IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 578 OF 2021

WITH

INTERIM APPLICATION NO.3958 OF 2023

Ajay Melwani,
Adult, Indian Inhabitant,
aged 59 years, Director of
Vivalavita Pharmaceuticals
Pvt. Ltd., having his office address
at 21, North Ave, Sainara Building,
Santacruz West, Mumbai
Maharashtra 400 054. ...Applicant

Vs.

The State of Maharashtra,
(through Anti-Narcotics Cell,
Azad Maidan Unit,
Anti – Narcotics Cell) .....Respondent

Mr. Rajiv Patil, Senior Advocate with Mr. Sameer Singh i/by Mr. Kisan Choudhary, for the Applicant.
Mr. Ashish I. Satpute, APP, for Respondent -State.

CORAM : A. S. GADKARI AND
DR NEELA GOKHALE, JJ.
RESERVED ON : 05th JULY, 2024.
PRONOUNCED ON : 22nd JULY, 2024.

JUDGMENT (*Per Dr. Neela Gokhale, J*) :

1) The Applicant seeks quashing of F.I.R No. 48 of 2019 *qua* him dated 11th July 2019 registered with the Anti Drug Department, Azad Maidan Unit, Crime Branch, Mumbai for offences punishable under

Sections 9(A), 25 (A),29 and 59 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2) Record reveals that, an Order dated 13th March 2023 passed by this Court, notice was issued to the State of Maharashtra. The investigation was allowed to continue but the Investigating Agency was restrained from filing the charge sheet qua the Applicant. By an Order dated 11th September 2023, the Application was admitted.

3) Brief facts of the case:-

3.1) The Applicant is alleged to be a director in the company called Vivalavita Pharmaceuticals Pvt. Ltd. and the Respondent is the State of Maharashtra through its Anti Narcotics Cell.

3.2) FIR was registered on a complaint of Mr. Prashant Dilip More, Assistant Police Inspector of the Anti Narcotics Cell, Azad Maidan Unit, Crime Branch, CID, Mumbai. It reveals that, one Sam Fine O Chem Ltd., a company engaged in the manufacture of chemicals had exported a controlled substance having name of N - Phenethyl – 4 Piperidone ('said chemical') to one Italian Company namely, Camberex Profarnacomilano S.R.L. It is the case of the Respondent that N-Phenethyl–4 Piperidone is a contraband substance, which falls under Schedule (B) at Serial 19 of the Narcotics Drugs & Psychotropic Substances (Regulation of Controlled Substances) Order, 2013 (The NDPS Order) export of which requires the 'no objection' certificate of the Narcotics Commissioner.

3.3) It is stated that, by Government Notification GSR 186 (E) dated 27th February 2018, the said chemical was added in Schedule 'B' of the NDPS Order. According to the Respondent, Sam Fine O Chem Ltd. manufactured 1,000 kgs. of the said chemical and delivered the same to Vivalavita through a transport company and stored it in Punjab State Containers and Warehousing JNTP, Maharashtra. The material was exported by the Applicant's company to ERRE GIERRE SPA, a company in Italy through Houston Shipping Company in its Ship No.1821 W. It is the case of the Respondent that, the said chemical was exported by Sam Fine O Chem, the Vivalavita Pharmaceuticals Pvt. Ltd. and other companies, without a 'No Objection' certificate from the Narcotics Commissioner as required under the NDPS Act. None of the Customs Officials had objected to this export without the NOC and they failed to verify adherence to the said compliance under the NDPS Act. The exporting companies as well as the officers concerned of the Customs Department thus committed the said offences under the NDPS Act and accordingly the FIR impugned herein was registered.

4) Mr. Rajiv Patil, learned Senior Advocate represents the Applicant and Mr. Ashish Satpute, learned APP appears for the State.

5) Mr. Rajiv Patil raised the following contentions:

5.1) The amendment of adding said chemical in Schedule B of the NDPS Order was not publicised by the Government nor were its own

statutory Authorities aware about the same.

