It has been detailed by us, with sufficient clarity, in the preceding paragraphs, that judges do not make law but only find the right law. This is precisely the reason behind retrospectively applying any overruling decision as a default rule. However, can the overruling judgment and its declaration of law be considered to be the "*law in force at the time of the commission*"? Such a question is required to be considered by us more particularly as regards matters which pertain to substantive law, like the present one. Herein, the controversy is whether the dealing in of psychotropic substances which are mentioned under the Schedule to the NDPS Act and not under Schedule I of the NDPS Rules would constitute an offence or not. While the decision in ***Rajesh Kumar Gupta*** *(supra)* answered in the negative, the subsequent decision in ***Sanjeev V. Deshpande*** *(supra)* answered affirmatively and overruled the decision in ***Rajesh Kumar Gupta*** *(supra)*. Following the general rule, the exposition of law in ***Sanjeev V. Deshpande*** *(supra)* is required to be considered as the right position of law from its inception. However, we

have to examine whether holding so would result in any implications on the fundamental rights of the accused, in the specific facts and attendant circumstances that accompany the present appeals.

125. Salmond, in his acclaimed work on jurisprudence, is of the opinion that a judge does not make law and merely declares it. According to him, when a particular decision is overruled, it is declared that the supposed rule laid down in such an overruled decision was never the right law. Since, it's authoritative value is erased completely, any intermediate transaction, despite being made on the strength of that supposed rule, would be governed by the principles established in the overruling decision.

126. A reflection of this proposition laid down by Salmond was evident in the decision of the Indiana Supreme Court, way back in the year 1898, in ***Center School Township v. State*** reported in **150 Ind. 168.,** which discussed the effect of the overruling of a decision. It was held that a decision of a court of last resort, is only an exposition of what the court "construes the law to be", therefore, while overruling a former decision, the court does not declare the overruled decision to be bad in law, but that it was "never the law". The overruling would be indicative of the fact that the court was simply mistaken in regard to the law in its former decision and it would have the effect of obliterating the former decision altogether. However, it was cautioned that

courts will not apply a change made by the overruling decision to the construction of the law given in the overruled decision, so as to invade the vested rights of any person. The relevant observations are reproduced hereinbelow:

> *"Passing, however, to the consideration of what is regarded by the parties as the real question in issue --that is to say: Shall we confine the change made in the interpretation of the law by the Taggart case so as to operate prospectively only, and thereby not affect appellant in its claim to the entire surplus dog fund distributed to and received by it prior to March 21, 1895; or* shall *the new construction of the statute be held to be binding on it as to the money in dispute?*
>
> *The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be, and in overruling a former decision by a subsequent one the court does not declare the one overruled to be bad law, but that it never was the law, and the court was therefore simply mistaken in regard to the law in its former decision. The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law always has been as expounded by the last decision. Haskett v. Maxey, 134 Ind. 182, 33 N.E. 358; Ram's Legal Judgments, 47.*
>
> *This rule, however, is subject to the well settled doctrine that courts will not so apply a change made in the construction of the law as it was held to be in the overruled case, as to invade what is considered vested rights, or, in other words, while as a general rule, the law as expounded by the last decision operates both prospectively and retrospectively, still, courts are required to and do confine it in its operation so as not to impair vested rights, such as property rights or those resting on contracts express or implied. Haskett v. Maxey, supra; Stephenson v. Boody, 139 Ind. 60.*
>
> *xxx xxx xxx*

> *Appellant, therefore, having received the money through a judicial misinterpretation of the law, cannot be successfully heard to deny appellee's right thereto which existed in the first instance, under the proper construction of the statute whereby the legislature had declared its will in respect to the disposition of the surplus dog fund."*
>
> (Emphasis supplied)

127. The aforementioned decision reiterates that any decision of a court would only be an evidence or an exposition of what the court construes the law to be and this is precisely why the overruling decision would remove any authoritative value that the overruled decision might have had, even during the intervening period. ***Center School Township (****supra)* also clarified that the vested right, if any, which is sought to be protected as an exception to the retrospective application of the overruling decision, must be real. They must be rights of property or those founded on contracts, express or implied. *For example,* say a right has arisen on a contract or a transaction in the nature of a contract which is authorised by a statute and the statute concerned, is repealed. In such a scenario, a vested right would exist independently of the repealed statute. It was also held that the vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law.

128. It is obvious that, in the factual circumstances before us, especially in matters of a criminal nature, the essence of the decision laid down in ***Rajesh Kumar Gupta*** *(supra)* could not be considered to have been separately embraced in

any contract, both express or implied. On the contrary, it is the legislative authority of the NDPS Act, more particularly Section 8 of the NDPS Act, which would have the final say on whether an offence is made out or not or govern the facts which the accused persons have subjected themselves to. When the very legal interpretation given to Section 8 of the NDPS Act could be said to have been wrong and misplaced in the overruled decision, it naturally follows that no vested right, whatsoever, could have accrued or be said to have existed independently of the statute, to such persons accused of a committing an offence under Section 8. More so, when the decision in ***Rajesh Kumar Gupta*** *(supra)* was an outlier on the issue when compared to several decisions that came prior to it.

129. A constitutional Bench of this Court in ***Rao Shiv Bahadur Singh and Another v. State of Vindhya Pradesh*** reported in **(1953) 2 SCC 111** was concerned with the invocation of Article 20(1) with respect to a pre-Constitution ex-post facto law and held that Article 20(1) prohibits all convictions or subjections to penalty, after the Constitution, in respect of ex-post facto laws, irrespective of whether the same was a post-Constitution or a pre-Constitution law. Herein, the Vindhya Pradesh Ordinance 48 of 1949, though enacted on 11.09.1949, i.e., after the alleged offences in the case therein were committed, was made retrospective and deemed to have been in force from 09.08.1948. It was

therefore, urged that the Ordinance was a "*law in force*" during the time the offences were committed and would not be hit by Article 20. However, this Court disagreed with such a contention and said that to accept such an argument would be to give a hyper-technical meaning to the words "*law in force*". If it were accepted then the very purpose of Article 20 would be defeated since any ex-post facto law could be given retrospective effect by the legislature to overcome the rigours of Article 20. It was this Court's opinion that "*law in force*" must be understood as being the law in fact in existence and in operation at the time of commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of the legislature to pass retrospective laws. The relevant observations are reproduced hereinbelow:

