

Santosh/Niti/Amrut/Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO.752/2021 (F)

H. S. ARUN KUMAR,

... APPLICANT

Versus

THE STATE OF GOA, Through
Police Inspector, Anjuna Police
Station, Anjuna, Bardez, Goa.

... RESPONDENT

Mr Ryan da Menezes, Mr Dhaval Zaveri, Mr Nigel John
Fernandes, Ms Gina Almeida, Mr S. Kamulkar, Mr N. Govekar
and Ms S. Alvares, *Advocates for the Applicant.*

Mr Anil Singh, Additional Solicitor General of India, with Mr
Pravin Faldessai, Deputy Solicitor General of India; Mr Raviraj
Chodankar, Central Government Standing Counsel; Mr Aditiya
Thakkar and Mr Shreeram Sirsat, *Advocates for the Narcotic
Control Bureau.*

Mr S. G. Bhohe, *Public Prosecutor for the State.*

Mr Rizwan Merchant with Mr Gaurish Agni, Mr Taraq Sayed, Ms Gayatri Gokhale Moorjani, Ms Zainba Abdi, Advocates for the accused persons.

Ms Caroline Collasso, Mr Shivan Desai, and Mr K. Poulekar, Advocates for the accused persons.

CORAM : M. S. SONAK &
BHARAT P. DESHPANDE, JJ.

Reserved on : 19th OCTOBER 2022

Pronounced on: 9th NOVEMBER 2022

JUDGMENT : (Per M. S. Sonak, J.)

1. Heard the learned Counsel.
2. The issue in this reference is whether the combined weight of the L.S.D. and the blotter or just the weight of the pure L.S.D. is relevant to determine the small or commercial quantity and the consequent punishment under the NDPS Act, 1985.
3. *Hitesh Hemant Malhotra vs. State of Maharashtra*¹, delivered by S. K.Shinde, J. holds that only the weight of the Pure L.S.D. matters. In *Narcotics Control Bureau vs. Anuj*

¹ 2020 S.C.C. online Bom. 3581

*Keshwani and anr.*², Revati Mohite Dere, J. holds that the combined weight of the blotter impregnated with L.S.D. is determinative in such matters.

4. On 28.07.2022, S. K. Shinde, J. made a referral order in Criminal Application (Bail) No.752/2021 (F) after noticing the above conflict and formulated the following questions for reference to a Bench of two Judges.

i. Whether blotter paper forms an integral part of the L.S.D. (drug), when put on it for consumption and, as such, weight of blotter paper containing L.S.D. will have to be considered for the purpose of determining small or commercial quantity of the offending drug, under the Narcotic Drugs & Psychotropic Substances Act, 1985?

ii. Whether blotter paper that carries drug (L.S.D. drops) which facilitate its consumption, as a whole is preparation or mixture or neutral substance within the meaning of the Narcotic Drugs & Psychotropic Substances Act, 1985?

5. Based on the above, The Hon'ble The Chief Justice, by Order dated 02.08.2022, referred the above two issues raised for consideration by the Regular Division Bench. Accordingly, the reference was heard on 12.10.2022, 17.10.2022, 18.10.2022 and

² 2021 SCC OnLine Bom 4548

19.10.2022. Upon conclusion of the hearing, reference was reserved for orders on 19.10.2022, which was the last sitting of the Division Bench before the Diwali vacations.

6. At the outset, Mr Anil Singh learned Additional Solicitor General of India submitted that this reference was incompetent and should be returned unanswered because the referral order neither disagrees with nor doubts the reasoning and conclusion in *Anuj Keshwani (supra)*. He submits that the referral order does not quote Rule 8 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 and opines that the matter could be more advantageously heard by a Bench of two or more judges. He submits that the absence of such "*jurisdictional facts*," the reference is incompetent. He relies on *Arun Kumar & Ors. vs. Union of India*³, *Trimurti Fragrances (P) Ltd. vs. Government of N.C.T., Delhi*⁴ and *Kerala State Science and Technology Museum vs. Rambal Co. & Ors.*⁵ in support of these contentions.