5.2) Sam Fine O Chem, the manufacturer had sought clarification from the Zonal Director, Narcotics Control Bureau, Home Ministry, Ahmedabad as to whether NOC was required for exporting the said Chemical. Mr. Patil points to a letter dated 14th May 2009 addressed by the Zonal Director, NCB, Home Ministry, Ahmedabad addressed to one Shri D.N.Mehta, Director of Sam Fine O Chem Ltd., clarifying that for export and production of said chemical, no permission is required from the Narcotics Control Bureau. According to Mr. Patil, the Zonal Director is the Nodal Agency for the enforcement of NDPS Act and the Applicant concluded from his clarification that NOC of the Narcotics Commissioner was not required.

5.3) The Export Promotion Council was not aware of the Government Notification amending NDPS Order to include the said chemical in the Schedule B.

5.4) The website of NCB had also not published any Notification requiring NOC of the Narcotics Commissioner for exporting the said chemical. According to Mr. Patil, it was only on 17th May 2019 that the Notification was updated on the website.

5.5) Even otherwise the Applicant can only be blamed of having committed a technical default of not procuring the required NOC. Moreover, the earlier consignments of the said substance were cleared by the Customs Officials and not held back for a lack of NOC.

5.6) The Customs Department continued to permit the export and import of the said chemical by Sam Fine O Chem Ltd. without any restriction without NOC for almost four months after the Applicant's consignment was dispatched on 1st June 2018.

5.7) The consignment comprising the said chemical was correctly described during the export and there was no misdeclaration by the Complainant.

5.8) The said chemical is used in various chemicals and in the absence of any other evidence, it cannot be said that, the Applicant exported the same for the manufacture of any narcotic drug or psychotropic substance.

5.9) According to Mr. Patil, Section 9A of the NDPS Act only regulates import inter-state and export inter-state of a controlled substance and does not apply to exports abroad.

5.10) It is thus the contention of the Applicant that, he has not committed any offence and the Respondent is on a wild goose chase to implicate the Applicant in whatever manner possible. It is urged that the FIR deserves to be quashed.

6) Mr. Satpute contends as follows:

6.1) The said chemical clearly falls in Schedule 'B' of the NDPS Order as amended and inserted by GSR 186 (E) dated 27th February 2018 with effect from the same date. The Notification was published in the

Official Gazette on 6th March 2018. The consignment was exported on 1st June 2018. The Applicant ought to have thus complied with the necessary requirements of obtaining the NOC from the Narcotics Commissioner as prescribed under the NDPS Act. Failure to do so resulted in commission of the said offence.

6.2) Since the Customs Officials failed to check the requirements of the export and verify adherence of compliance by the Applicant and other companies, the complaint has been lodged even against the Customs Officers concerned.

6.3) The witnesses, who are working with the Applicant have also given statements that they acted on the instructions of the Applicant.

6.4) The Applicant left India before registration of C.R.No.48 of 2019 which clearly brings home the guilt to him.

6.5) Upon enquiry with the office of the Narcotics Control Bureau, Rome, Italy, it was revealed that under the Italian Laws, the said chemical is considered to be a fore runner of drugs since 6th July 2018 and it was used for the production of 'Fenspiride Hydrochloride'. Thus, it is the say of the Respondent that the said chemical was imported into Italy without the Italian Government's approval.

6.6) It is stated that the Zonal Director addressing the Director of Sam Fine O Chem Ltd., was not the competent authority to issue NOCs and it is the Narcotics Commissioner, who is vested with the authority to grant

NOC under the NDPS Act.

6.7) In reference to the contention of the Applicant that the Government Notification was not uploaded in the Risk Management Centre for Customs ('RMCC'), it is contended that not uploading risk parameters does not excuse the Applicant from procuring NOC from the competent authority. Mr. Satpute handed over a letter dated 5th July 2024 issued by the then Zonal Director namely, Mr. Bruno A., clarifying that his letter to the Director of Sam Fine O Chem Ltd., dated 8th July 2019 was in reply to the Director's query regarding NOC from the NCB, Ahmedabad Unit. He clarified that the NCB Zonal was not competent to issue NOC for export/import of any controlled substance in Schedule B and hence, Mr. Bruno clarified the limitency of the role of his office.