> *"15. The next and the only serious question that arises in this case is with reference to the objections raised in reliance on Article 20 of the Constitution. This question arises from the fact that the charges as against the two appellants, in terms, refer to the offences committed as having been under the various sections of the Penal Code as adapted in the United States of Vindhya Pradesh by Ordinance 48 of 1949. This Ordinance was passed on 11-9-1949, while the offences themselves are said to have been committed in the months of February, March and April 1949 i.e. months prior to the Ordinance. It is urged, therefore, that the convictions in this case which were after the Constitution came into force are in respect of an ex post facto law creating offences after the commission of the acts charged as such offences and hence unconstitutional. This contention raises two important questions viz. (1) the proper construction of Article 20 of the Constitution, and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when Ordinance 48 of 1949 was passed or were already so prior thereto.*

xxx *xxx* *xxx*

22. In this connection our attention has been drawn to the fact that the Vindhya Pradesh Ordinance 48 of 1949, though enacted on 11-9-1949 i.e. after the alleged offences were committed, was in terms made retrospective by Section 2 of the said Ordinance which says that the Act "shall be deemed to have been in force in Vindhya Pradesh from 9-8-1948", a date long prior to the date of the commission of the offences. It was accordingly suggested that since such a law at the time when it was passed was a valid law and since this law had the effect of bringing this Ordinance into force from 9-8-1949, it cannot be said that the convictions are not in respect of "a law in force" at the time when the offences were committed. This, however, would be to import a somewhat technical meaning into the phrase "law in force" as used in Article 20. "Law in force" referred to therein must be taken to relate not to a law "deemed" to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of Article 20 would be completely defeated in its application even to ex post facto laws passed after the Constitution. Every such ex post facto law can be made retrospective, as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies Article 20 cannot possibly be adopted.

23. It cannot therefore be doubted that the phrase "law in force" as used in Article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of legislature to pass retrospective laws. It follows that if the appellants are able to substantiate their contention that the acts charged as offences in this case have become such only by virtue of Ordinance 48 of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of Article 20 of the Constitution and to have their convictions set aside. [...]"

(Emphasis supplied)

130. On the other hand, the issue in question before this Court in ***Soni Devrajbhai Babubhai v. State of Gujarat*** reported in **(1991) 4 SCC 298** related to the insertion of Section 304-B to the IPC, 1860 w.e.f. 19.11.1986 which created a new substantive offence more stringent than Section 498-A IPC. The incident in question in the case occurred prior to 19.11.1986 and therefore, the accused were tried under Section 498-A instead of Section 304-B since their trial under the latter provision would be hit by Article 20(1). While affirming the view taken by the High Court, it was elaborated that, it was Section 498-A which was in the statute book when the incident occurred. The offence punishable under Section 304-B, known as dowry death, was inserted into the statute books only after the offence had been committed. Another indication that a new offence was "created" was that Section 304-B IPC is punishable with a minimum sentence of seven years which may extend to life imprisonment and was triable by a Court of Session whereas Section 498-A IPC is triable by a Magistrate of the First Class and is punishable for a term which may extend to three years in addition to a fine. The relevant observations are reproduced below:

> *"9. It is clear from the above historical background that the offence of dowry death punishable under Section 304-B of the Indian Penal Code is a new offence inserted in the Penal Code, 1860 with effect from November 19, 1986 when Act 43 of 1986 came into force. The offence under Section 304-B is punishable with a minimum sentence of seven years which may extend to life imprisonment and is triable by Court of Session. The corresponding amendments made in the Code of Criminal*

Procedure and the Indian Evidence Act relate to the trial and proof of the offence. Section 498-A inserted in the Penal Code, 1860 by the Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983) is an offence triable by a Magistrate of the First Class and is punishable with imprisonment for a term which may extend to three years in addition to fine. It is for the offence punishable under Section 498-A which was in the statute book on the date of death of Chhaya that the respondents are being tried in the Court of Magistrate of the First Class. The offence punishable under Section 304-B, known as dowry death, was a new offence created with effect from November 19, 1986 by insertion of the provision in the Penal Code, 1860 providing for a more stringent offence than Section 498-A. Section 304-B is a substantive provision creating a new offence and not merely a provision effecting a change in procedure for trial of a pre-existing substantive offence. Acceptance of the appellant's contention would amount to holding that the respondents can be tried and punished for the offence of dowry death provided in Section 304-B of the Penal Code, 1860 with the minimum sentence of seven years' imprisonment for an act done by them prior to creation of the new offence of dowry death. In our opinion, this would clearly deny to them the protection afforded by clause (1) of Article 20 of the Constitution which reads as under:

> *"20. Protection in respect of conviction for offences.— (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."*

10. In our opinion, the protection given by Article 20(1) is a complete answer to the appellant's contention. The contention of learned counsel for the appellant that Section 304-B inserted in the Penal Code, 1860 does not create a new offence and contains merely a rule of evidence is untenable. The rule of evidence to prove the offence of dowry death is contained in Section 113-B of the Indian Evidence Act providing for presumption as to dowry death which was a simultaneous amendment made in the Indian Evidence Act for proving the offence of dowry death. The fact that

the Indian Evidence Act was so amended simultaneously with the insertion of Section 304-B in the Penal Code, 1860 by the same Amendment Act is another pointer in this direction. This contention is, therefore, rejected."