7. Mr Rizwan Merchant points out that the referral order notes the conflict between *Hitesh Malhotra (supra)*, which was incidentally delivered by the referral judge and *Anuj Keshwani*

³ 2007 (1) SCC 732

⁴ 2022 SCC OnLine SC 1247

⁵ 2006 (6) SCC 258

(*supra*). He submits that the referral order must be read and construed holistically. He presents that *Hitesh Malhotra (supra)* and *Anuj Keshwani (supra)* have considered ***Hira Singh vs. Union of India***⁶, and therefore the doctrine of *per incuriam* was not attracted. Mr Merchant relied on some decisions in support of his submissions. Based upon this, Mr Merchant submits that the reference was perfectly competent.

8. In our judgment, the referral order must be read and construed holistically, keeping in mind the background in which the same was made. The orders of the Court are not Statutes and, therefore, must not be interpreted like Statutes. The circumstance that *the referral judge decided Hitesh Malhotra (supra)* is also relevant and cannot be ignored.

9. The referral order explicitly refers to the conflict between *Hitesh Malhotra (supra)* and *Anuj Keshwani (supra)*. The referral order styles the view of the Coordinate Bench in *Anuj Keshwani (supra)* as "*a contrary view*". The very use of this expression, coupled with the significant circumstance that the referral judge himself delivered *Hitesh Malhotra (supra)*, makes it clear that the referral judge stands by his view in *Hitesh Malhotra (supra)* and regards the view in *Anuj Keshwani (supra)* as a contrary view,

⁶ (2020) 20 SCC 272

with which he disagrees. Even the Hon'ble The Chief Justice, though on the administrative side, construed the referral order as noting the conflicting views on the subject and, consequently, the necessity of the issue being decided by a Bench of two judges.

10. After recording the conflict between the two sets of decisions, the referral order states that "*it would be appropriate to refer the following issues to a Bench of two Judges*". Again, this expression suggests that the referral judge deemed it appropriate to propose a reference to a Bench of two judges so that the contrary views on the same subject and the resultant uncertainty do not persist. This is another and perhaps a more elegant way of saying that this issue could be more advantageously decided by a Bench of two or more judges.

11. Besides, as was pointed out by Mr Merchant, the conflicting decisions specifically noted the Supreme Court decision in *Hira Singh (supra)*. *Anuj Keshwani (supra)* followed the binding precedent, but *Hitesh Malhotra (supra)* distinguished it. Even *Anuj Keshwani (supra)* does not give a clear finding about *Hitesh Malhotra (supra)* being *per incuriam*. There is only the sentence in para 35 about "*the orders in Hitesh Malhotra*

(*supra*) and *Harsh Meshram vs. The State of Maharashtra*⁷ cannot be said to have any binding effect".

12. Therefore, it is apparent that the two Learned Single Judges have reached different findings or conclusions on the issue of whether the combined weight of the blotter and L.S.D. is determinative in such matters. The referral order refers explicitly to the contrary views on the subject and then opines about the appropriateness of a reference to a Bench of two judges. Based on all this, we are satisfied that this reference is competent and is best decided on its merits. The decisions Mr Singh relied upon do not apply or are distinguishable. The same are discussed briefly hereafter.

13. *Arun Kumar (supra)* is inapplicable because no jurisdictional facts are involved, and the jurisdictional parameters essential to sustaining a reference are very much present. *Trimurti Fragrances (supra)* states that a reference is incompetent without conflict between two decisions. Here, the conflict is apparent. *Kerala State Science and Technology Museum (supra)* does not apply because, as the Reference Court, we do not propose adjudicating upon any issue alien to the questions referred. *Shakuntalabai Krishna Bhoyar & Ors. vs. State of*

⁷ Criminal Bail Application No.1671 of 2021 decided on 13.05.2021

*Maharashtra, through Collector, Nagpur*⁸ explains that a decision rendered by the High Court without considering a binding precedent of the Supreme Court on the subject would be *per incuriam*. Here, *Hira Singh (supra)* was considered in the conflicting decisions.

14. On merits, Mr Rizwan Merchant, Ms C. Collaso and Mr K. Poulekar submitted that the weight of the blotter paper must be excluded because L.S.D. on a blotter was not a mixture, and a blotter was not a "*neutral substance*" in the context of L.S.D. They referred to the definition of *coca leaf* in Sections 2(vi) and *opium* in 2(xv) of the NDPS Act. They offered that wherever the weight of neutral substance was intended to be considered, the Legislature has said so. Emphasizing the word "*such*", they urged that a preparation or mixture under the NDPS Act contemplates a preparation or mixture of two or more drugs or psychotropic substances.