6.8) Mr. Satpute thus urged the Court to dismiss the Application.

7) We have heard both the counsels and perused the documents on record with their assistance.

8) The only question that arises for our consideration is whether ignorance of notification published in the Government Gazette be a defence sufficient enough to justify quashing of F.I.R. by holding that no cognizable offence is *prima facie* made out from a plain reading of the FIR.

9) Section 79 of the Indian Penal Code ('IPC') provides that *nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in*

good faith, believes himself to be justified by law in doing it. It is settled legal position that ignorance of law is no defence to a criminal charge. In the landmark case of *Mayer Hans George v. State of Maharashtra*[1], it has been held by the Supreme Court as under:

> *"In a sense the knowledge of the existence or content of a law by an individual would not always be relevant, save on the question of the sentence to be imposed for its violation. It is obvious that for an Indian law to operate and be effective in the territory where it operates viz., the territory of India, it is not necessary that it should either be published or be made known outside the country. Even if, therefore, the view enunciated by Bailache J., is taken to be correct, it would be apparent that the test to find out the effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India. It was "published" and made known in India by publication in the Gazette on the 24th November and the ignorance of it by the Respondent who is a foreigner is, in our opinion, wholly irrelevant."*
>
> ***xxxxxxxxx***
>
> *".....Where there is statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of*

1 AIR 1965 SC 722

> *which could be the subject of prosecution but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in usual form i.e., by publication within the country in such media as generally adopted to notify to all the persons concerned the making of rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the rules made being published in the Official Gazette. It therefore stands to reason that publication in the Official Gazette viz., the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the person concerned.*"

10) 'Ignorance of law is no excuse for breaking it' is one of the essential principles of jurisprudence. The rationale behind this principle is that if ignorance was an excuse, every person who is charged for any offence or involved in a crime would merely claim that he was unaware of the law in question in order to avoid liability, even though he was well aware of the consequences of breaking the law. The law enforcement machinery shall come to a grinding halt if ignorance is accepted as a defence. It can also lead to mishandling of law on the part of law breakers and this can never be the intention of Legislature to protect the law breakers by providing a shield of ignorance. The Supreme Court in its decision in the case of *State of Bengal v. Administrator, Howrah*

Municipality and Ors.[2] held that the Assistant Divisional Manager of the Company-Appellant to not be an illiterate person or so ignorant person who could not calculate the period of limitation and such appeals filed by such companies daily.

11) In the case in hand, admittedly the Notification dated 27th February 2018 is published in the Government Gazette on 6th March 2018. The NDPS Act itself is publicised widely. Notwithstanding the fact that the Notification is a delegated legislation and not publicised as much as a statute enacted in the Parliament, nevertheless a company engaged in the business of export-import of pharmaceutical products and allied substances cannot be believed to be ignorant of the rules and regulations governing the said business. The Applicant is a regular purchaser of chemicals from manufacturing companies such as Sam Fine O Chem Ltd. The information available on the Ministry of Corporate Affairs Website clearly shows that, the company is incorporated on 23rd February 2012 and the Applicant is a director from its inception. Thus, he is aware of the dynamics of the business since 2012. Apprising and updating himself with the ever-changing developments in the export import legislations and rules and regulations thereof must obviously be regular activity of the company and its officials. The Applicant cannot justify the omission to comply with the requirements of exports on the pretext that the RMCC or the Export Promotion Council of

2 AIR 1972 sc 749.

India – (Pharmexcil) failed to update the Notification on its own website. The Export Promotion Council is merely a facilitator in promoting exports of pharmaceutical products. Similarly, the RMCC is an IT driven system with the primary object to strike an optimal balance between facilitation and enforcement and to promote a culture of self compliance in custom clearance. It is in fact a facilitator for the custom officials to assist in enhancing security by focusing efforts on "high risk" imports and detecting dangerous, prohibited or restricting goods. This perhaps may be a defence that may shield the Customs Officials but does not justify the Applicant failure of non-compliance of the provisions of the NDPS Act.