(Emphasis supplied)

131. Another Constitutional Bench of this Court in ***Central Bureau of Investigation v. R.R. Kishore*** reported in **(2023) 15 SCC 339** was faced with the issue whether the declaration of Section 6-A of the DSPE Act, 1946 as unconstitutional by the judgment rendered in ***Subramanian Swamy v. Director, Central Bureau of Investigation and Another*** reported in **(2014) 8 SCC 682** led to the creation of a new offence, which had the effect of causing implications on the fundamental right guaranteed under Article 20(1) of the Constitution, and also whether the declaration of unconstitutionality must be given prospective effect. This Court held that the declaration of Section 6-A as unconstitutional would not have any implications as far as fundamental rights are concerned since the provision purely related to a procedural aspect. Furthermore, since the declaration of a provision as unconstitutional goes to the root of it and makes it *void ab initio* and *non-est*, it's effect would be retrospective in nature. In declaring so, the Bench elaborated on the following aspects:

i. ***First,*** that under the first part of Article 20(1), it is only the conviction or sentence for any offence under an ex-post facto law that is prohibited. It would be highly unjust, unfair and in violation of human

rights to punish a person under an ex-post facto law for acts or omissions that were not an offence when committed. The Bench agreed with the position taken in ***Rao Shiv Bahadur Singh*** *(supra)* that the term "*law in force*" under Article 20 must be taken to be the law factually in force or the existing law at the relevant time and not a law made applicable to the past period by virtue of a deeming fiction by the legislature.

ii. ***Secondly,*** Section 6 of the General Clauses Act, 1897 provides that when an enactment is repealed, unless a different intention appears, the repeal shall not affect the previous operation of the repealed enactment or; affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment. Section 6 was held to be inapplicable to the scenario at hand since it was not a case where an enactment was repealed or revived but the situation pertained to the declaration of a statutory provision as unconstitutional. Therefore, it cannot be said that any right or privilege was acquired on the basis of the provision which came to be declared as unconstitutional and that the concerned individuals or accused could press such an unconstitutional provision in their favour. The relevant observations are reproduced hereinbelow:

> *37. Clause (1) of Article 20 of the Constitution consists of two parts. The first part prohibits any law that prescribes judicial*

punishment for violation of law with retrospective effect. Clause (1) of Article 20 of the Constitution does not apply to civil liability, as distinguished from punishment for a criminal offence. Further, what is prohibited is conviction or sentence for any offence under an ex post facto law, albeit the trial itself is not prohibited. [...]

38. The right under first part of clause (1) of Article 20 of the Constitution is a very valuable right, which must be safeguarded and protected by the courts as it is a constitutional mandate. The Constitution Bench of this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh [Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, (1953) 2 SCC 111 : 1953 SCR 1188] , highlighted the principle underlying the prohibition by relying upon judgment of Willes, J. in Phillips v. Eyre [Phillips v. Eyre, (1870) LR 6 QB 1 at pp. 23 and 25] and of the United States Supreme Court in Calder v. Bull [Calder v. Bull, 1 L Ed 648 at p. 649 : 3 Dall 386 : 3 US 386 (1798)] , to hold that it would be highly unjust, unfair and in violation of human rights to punish a person under the ex post facto law for acts or omissions that were not an offence when committed. [...]

39. Rao Shiv Bahadur Singh [Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, (1953) 2 SCC 111 : 1953 SCR 1188] observes that the language of clause (1) of Article 20 of the Constitution is much wider in terms as the prohibition under the article is not confined to the passing of validity of the law, and that fullest effect must be given to the actual words used and what they convey. Accordingly, the decision had struck down Vidhya Pradesh Ordinance 48 of 1949, which though enacted on 11-9-1949, had postulated that the provisions would deemed to have come into force in Vidhya Pradesh on 9-4-1948, a date prior to the date of commission of offences. Interpreting the term "law in force", it was held that the Ordinance giving retrospective effect would not fall within the meaning of the phrase "law in force" as used in clause (1) of Article 20 of the Constitution. The "law in force" must be taken to relate not to a law deemed to be in force, but factually in force, and then only it will fall within the meaning of "existing law". Artifice or fiction will fall foul, when they are with the intent to defeat the salutary object and purpose behind clause (1) of Article 20 of

the Constitution. [In the present case, we need not examine when an offence is a continuous offence, an aspect and matter of considerable debate.]

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42. The learned counsel for the parties have also briefly referred to Section 6 of the General Clauses Act, 1897. It would be appropriate to reproduce the said provision hereunder:

> *"**6. Effect of repeal**.— Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—*
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
> *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."*

A plain reading of the above provision indicates that the repeal of an enactment shall not affect previous operation, unless a different intention appears. It may be appropriately noted here that the present case does not involve repeal or revival of any enactment but is a case where a Constitution Bench of this

Court has declared a statutory provision as invalid and unconstitutional being hit by Article 14 of the Constitution. As such Section 6 of the 1897 Act will have no application."

(Emphasis supplied)

132. The background and context under which we are examining the applicability of Article 20(1) to the facts of our case are quite different and distinguishable. We are not concerned with a situation where the legislature or another competent authority had once enacted a provision/rule wherein the dealing of substances only mentioned in Schedule I of the NDPS Rules, would constitute an offence and the same later came to be substituted with a provision/rule which stated that the dealing in of all substances mentioned under the Schedule to the Act would also constitute an offence under Section 8. It is just that the position of law was assumed to be so in ***Rajesh Kumar Gupta*** *(supra)*, however, that conclusion was expressly declared as wrong in ***Sanjeev V Deshpande*** *(supra)*. The three-judge Bench in ***Sanjeev V Deshpande*** *(supra)* while overruling ***Rajesh Kumar Gupta*** *(supra)* went to the extent of saying that ***Rajesh Kumar Gupta*** *(supra)* ignored the mandate of Section 8(c) of the NDPS Act and that it was wrongly decided. Therefore, the intention of the legislature along with the true import and meaning of Section 8(c) read with the relevant rules was always that the dealing in of any psychotropic substance mentioned under the Schedule to the Act in contravention of the provisions of the Act and Rules framed thereunder, must necessarily be punished. The consistent line of decisions of

this Court, as elaborated by us in the preceding parts of this judgment, which pre-existed the decision in ***Rajesh Kumar Gupta*** *(supra)* and which also support the conclusion reached by ***Sanjeev V Deshpande*** *(supra)* and by us, serve as a testament to the undoubted position of law contained in the NDPS Act and its Rules, in this regard.