15. Mr Merchant submitted that *Anuj Keshwani (supra)* was based on the incorrect premise that the consumers invariably swallow the blotter along with the L.S.D. drop on it and that it was impossible to separate L.S.D. once dissolved in a solvent and dropped on a blotter. He repeatedly raised that after a blotter with

8 1986 SCC OnLine Bom 121

L.S.D. drop is placed on the tongue or licked, the L.S.D. upon it is infused in the consumer's body leaving behind a benign blotter without any traces of L.S.D. on it. He submits that such a benign blotter may or may not be swallowed by the consumer. He offered that since the scientific techniques had made it possible to determine the exact contents of the pure L.S.D. from the blotter, there is no good reason for taking into account the weight of the blotter to decide whether the quantity is small, intermediate or commercial.

16. Mr Merchant submits that interpretation in *Anuj Keshwani (supra)* exposes the provisions to the charge of discrimination and violation of fundamental rights guaranteed to an accused under the Constitution of India. He submits that the dosage of pure L.S.D. is so tiny that a dealer or a peddler with several doses of pure L.S.D. may qualify to be sentenced for possessing a small or intermediate quantity. In contrast, the consumer, if the weight of the blotter is to be included, may be convicted for possessing to commercial quantity. He submits that such discriminatory results can be avoided by excluding the weight of the blotter and focusing on pure L.S.D. contents.

17. Mr Merchant, Ms Collasso and Mr Poulekar submitted that *Hira Singh (supra)* would have no application in the context

of L.S.D., which is unique in its characteristics and properties. They propose that the observations in *Hira Singh (supra)* must be restricted in the context of the drug "heroin". They submitted that even *Hira Singh (supra)* holds that L.S.D. blotter is only a carrier, facilitating its consumption. However, the same is neither a preparation nor a mixture within the meaning of the NDPS Act.

18. Mr Merchant submitted that no reliance could be placed on *Richard L. Chapman vs. United States*⁹ and *Finch vs. The Queen*¹⁰ because the legislative schemes of the Statutes in the United States of America and Australia were at a tangent from the statutory scheme of the NDPS Act in India. He offered that even the International Convention, to which India is a party, provides that the applicability of any foreign legislation would depend upon the domestic or applicable Constitutional provisions. Finally, Mr Merchant submitted that even *Hira Singh (supra)* merely referred to *Chapman (supra)* but did not rely upon it.

19. For all the above reasons, Mr Merchant, Ms Collasso and Mr Poulekar commended the adoption of the view in *Hitesh*

⁹ 1991 SCC OnLine US SC 85

¹⁰ 2016 NSWCCA 133

Malhotra (supra) and *Harsh Meshram (supra)* in preference to the view in *Anuj Keshwani (supra)*.

20. Per Contra, Mr Anil Singh submitted that the preparation, defined under Section 2(xx), includes a mixture. A plain reading of the definition along with Note 4 below S.O. dated 19.10.2001 makes it clear that a blotter containing L.S.D. would be a preparation (which includes a mixture) of a psychotropic substance. Therefore, the entire weight must be taken into consideration. He submits that the L.S.D., which is admittedly a psychotropic substance combined with a blotting paper, would amount to a mixture. He submits that the L.S.D., when put on a blotting paper, would also amount to a dosage since that is how L.S.D. is consumed. He, therefore, commended the adoption of the view taken by *Anuj Keshwani (supra)*.

21. Mr Singh and Mr Bhoje referred to the Statement of Objects and reasons for the amendment Act 2016 and the dictum in *Hira Singh (Supra)*. They offered the dictum in *Hira Singh (supra)* was a drug or psychotropic substance-agnostic dictum. The principles in the said decision would equally apply to L.S.D. They submitted that the principles in *Chapman (supra)* or *Finch (supra)* apply to the issue at hand and must be considered, given their persuasive value.