12) In yet another decision in the case of *M/s. Pankaj Jain Agencies v. Union of India*[3], the Supreme Court rejected as unacceptable, the contention of the Petitioner in that case that, notwithstanding the publication in the official gazette there was yet a failure to make the law known and that, therefore the Notification did not acquire the elements of operation and enforceability. The Supreme Court later reiterated its own view in its earlier decision in the matter of *B.K.Srinivasan & Ors. v. State of Karnataka*[4]

> *"15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the*

3 1994 SCC (5) 198
4 (1987) 1 SCC 658

law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's `unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation……."

13) Admittedly, Section 1(3) of the NDPS Act specifies that the Act shall come into force on such date as the Central Government may, by Notification in the Official Gazette appoint and different dates may be appointed for different provisions of this Act. Amendment to the NDPS

Order was brought about by Notification dated 27th February 2018 and was published in Government Gazette on 6th March 2018 by the Ministry of Finance. Thus, the parent statute, i.e., the NDPS Act itself prescribed the manner in which provisions will take effect. The manner as specified is followed and the Notification is published in the Official Gazette. The negligence or omission of the Applicant to update himself regarding applicable law for the time being in force, to his business activity is not an excuse for non-compliance. Moreover, the letter of the Zonal Director addressed to the Director of Sam Fine O Chem Ltd., will not aid the present Applicant since it is his independent duty to verify necessary compliance and act in aid thereof. We agree with the arguments advanced by the learned APP Mr. Satpute in this regard.

14) The law relating to parameters of quashing FIR are well settled in the case of *State of Haryana v. Bhajanlal*,[5] wherein the Supreme Court held as under:

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration*

5 1992 Supp (1) SCC 335.

wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint

are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance 6 of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.."

15) The Supreme Court in a recent decision in the case of *Priyanka Jaiswal v. The State of Jharkhand and Ors.*[6] has observed as under:

"13……This Court in catena of judgments has consistently held that at the time of examining the prayer for quashing of the criminal proceedings, the Court exercising extra-ordinary jurisdiction can neither undertake to conduct a mini trial, nor enter into appreciation of evidence of a particular case. The correctness or otherwise of the allegations made in the complaint cannot be examined on the touchstone of probable defence that the accused may raise to stave

6 2024 INSC 357

off the prosecution and any such misadventure by the Courts resulting in proceedings being quashed would be set aside.....”

16) Considering the settled legal position, we are not required to examine the defence of the Applicant at this stage. The defence of the Applicant pertaining to failure of the RMCC to update the Notification on its website, a deliberate omission of the Customs Officials in failing to verify compliance by exporters and/or a genuine lapse of officials to update the Notification on the RMCC website, etc., can be tested before the trial Court. We are of the view that the allegations in the FIR taken at their face value *prima facie* discloses commission of a cognizable offence. We are thus not inclined to exercise our inherent powers under Section 482 of the Code of Criminal Procedure, 1973 to quash the FIR.

17) The Criminal Application is thus dismissed.

18) Rule is accordingly discharged.

19) In view of dismissal of Criminal Application, Interim Application No.3958 of 2023 pending therein shall also stand disposed off.

(DR NEELA GOKHALE, J.) (A.S. GADKARI, J.)

20) At this stage, learned Advocate for Applicant submitted that, the Applicant intends to test the correctness of the present Order before the Hon’ble Supreme Court. He submitted that, by an Order dated 13th March

2023, the ad-interim relief has been granted in favour of the Applicant, which may be continued for a period of four weeks from today.

21) Learned APP opposed the said motion.

22) However, taking into consideration the fact that, an important question of law is involved in the Application, we deem it appropriate to continue the ad-interim relief, granted by Order dated 13th March 2023, for a period of four weeks from today.

(DR NEELA GOKHALE, J.) (A.S. GADKARI, J.)