133. Furthermore, we are also not concerned with a scenario wherein the language of Section 8 of the NDPS Act is visibly narrow and through the act of judicial interpretation, an unreasonably wide or expansive interpretation has been accorded to it by the decision in ***Sanjeev V Deshpande*** *(supra)* and also by us. On the contrary, it is our opinion that the construction to Section 8 of the NDPS Act was inordinately restricted in ***Rajesh Kumar Gupta*** *(supra)* when the scope and ambit of the provision was clear in itself. Hence, the decision in ***Sanjeev V Deshpande*** *(supra)* taken along with the elaborate discussion which we have engaged in on the position of law, has only served to clarify the true meaning as exactly reflected in the statute, without any undue narrowing or expansion. Therefore, there is no doubt in our mind while clarifying that the decision in ***Sanjeev V Deshpande*** *(supra)* overruling the decision in ***Rajesh Kumar Gupta*** *(supra)* would have retrospective effect, that there would arise no adverse implications as regards the Article 20(1) rights which the accused persons are otherwise entitled to.

134. The Blackstonian theory also lends great support to our conclusion since it underscores the principle that it is not the function of the court to pronounce a "new rule" but to maintain and expound the "old one". Therefore, the overruling of a decision cannot be equated to the creation of a new law. The correct principle of law is merely clarified and applied retrospectively. Therefore, in the circumstances of the instant case, it cannot be said that a new offence was "created" subsequently. It is to be considered as always have existed. The offence under Section 8 as expounded in ***Sanjeev V Deshpande*** *(supra)* was not introduced out of thin air and it cannot be said that its existence as construed in the aforesaid decision was undeniably absent from the scheme of the provisions under the NDPS Act. We have elaborated with sufficient detail, by even exhaustively and conscientiously discussing the Articles of the Convention of Psychotropic Substances, 1971 which motivated the enactment of the NDPS Act along with the object of the NDPS Act and concluding that it would be a grave error to assume that the law was ever otherwise.

135. Moreover, consider a situation wherein a certain statute or provision is declared to be unconstitutional by this Court for being violative of Article 14 of the Constitution but with prospective effect. Can it be argued that the actions undertaken on the basis of that unconstitutional provision or legislation, until the date of the judgment, would be open to being challenged for also being

violative of Article 14? This would necessarily be answered in the negative because the Court consciously declares prospectivity after weighing and balancing all interests and practical realities. No individual can claim the benefit of the decision declaring a provision as unconstitutional for transactions or events which occurred prior to that decision if the intention to give prospective effect to the decision is plain and direct. No doubt, the actions wrongly taken in the past would not be automatically validated but on a balance of equities, a challenge to those actions are also disallowed. Similarly, while a decision is being overruled and the default rule of retrospectivity in matters of overruling is applied, it would not be permissible for anyone to contend that any right accrued to them on the basis of the judgement which declared the wrong proposition of law. Therefore, the retrospective overruling of the decision in ***Rajesh Kumar Gupta*** *(supra)* cannot be faulted with for being possibly hit by Article 20(1) of the Constitution. It would not be open for an accused to contend that any right accrued to them on the basis of the judgement in ***Rajesh Kumar Gupta*** *(supra).* However, with a view to do complete justice to the issue at hand, we declare that matters in which the trial has already concluded on the basis of the incorrect exposition of law and have attained finality, would not be disturbed. It would be tedious endeavour for all those acquittals to be re-opened and re-tried again. Having said so, any and all

pending matters would be adjudged on the basis of the correct interpretation of law as declared in ***Sanjeev V Deshpande*** *(supra).*

136. The decisions of this Court in ***Rao Shiv Bahadur Singh*** *(supra)*, ***Soni Devrajbhai Babubhai*** *(supra)* and ***R.R. Kishore*** *(supra)* would not in any manner be an impediment to the above conclusion since – *First,* in ***Rao Shiv Bahadur Singh*** *(supra),* it was opined that the expression "*law in force*" must be understood as being the law in fact in existence and in operation at the time of commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of the legislature to pass retrospective laws. The same is inapplicable herein since; (a) we are not dealing with a situation where the legislature has introduced a new offence which is sought to be retrospectively enforced and (b) the overruling of a decision and the declaration of the right meaning of law is not attributed to the provision by the overruling court through a "deeming fiction". The overruling decision only mirrors what the lawmakers wanted the law to be and what it always was. Therefore, it cannot be disputed that the interpretation given in the overruling decision was infallibly the "*law in force*" at all times. *Secondly,* in ***Soni Devrajbhai Babubhai*** *(supra),* it was apparent that the offences were traceable to two different provisions, the latter of which created a distinct offence and entered into the statute books much later in time. Therefore, it could be said without

any doubt that a new offence was "created". *Thirdly,* in ***R.R. Kishore*** *(supra).* it was reiterated that it was only the conviction or sentence for any offence under an ex-post facto law that is prohibited under Article 20(1). The overruling of a decision cannot be equated to the enactment of an ex-post facto law, especially when the interpretation given to the statute/provision in the overruling decision is not a novel and unreasonably expansive interpretation of the provision in question such that it was completely unforseeable. An ex-post facto law lays down a new or completely alternate legal position from what existed before. The same is not the effect of an overruling decision which only interprets the intention which always remained with the legislature while enacting the concerned provision. The indiscriminate dealing in of substances which are only mentioned under the Schedule to the Act cannot be said to have been indubitably legal and allowed by the legislation prior to the decision in ***Sanjeev V Deshpande*** *(supra).*

137. We find it necessary to reiterate that acquittals which have already been recorded and have attained finality would not be unsettled in light of the overruling decision or the observations made by us. If it were a reverse scenario i.e., if the decision in ***Rajesh Kumar Gupta*** *(supra)* led to the conviction of several accused and then subsequently, the effect of the ratio in ***Sanjeev V. Deshpande*** *(supra)* was such that those accused were to be acquitted because

an offence was not made, we would have, without an iota of doubt leaned in favour of those matters being reconsidered and the convictions also being re-examined in light of the clarification given in the subsequent decision. However, presently, the situation not being such, we do not wish to subject any accused who has been acquitted, to trial again.