22. The rival contentions now fall for our consideration.

23. The Scheme of the NDPS Act provides graded sentences for possession of small, intermediate and commercial quantities of narcotic drugs or psychotropic substances. Therefore, the penalties or the sentencing has a direct nexus with the amount of the contraband psychotropic substance.

24. Besides, Section 37 of the NDPS Act imposes certain limitations when granting bail for offences involving a commercial quantity of narcotic drugs or psychotropic substances. These limitations are in addition to those under the Cr.P.C. or any other law for the time being in force.

25. Therefore, much turns on the issue of the quantification of the contraband drug or the psychotropic substance in the context of sentencing after trial and bail during the trial. The two questions referred to in paragraph 5 of Justice Shinde's referral order dated 28.07.2022 or in the actual referral order dated 02.08.2022 in sum and substance require us to consider whether, in determining small, intermediate or commercial quantities, the combined weight of the blotter impregnated L.S.D. or just the pure L.S.D. is the crucial determining factor.

26. *Hitesh Malhotra (supra)*, decided by the referral judge S. K. Shinde, J., has held that only the weight of pure L.S.D. is the determining factor and not the combined weight of blotter and L.S.D. impregnated in the blotter. The Court further held that since the blotter containing dried L.S.D. drops of L.S.D. solution is neither a mixture nor a neutral substance, *Hira Singh (supra)* has no application.

27. *Harsh Meshram (supra)* was delivered by another learned Single Judge S. P. Tavde, J. on 13.05.2021. This decision follows *Hitesh Malhotra (supra)*. The reasoning in paragraph 11 of *Hitesh Malhotra (supra)* has been quoted verbatim in paragraph 7 of *Harsh Meshram (supra)*. Therefore, there is no separate reasoning in *Harsh Meshram (supra)*.

28. *Anuj Keshwani (supra)* was decided by another learned Single Judge Revati Mohite Dere, J. on 29.11.2021. The learned Single Judge, upon a detailed consideration of the statutory provisions and national and international precedents on the subject, concluded that the blotter paper forms an integral part of L.S.D. when put on a blotter paper for consumption and, as such, the weight of the blotter paper containing L.S.D. will have to be considered for determining a small or commercial quantity of the offending drug.

29. Mr Merchant, at one stage, did contend that L.S.D. is in liquid form and, therefore, there is arbitrariness involved in entry 133 of the Schedule measuring it in milligrams. He also argues that each tile of the blotter alleged to be impregnated with L.S.D. must be separately analyzed. *Anuj Keshwani (supra)*, in paragraphs 37 to 43, refers briefly to the later issue of separate analysis. But both these issues are not referred to for our consideration in this reference. Therefore, there is no question of our addressing the said issues in this opinion. Nevertheless, this position is made clear at the outset, lest we are otherwise misunderstood.

30. The legal literature and precedents on the subject reasonably establish that the most common method of storing, transporting, concealing, selling, purchasing, consuming or otherwise dealing with L.S.D is impregnating it in a blotter. Such a blotter is not the usual ink blotter but an ultra-thin, ultra-absorbent blotter mostly made of rice, cotton, or flax seeds. Such a blotter impregnated with L.S.D. is placed on or below the tongue, licked, and mostly swallowed or otherwise ingested. This is because a pure dose of L.S.D. is exceptionally potent. Therefore, even a typical dosage is minuscule, i.e. in the range of 30 to 150 milligrams. These were the unique characteristics or properties referred to by the Counsel for the accused person.

31. These so-called unique characteristics and properties are reflected in the several reported matters on the subject. *Hitesh Malhotra (supra)* and *Anuj Keshwani (supra)* also refer to these aspects in the precise context of L.S.D. on a blotter. Even the written submissions by the learned Additional Solicitor General and the learned Counsel for the accused person have referred to these aspects. There is no significant variation between the two versions. Thus, the Counsel raised no serious or irreconcilable disputes on these factual aspects. Therefore, referencing these factual aspects and noticing how they have been addressed would assist in evaluating the subject's statutory provisions and precedents.