138. In ***Somaiya*** *(supra),* this Court had emphasized that it cannot be said that the past actions would be validated when the doctrine of prospective overruling is resorted to. Therefore, the idea is not to declare all the actions that were taken contrary to law or in pursuance of an unconstitutional provision as valid, but to save those transactions on a balance of considerations. Similarly, if the accused before us had been acquitted directly as a consequence of the decision in ***Rajesh Kumar Gupta*** *(supra),* the same cannot be said to have been made in accordance with law. Although, we have expressed our intention to not disturb any acquittal made in the past, which have attained finality, if the accused persons before us were acquitted by the respective Trial Courts due to the interpretation given in ***Rajesh Kumar Gupta*** *(supra)* and after an examination of materials placed on record, we were satisfied that the accused before us were indeed guilty of the offence with which they were charged, we could have held them "technically guilty" of the offence under Section 8 of the NDPS Act.

139. This concept of "technical guilt" found mention in the decision of this Court in ***Food Inspector, Calicut Corporation v. Cherukattil Gopalan and Another*** reported in **(1971) 2 SCC 322.** Here, the issue was whether the respondent running a tea-stall could be said to have "sold" the sugar to the Food Inspector under Section 2(xiii) of the Prevention of Food Adulteration Act, 1954 and hence fall under the ambit of Sections 7 and 16(1)(a)(i) of the Act which prohibits and punishes the manufacture, sale etc. of adulterated articles of food. The counsel for the appellant had, during the course of the arguments, made it clear that the appellant did not want the respondents to be convicted in case his contentions were accepted and that the Corporation only wished to clarify the legal position on the aforesaid issue. In conclusion, while this Court agreed with the contentions of the appellant, the respondents were only held to be "technically guilty" of the offence with which they were charged and this Court opined that they had been wrongly acquitted by the High Court and the Trial Court respectively. The relevant observations are reproduced below:

> *"26. Coming to the case on hand, on the findings of the two courts the sugar in question has been found to be adulterated. The purchase by the Food Inspector from the accused of sugar for purposes of analysis is a sale under Section 2(1) of the Act. Section 7 prohibits a person from selling adulterated article of food. Similarly, under Section 16(1)(a)(i) any person who sells adulterated food commits an offence and is punishable therein. The sugar which is the commodity before us is food under Section 2(3) of the Act. We have already pointed out that sugar by itself is an article used as food or at any rate it is an article which ordinarily enters into or is used in the composition or preparation of human food. In this case the sale was for analysis and the article*

was an article of food and in view of the concurrent findings of both the courts that it was adulterated, the respondents have contravened Sections 16(1)(a)(i) of the Act. Hence it must be held that the respondents are technically guilty of the offence with which they were charged and they have been wrongly acquitted by the High Court and the District Magistrate. But in view of the fact that the appellant has argued the appeal only as a test case and does not challenge the acquittal of the respondents, we merely set aside the order and judgment of the High Court. But we may make it clear that apart from holding the respondents technically guilty, we are not setting aside the order of acquittal passed in their favour."

(Emphasis supplied)

140. In ***Cherukattil Gopalan*** *(supra)*, this Court did not set aside the order of acquittal which was passed in favour of the accused but at the same time, streamlined the position of law in that regard and only set aside the order and judgment of the High Court. Along similar lines, while we are refraining from directing that the orders of acquittal (if any) passed due to the decision in ***Rajesh Kumar Gupta*** *(supra)* be disturbed, in so far as the accused person before us are concerned, it would have been appropriate to declare them to be technically guilty of the offence under Section 8 of the NDPS Act, had they been acquitted. However, what has been brought out from the facts of the appeals before us, is that the accused persons were not acquitted but discharged due to the decision in ***Rajesh Kumar Gupta*** *(supra)*. Therefore, there arises no occasion for us to hold them technically guilty of the offences under the provisions of the NDPS Act that they were charged with. At this juncture, the

obvious next step would be for the trial *qua* all the accused before us to be commenced in accordance with law.

141. One another question of law which has sprung up in the facts of our case is whether, after the charges are framed by the Trial Court, an accused could be discharged or his charges could be deleted through an application made under Section 216 of the CrPC.

iii. The scope of Section 216 of the CrPC

142. Section 216 of the CrPC reads as thus:

> *"**216. Court may alter charge.**—*
> *(1) Any Court may alter or add to any charge at any time before judgment is pronounced.*
>
> *(2) Every such alteration or addition shall be read and explained to the accused.*
>
> *(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*
>
> *(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.*
> *(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless*

sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

(Emphasis supplied)

143. Under this provision, any Court is empowered to "alter" or "add" to any charge framed against the accused, at any time before the judgment is pronounced. Therefore, an outer time limit is set i.e. the power conferred upon the Courts cannot be exercised after a decision is pronounced in the matter. Although the provision does not expressly provide for the stage of the trial after which the power under Section 216 CrPC can be exercised, yet logic and rationale obviously requires it to be exercised after a charge has been framed by the Trial Court under Section 228 CrPC. For if no charge has been framed, there arises no occasion to add or alter it. As a natural corollary, if an accused has already been discharged under Section 227 CrPC, no application or action under Section 216 CrPC would be maintainable.

144. The Court may alter or add to any charge either upon its own motion or on an application by the parties concerned. Therefore, such a power can be invoked by the Court *suo moto* as well. This power under Section 216 CrPC is exclusive to the concerned Court and no party can seek such an addition or alteration of charge as a matter of right by filing an application. It would be the Trial Court which must decide whether a proper charge has been framed or not, at the appropriate stage of the trial. On a consideration of the broad probabilities of

the case, the total effect of the evidence and documents adduced, the Trial Court must satisfy itself that the exercise of power under Section 216 is necessary. The provision has been enacted with the salutary object to ensure a fair and full trial to the accused person(s) in each case.

145. This Court in ***Anant Prakash Sinha v. State of Haryana and Another*** reported in **(2016) 6 SCC 105** summarised the principles as regards Section 216 CrPC. Herein, charges were framed against the appellant-husband for the commission of offences punishable under Sections 498-A and 323 IPC. During the pendency of the matter, the informant wife had filed an application under Section 216 CrPC for framing an additional charge under Section 406 IPC against both the husband and the mother-in-law on the ground that there was an express complaint with regard to the misappropriation of her entire Stridhan and other articles. Hence, it was contended that the accused persons had committed criminal breach of trust, however, a charge sheet was not filed in respect of the said offence. The application was allowed by the Trial Court and subsequently, the Revisional Court upheld the framing of charge under Section 406 IPC only against the appellant-husband. This Court while agreeing with the High Court summarised the principles underlying Section 216 CrPC as follows:

i. ***First***, the test for exercise of power under Section 216 CrPC is that it must be founded on the material available on record and therefore, it

can be on the basis of the complaint or the FIR, or other accompanying documents or materials brought on record during the course of the trial. The charge which has been framed by the Trial Court must therefore be in accord with the materials available before him.

ii. ***Secondly***, the power must not be construed in a restricted manner to mean that unless evidence has been let in, the charges that have already been framed cannot be altered. The Court is empowered to change or alter the charge framed, if it finds that there is a defect or that something has been left out in the order framing charge.

iii. ***Thirdly,*** it is obligatory for the Court to ensure that no prejudice is caused to the accused due to the addition or alteration of charge. The accused must be informed and made aware of the new charge as also the case against him so that he can understand the defence that can be led on his behalf.

The relevant observations are reproduced hereinbelow:

> *"18. From the aforesaid, it is graphic that the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before*

him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.

19. In addition to what we have stated hereinabove, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial. It has been held in Amar Singh v. State of Haryana [Amar Singh v. State of Haryana, (1974) 3 SCC 81 : 1973 SCC (Cri) 789] that the accused must always be made aware of the case against him so as to enable him to understand the defence that he can lead. An accused can be convicted for an offence which is minor than the one he has been charged with, unless the accused satisfies the court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. [...]"

(Emphasis supplied)

146. In another decision of this Court in ***Nallapareddy Sridhar Reddy v. State of A.P.*** reported in **(2020) 12 SCC 467**, the scope of powers under Section 216 was elaborated. It was stated that the power under this provision to alter a charge is an exclusive and wide-ranging power and this is clear from the fact that it may be exercised at any time before the judgment is pronounced, meaning also at a stage wherein the evidence and arguments are completed and the judgment is reserved. It was further stated that if the Court is of the opinion that there was an omission in the framing of charge or if the existence of the factual ingredients constituting another offence is also inferred from a *prima facie* examination of the material brought on record, the alteration or addition

of a charge can be done. Such material brought on record must have a direct nexus with the ingredients of the alleged offence. This Court cautioned that the power under this provision must be exercised judiciously and observed as follows:

> "*21. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words "at any time before judgment is pronounced" in sub-section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges. Sub-section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused.*"
>
> (Emphasis supplied)

a. What is the meaning of the expression "alter" occurring in Section 216 CrPC.

147. P. Ramanatha Aiyar in his ***Law Lexicon*** *(6th Edn.)* defined "alter" as "*to make a change in; to modify; to vary in some degree*". "Alteration" is defined as a

"*change or substitution of one thing for another*". Further, it has been elaborated that the term "alter" is to be distinguished from its synonyms i.e., "change" and "amend". To change something may import the substitution of an entirely different thing, while on the other hand, to alter would be to operate upon a subject matter which continues to be the same objectively while just modified in some particular. To illustrate it better in the context of charging an accused with an offence, let's say an accused is charged with an offence initially under Section 323 IPC for simple hurt. If the Trial Court is of the opinion that the case is in fact one of grievous hurt, it may alter the charge of the accused for an offence under Section 325 IPC. This would be an alteration since the broad subject matter continues to be the same. Further, to amend would imply that the modification made in the subject improves it, which might not necessarily be the case with an alteration. In other words, an amendment may involve an alteration but an alteration does not always amend.

148. In ***Sohan Lal and Others v. State of Rajasthan*** reported in **(1990) 4 SCC 580**, this Court while holding that an application under Section 216 would not be maintainable against persons who have already been discharged, elaborated the meaning of the words "alter and add to" as follows:

> *"12. Add to any charge means the addition of a new charge. An alteration of a charge means changing or variation of an existing charge or making of a different charge. Under this section addition to and alteration of a charge or charges implies one or more existing charge or charges."*
>
> (Emphasis supplied)

149. Therefore, to alter a charge would be to vary an existing charge and make a different charge. Hence, when the Court exercises its power under Section 216, either on its own motion or on an application made by the parties, and "alters" a charge, it would be necessary that the existing charge be varied and a new charge be made. In the instant case, in Criminal Appeal No. 1319 of 2013, the Trial Court in its order dated 30.11.2006 had held that the charge framed by his predecessor for the offence under Sections 8, 22 and 29 of the NDPS Act had not been made out and that the case of the accused had to be a case under the D&C Act which would be triable by the Metropolitan Magistrate. In Criminal Appeal No. 272 of 2014, again, the Trial Court in its order dated 17.04.2010 similarly held that the offences under Sections 8 and 22 of the NDPS Act were not made out and the matter would fall within the rigours of the D&C Act.

150. However, if careful attention is paid to the orders of the Special Judge in both the appeals, it cannot be said that they have exercised their power under Section 216 to "alter" the charge of the accused persons. We say so because, the charge which existed under Sections 8, 22 and 29 of the NDPS Act in Criminal Appeal No. 1319 of 2013 and under Sections 8 and 22 of the NDPS Act in Criminal Appeal No. 272 of 2014 respectively were not varied and a different charge under a specific provision of the D&C Act was not made. In such a circumstance, in effect, the Special Judge had discharged or deleted the charge of the accused persons under the NDPS Act in both the appeals.

b. Whether charges could be deleted or the accused be discharged under Section 216 CrPC.

151. Section 216 CrPC provides the Court with the power to do two things – *One*, alter a charge and *two,* add to a charge. Nowhere, does the provision expressly or by necessary implication lead to an inference that a charge could be deleted altogether. No doubt, the Court is given an expansive and wide-ranging power. However, that must not mean that the powers conferred are without any limits.