32. *Hitesh Malhotra (supra)* records that L.S.D. is sold on the streets in small tablets (microdots), capsules or gelatin squares. It is so potent that a small effective dose of the pure drug is virtually invisible (inconceivable). As a result, it is usually diluted with other materials. In the said case, L.S.D. was found in the form of drops dried on 23 pieces of paper (blotters). The Court noted that the most common form of L.S.D. is a drop of L.S.D. solution dried on to piece of paper or gelatin sheet, pieces of blotter paper which release the drop when swallowed/consumed. From this, the Court noted that drying L.S.D. on a piece of paper merely facilitates L.S.D. consumption. This process neither

changes the drug (psychotropic substance) nor its chemical composition.

33. *Anuj Keshwani (supra)*, records that L.S.D. is often added to absorbent paper, such as 'blotter paper'. The paper can be divided into small squares, 'tabs', with each square representing one dose called a 'hit'. Unlike toilet paper or tissue paper, blotter paper appears to be made from an extra-absorbent material and generally includes ingredients such as rice, cotton and even flax seed. It is impossible to visually identify the strength or type of drug when buying. Drug active in the microgram range, most notably 'L.S.D.', is commonly distributed illicitly on blotter paper. A liquid solution of the drug is applied to the blotter paper, which typically is perforated into individual doses. Blotter as a delivery method allows for easy dosing of potent substances and easy sublingual administration of drugs. The Court noted that the standard L.S.D. dose appears to be around 30–150 micrograms (mcg). A single 'hit' on a blotter paper contains L.S.D. in this range. Without chemical testing, it is impossible to know the quantity of L.S.D. on the blotter paper.

34. Thus, on the factual aspect concerning the use of a blotter paper to facilitate the distribution, storage, sale, concealment and consumption of L.S.D., there is no significant divergence between

Hitesh Malhotra (supra) and *Anuj Keshwani (supra)*. Moreover, learned Counsel referred to and relied upon several decisions, including *Harsh Meshram (supra)* and *Datta Paratkar vs. State of Goa*¹¹, *Rijesh Ravindran vs. Union of India*¹², *Sreeraj vs. State of Kerala*¹³, where blotters with L.S.D. were seized in a form substantially similar to that described in *Hitesh Malhotra (supra)* and *Anuj Keshwani (supra)*.

35. *Chapman (supra)* decided by the **United States Supreme Court** records that according to the sentencing commission in the United States, the L.S.D. in an average dose weighs 0.05 milligrams; there are, therefore, 20,000 pure doses in a gram. The pure dose is such a tiny amount that it must be sold to retail customers in a "carrier." First, pure L.S.D. is dissolved in a solvent such as alcohol; either the solution is sprayed on paper or gelatin, or the paper is dipped in the solution. The solvent evaporates, leaving minute amounts of L.S.D. trapped in the paper or gel. Then the paper or gel is cut into "one-dose" squares and sold by the dose. Users either swallow the squares, lick them until the drug is released, or drop them into a beverage, thereby releasing the drug.

11 2015 SCC OnLine Bom 5630

12 2020 SCC OnLine Kar 3401

13 Bail Application No.1718/2021

36. *Chapman (supra)* also records that although L.S.D. is not sold by weight but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes L.S.D. easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic the drug; therefore, it was rational for Congress to set penalties based on this chosen tool. Congress was also justified in avoiding arguments about the accurate weight of pure drugs that might have been extracted from blotter paper had it chosen to calibrate sentences according to that weight. The Court also noted that the blotter paper seems to be the carrier of choice. The vast majority of cases will therefore do exactly what the sentencing scheme was designed to do - punish those who deal in larger amounts of drugs more heavily. The United States Supreme Court held that the combined weight and not just the weight of pure L.S.D is relevant for punishment.

37. In *United States vs. Marshall*¹⁴, the United States Court of Appeals for the **Seventh Circuit**, was also concerned *inter alia* with the sale of ten sheets (1,000 doses) of blotter papers containing L.S.D. Incidentally, it is against the judgment delivered in this matter by the Seventh Circuit that the United States Supreme Court issued certiorari and ultimately affirmed

¹⁴ 908, F.2d 1312

the Majority view that the combined weight of the blotter and L.S.D. was relevant for sentencing (Chapman's case).