152. In a recent decision of this Court in ***K. Ravi v. State of Tamil Nadu and Another*** reported in **2024 SCC OnLine SC 2283**, this Court had categorically observed that Section 216 does not give any right to the accused to file a fresh application seeking discharge after the charge has been framed by the Court. Herein, several accused were charge-sheeted under Sections 147, 148, 323, 324, 307 and 302 of the IPC respectively. The respondent no. 2 - accused filed an application for discharge under Section 227 CrPC which was dismissed by the Sessions Court. After charges were framed, the respondent no.2 along with the other accused then filed an application under Section 216 CrPC seeking alteration of charge, which was also dismissed. In revision, the High Court, however, set aside the charge framed against the respondent no. 2. While holding that an accused cannot seek a discharge under the garb of modification/alteration of charge through a Section 216 application, this Court

also highlighted that it has become routine practice for the accused to file an application under Section 216 CrPC after their application for discharge under Section 227 CrPC is dismissed, sometimes in ignorance of the law but also on other occasions with the sole intent of derailing the trial. The relevant observations are as thus:

> *"7. From the above conspectus of events, it clearly transpires that the Respondent No. 2 after having failed to get himself discharged from the Sessions Court as well as from the High Court in the first round of litigation, filed another vexatious application before the Sessions Court under Section 216 of Cr. P.C., after the framing of charge by the Sessions Court, for modification of the charge. The Sessions Court having dismissed the said application, the Respondent No. 2 preferred the Revisional Application before the High Court under Section 397 and 401 of Cr. P.C. The High Court in its unusual impugned order, discharged the Respondent No. 2 (A-2) from the charges levelled against him, though his earlier application seeking discharge was already dismissed by the Sessions Court and confirmed by the High Court and that position had attained finality. [...]*
>
> *xxx xxx xxx*
>
> *11. It is trite to say that Section 216 is an enabling provision which enables the court to alter or add to any charge at any time before judgment is pronounced, and if any alternation or addition to a charge is made, the court has to follow the procedure as contained therein. Section 216 does not give any right to the accused to file a fresh application seeking his discharge after the charge is framed by the court, more particularly when his application seeking discharge under Section 227 has already been dismissed. Unfortunately, such applications are being filed in the trial courts sometimes in ignorance of law and sometimes deliberately to delay the proceedings. Once such applications though untenable are filed, the trial courts have no alternative but to decide them, and then again such orders would be challenged before the higher courts, and the whole criminal trial would get derailed. Suffice it*

to say that such practice is highly deplorable, and if followed, should be dealt with sternly by the courts."

(Emphasis supplied)

153. A few High Courts have also rightly taken the view that an application under Section 216 CrPC cannot lead to the deletion of charge or the discharge of an accused. In a relatively recent decision of the High Court of Allahabad in ***Dev Narain v. State of U.P. and Another*** reported in **2023 SCC OnLine All 3216**, it was stated that a prayer for discharge cannot be sustained in an application under Section 216 CrPC. Herein the sole-accused moved an application for discharge and the same was rejected. The application under Section 482 CrPC filed before the High Court was also dismissed but with the observation that "it is open to the applicant to move an application for alteration of charge under Section 216 CrPC before the Trial Court". Charges were framed against the accused under Sections 498-A, 304-B, 323 IPC and Sections 3 and 4 of the Dowry prohibition Act, 1961. After the evidence of PW-1 was recorded, the accused moved an application under Section 216 CrPC for alteration of charge and the same also came to be dismissed by the Trial Court. The High Court stated that the alteration of charge and deletion of charge hold different field and that these two cannot be intermingled. A perusal of the prayer made by the accused in the 216 CrPC application indicated that it was, in essence, a prayer for discharge and quashing of the charges levelled against him. Therefore, it was held that such a power to delete charges is not conferred on the Court under

Section 216 CrPC. It was added that a charge once framed, it must lead either to an acquittal or conviction at the end of the trial and charges cannot be permitted to be deleted mid-trial. The relevant observations are reproduced hereinbelow:

> "*9. From perusal of above, is apparent that the Court may alter or add to any charge at any time before judgment is pronounced but alteration of charge and deletion of charge hold different field and these two cannot be intermingled, otherwise it will cause miscarriage of justice. This is admitted fact that the discharge application moved by the revisionist was dismissed by the trial court and the criminal revision moved by the revisionist against rejection of discharge application has been dismissed by this Court vide order dated 9.8.2017 in Criminal Revision No. 2500 of 2017, wherein this Court observed that the instant criminal revision is finally disposed of with a direction that in case, the revisionist is aggrieved with regard to the framing of the charge as on date, he may file an appropriate application at the appropriate stage when the evidence is to be produced with regard to the alteration of charge and in case, such an application is filed, the same shall be heard and decided in accordance with law after hearing all parties concerned.*
>
> *10. The charge has been framed against the accused by the court below under Sections 498-A, 304-B, 323 IPC and 3/4 of D.P. Act. The evidence of PW-1 Vibhuti Bhushan Garg was recorded on 1.9.2017 to 29.5.2018 and thereafter the present application under Section 216 Cr. P.C. has been filed for alteration of charge. [...]*
>
> *11. From perusal of prayer made in application under Section 216 Cr. P.C., it appears in essence that this is a prayer for discharge as the revisionist has stated that he may be discharged from charged penal sections and the charges levelled against him be quashed. The trial court in exercise of its powers under Section 216 Cr. P.C. cannot delete the charges framed by it for the said offences as the criminal procedure code does not confers such powers on the court. The trial court can only alter to a charge or to add to a charge, which has already framed. The discharge*

application moved by the revisionist has already been dismissed and said order has attained finality.

xxx xxx xxx

14. This Court in the case of Vibhuti Narayan Chaubey Alias v. State of U.P., 2003 Cri LJ 196 held that Section 216 of the code did not provide for deletion of a charge and that the word "delete" had intentionally not being used by the legislature.

I am in agreement with this conclusion. The petitioner is seeking the deletion of a charge of conspiracy altogether that is not permissible under Section 216 of the Code. The charge once framed must lead to either acquittal or conviction at the conclusion of trial. Section 216 of the Code does not permit the deletion of the same. Subsequently, Delhi High Court in the case of Verghese Stephen v. Central Bureau Of Investigation, 2007 Cri LJ 4080, placed reliance on aforesaid judgment of this Court in the case of Vibhuti Narayan Chaubey (supra)."

(Emphasis supplied)

154. We are in agreement with the view that once charges have been framed by the Trial Court in exercise of the powers under Section 228 CrPC, the accused cannot thereafter be discharged, be it through an exercise of the powers under Sections 227 or 216 CrPC. It is reiterated that the language of Section 216 CrPC provides only for the addition and alteration of charge(s) and not for the deletion or discharge of an accused. If the Legislature had intended to empower the Trial Court with the power to delete a charge at that stage, the same would have been expressly and unambiguously stated. Therefore, at such a stage of the trial, the accused must necessarily either be convicted or acquitted of the charges that were so framed against him. No shortcuts must be allowed.

155. In both the appeals before us i.e. Criminal Appeal Nos. 1319 of 2013 and 272 of 2014 respectively, the Trial Courts *vide* their orders dated 30.11.2006 and 17.04.2010 have in effect deleted the charge framed for the offence under the provisions of the NDPS Act and then transferred the file to the Court of the Metropolitan Magistrate for proceeding in accordance with the provisions of the D&C Act, without arriving at a decision to acquit the accused as regards the charges already framed under the provisions of the NDPS Act. The same is impermissible under the scheme of our criminal procedure code and both the Trial Courts could be said to have committed a grave error while reaching the conclusion that as the offences were not triable by them, the case should be transferred to the court of the Metropolitan Magistrate respectively.

E. CONCLUSION

156. It cannot be said that the dealing in of "Buprenorphine Hydrochloride" would not amount to an offence under Section 8 of the NDPS Act owing to the fact that the said psychotropic substance only finds mention under the Schedule to the NDPS Act and is not listed under Schedule I of the NDPS Rules. There exists nothing to indicate that Rules 53 and 64 of the NDPS Rules respectively, are the governing rules in their respective Chapters, more so, when the language

of the other rules in Chapters VI and VII respectively, are clear about their application to the substances mentioned under the Schedule to the Act as well.

157. All the psychotropic substances mentioned under the Schedule to the Act have potential grave and harmful consequences to the individual and the society at large, when abused. Some psychotropic substances mentioned under the Schedule to the NDPS Act are also mentioned under the D&C Act and the rules framed thereunder. This is only because those substances while capable of being abused for their inherent properties could also be used in the field of medicine. However, the mere mention of certain psychotropic substances under the D&C regime would not take them away from the purview of the NDPS Act, if they are also mentioned under the Schedule to the NDPS Act.

158. There arises no occasion for us to declare the interpretation given to Section 8 of the NDPS Act and the relevant NDPS Rules, by the decision in ***Sanjeev V. Deshpande*** *(supra)*, as prospectively applicable. There exists no overwhelming reason for us to do so. On the other hand, in order to meet the ends of justice and with a view to ensure that public interest is safeguarded and to give effect to the salutary object behind the enactment of the NDPS Act, the decision must necessarily be retrospectively applicable. This Court in ***Sanjeev V. Deshpande*** *(supra)*, perhaps, did not think fit to confine or restrict its interpretation of Section 8 of the NDPS Act to future cases only. This is evinced from the fact

that whilst overruling ***Rajesh Kumar Gupta*** *(supra)*, it deliberately chose not to discuss the doctrine of prospective overruling let alone resort to it. This conspicuous silence in ***Sanjeev Deshpande*** *(supra)* as regards the prospective or retrospective effect of overruling ***Rajesh Kumar Gupta*** *(supra)* has to be borne in mind and given due deference. As a natural corollary to the aforesaid, we see no reason why we should deviate from the default rule of retrospectivity and instead, resort to the doctrine of prospective overruling. Therefore, pending cases, if any, which were instituted before the decision of this Court in ***Sanjeev V. Deshpande*** *(supra)* would also be governed by the law as clarified by it.

159. Furthermore, the retrospective application of the dictum in ***Sanjeev V. Deshpande*** *(supra)* would not give rise to any implications as regards the rights of the accused persons under Article 20(1) of the Constitution. This is because while overruling the decision in ***Rajesh Kumar Gupta*** *(supra)*, the decision in ***Sanjeev V. Deshpande*** *(supra)* has only clarified the law as it stood from its inception and given true effect to the meaning assigned to the relevant provisions of the NDPS Act and the Rules thereunder, by the lawmakers. The same cannot be construed as creating a new offence. Additionally, the overruling of a decision cannot be equated to the enactment of an ex-post facto law, especially when the interpretation given to the statute/provision in the overruling decision is not a novel and unreasonably expansive interpretation of

the provision in question such that it was completely unforseeable. It cannot be reasonably argued that the indiscriminate dealing in of substances which are only mentioned under the Schedule to the NDPS Act and absent under Schedule I of the NDPS Rules, was indubitably legal and allowed by the legislation, prior to the decision in ***Sanjeev V. Deshpande*** *(supra).* Therefore, there remains no doubt in our minds that giving retrospective effect to the decision in ***Sanjeev V. Deshpande*** *(supra)* would be necessary considering the facts and circumstances in the background of which we are called upon to adjudicate these matters

160. However, having held that the decision in ***Sanjeev V. Deshpande*** *(supra)* must be given retrospective effect, we find it necessary to clarify that acquittals which have already been recorded as a consequence of the decision in ***Rajesh Kumar Gupta*** *(supra)* and have attained finality, would not be unsettled in light of the overruling decision in ***Sanjeev V. Deshpande*** *(supra)* or the observations made by us.

161. We are, therefore, of the view that both the Trial Court and the High Court committed an error in holding that the offence under the provisions of the NDPS Act is not made out. The Trial Courts in both the appeals could also not have discharged/deleted the charge under the NDPS Act framed against the

accused persons while disposing of an application under Section 216 CrPC. This is something not permissible within our criminal procedure and the High Court unfortunately failed to take notice of this aspect.

162. In view of the law expounded by us, since the accused concerned in both the appeals were not acquitted in their respective trials, we direct that they be tried by the concerned Special Judge, NDPS, in accordance with law. The Trial Courts are directed to proceed with the trial and conclude it expeditiously.

163. With the aforesaid directions, we allow both the appeals filed by the appellants and set aside the impugned orders passed by the High Court.

164. We direct the Registry to send one copy each of this judgment to all the High Courts.

165. Pending application(s), if any, shall stand disposed of.

…… J.
(J.B. Pardiwala)

…… J.
(Manoj Misra)

New Delhi;
17th April, 2025.