38. *United States vs. Marshall (supra)* records that L.S.D. and blotter paper are not commingled in the same way as cocaine and lactose. What is the nature of the association? The possibility most favourable to the defendants is that L.S.D. sits on blotter paper as oil floats on water. Immiscible substances may fall outside the statutory definition of "mixture". The possibility does not assist defendants - not on this record, anyway. L.S.D. is applied to the paper in a solvent; after the solvent evaporates, a tiny quantity of L.S.D. remains. Because the fibres absorb the alcohol, the L.S.D. solidifies inside the paper rather than on it. You cannot pick a grain of L.S.D. off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of L.S.D. a mixture.

39. *United States vs. Marshall (supra)*, which the U.S. Supreme Court affirmed in *Chapman (Supra)*, gives three reasons supporting the law, making penalties depend upon gross(combined) rather than net(pure L.S.D.) weight:-

"(i) First, L.S.D. is sold at retail for a low price (a few dollars per dose). Blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell. Because the carrier

medium is an ingredient in the drug distribution business, it is rational to design a schedule of penalties based on that tool of the trade. Similarly, it is rational to make the penalty depend upon a carrier that is essential to successful distribution of the drug.

(ii) Second, extracting the "pure" drug and debating whether that task has been done properly is unnecessary if, 99% of all cases, L.S.D. is sold in blotter paper. Why reduce the amount to a pure measure if that almost never spells a difference? No one has been prosecuted for distributing L.S.D. in sugar cubes in the last 20 years. Similarly, no one has been prosecuted for possessing significant quantities of pure L.S.D. in the last decade. Why worry about how to treat manufacturers caught red-handed with pure dry L.S.D. if they are never nabbed? Statutes rationally may be addressed to the main cases rather than the exceptions.

(iii) Third, extracting L.S.D. from blotter paper and weighing the drug accurately may be difficult. One dose is an exceedingly small quantity of pure L.S.D. Counsel suggested at oral argument that it takes a specialist in gas chromatography to extract the drug, and that this is done only for samples rather than the defendant's entire supply. Figures reported in the cases (including this one) are extrapolations from samples, not actual weights. Congress rationally may decide to avoid a costly and imprecise process."

40. In *United States vs. Rose*¹⁵, the United States Court of Appeals for **Seventh Circuit**, this time speaking through Posner, J. (who had filed a dissenting opinion in *United States vs.*

15 881 F.2d 386

Marshall), was concerned with the L.S.D. – saturated blotter paper with a combined weight of 7.3 grams out of which the net weight of L.S.D. was only 0.01787 grams.

41. The Court noted that drugs are rarely taken in undiluted form. Instead, the active agent is combined with inactive ones. L.S.D., which is so potent that a pure dose would be a barely visible droplet, is commonly ingested in either of two forms. The first is swallowing a sugar cube or candy soaked with L.S.D. in an alcohol solution. The second involves the blotter paper, usually an 8 by 5-inch sheet sectioned in little squares, each with a spot of L.S.D. in an alcohol solution. The user cuts off one of the squares, swallows it, or dissolves it in a beverage. In combination with the blotter paper, the quantity of L.S.D. that Rose sold supplied almost 500 doses. Suppose the paper had weighed only a seventh as much (bringing the sale down to the minimum weight that triggers the five-year no-parole minimum term in section 841(b)(1)(B)(v), the sale would still have been of 70 doses – a non-trivial amount. A lighter carrier than paper (remember that this is not "blotter paper" in the conventional sense) is hard to imagine. The Court held that the paper carrier in which L.S.D. is sold, like the LSD-saturated sugar cube or candy, is a "substance or mixture containing a detectable amount of L.S.D." And it is,

therefore, the weight of the carrier plus the L.S.D., rather than of the L.S.D. alone, that determines the gravity of the offence.

42. In *United States vs. Taylor*,¹⁶ the United States Court of Appeals for the **Fifth Circuit**, was again concerned with L.S.D. on a blotter (distribution medium paper), the combined weight of which was 17.53 grams. The Court held that it was this combined weight that was relevant. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity.

43. In *United States vs. Bishop*,¹⁷ the United States Court of Appeals for the **Fifth Circuit**, was again concerned with the same issue. The Court noted from the Trial Judge's Order about the testimony indicating that users of L.S.D. either licked the L.S.D. from the tab of blotter paper, which dissolved the impregnated L.S.D. with their saliva, or simply chewed and swallowed the small square of blotter paper containing the absorbed L.S.D. The method of ingestion was a matter of the user's personal preference. The Trial Judge observed that what is important is

16 868 F.2d 125

17 894 F.2d 981

that the blotter paper itself can be and is ingested with the drug much the same as any dilutant or cutting agent would be ingested.

44. The Court rejected the contention that using blotting paper as a carrier for L.S.D. provides no greater threat to society than L.S.D. in its pure form, and therefore, Congress did not intend that the weight of the paper be included in the weight calculation. The Court held that this argument overlooks the fact that "*the pure chemical compound of L.S.D. is extremely potent – far too potent to be of any use to those who would ingest it. It is, therefore, necessary to dilute the solid L.S.D. and convert it into an easily ingestible form.*" The L.S.D. carriers serve the same function as cutting agents. The blotter paper serves the purpose of making the L.S.D. ready for retail sale and ingestion by the user. The Court held that Congress recognized this and intended the weight of the carrier to be included.

45. In *United States vs. Bishop (supra)*, the defendants, offered examples of L.S.D. being included in suitcases, bricks, etc., to illustrate that absurdity results from including the weight of the carrier in the weight calculation. The Court disposed of such objections by observing thus:

"Appellants offer examples of L.S.D. being included in suitcases, bricks, etc., to illustrate that absurdity results from including the weight of the carrier in the weight calculation. We do not believe this parade of horrors requires that we reach a different conclusion here. Our job is not to speculate about "extraordinary circumstances in which a legislative scheme breaks down; we live in a real world, and so apply the law to real world facts. We will deal with absurd situations when they are before us; for now we will assume that Congress knew distributors like Defendant would be faced with these enhanced sentencing provisions."

46. In *United States vs. Daly*¹⁸, the United States Court of Appeals for the **Fourth Circuit**, was again concerned with the seizure of approximately 755 grams of blotter paper impregnated with L.S.D. The test later revealed that the "un-cut" L.S.D. contained in the paper weighed about 2.33 grams. The Court noted that the distributors normally "cut" the L.S.D. by impregnating the pure, liquid drug in sugar cubes or blotter paper. Users then take the drug by ingesting the sugar or paper. Therefore, the dispositive question was whether blotter paper impregnated with L.S.D. constitutes a "mixture or substance containing a detectable amount" of the drug. The Court held that it does and affirmed the decision of the Trial Court using the combined weight of the un-cut L.S.D. and the blotter paper to determine the defendant's base offence level.

18 883 F.2d 313

47. In *United States vs. Elrod*¹⁹, the United States Court of Appeals for the **Sixth Circuit**, was concerned with a conviction for possessing L.S.D. on a blotter paper. The combined weight of the blotter with the L.S.D. on it was approximately 11 grams, of which 0.09 grams were pure L.S.D. The Court noted that the blotter paper referred to is not the type of paper used to absorb ink. Rather, it is considerably thinner, of the same consistency, and generally off-white in colour. Most often, the blotter paper is perforated into 1-inch sections upon which approximately 25 micrograms (the amount of a normal dosage) of L.S.D. are placed. The impregnated square is sometimes ingested; at other times, it is used to transfer the L.S.D. for ingestion by other means. The Court ultimately affirmed the Trial Court's sentence based upon the blotter's and L.S.D's combined weight.

48. In *United States vs. Larsen*²⁰, the United States Court of Appeals for the **Tenth Circuit**, was again concerned with the L.S.D. on a blotter. The Court noted the substance was sold with individual drops absorbed or spotted on blotter paper. The Court concluded, in agreement with all of the other Circuit-level decisions, that the weight of the blotter paper was considered correctly, mainly because the blotter paper is often ingested with the

¹⁹ 898 F.2d 60

²⁰ 904 F.2d 562

L.S.D. and is one of the most commonly used carrier mediums for L.S.D., as well as one of the least weighty. The Court noted that it did not have an absurd fact situation, such as a hit of L.S.D. placed on a two-pound brick before it. The Court held that it would deal with such an unusual situation when it comes before it and not in the abstract.

49. Thus, practically, all the United States Circuit Courts of Appeals addressing this issue have dealt with the L.S.D. on blotters and held that the weight of the entire substance or the combined weight should be used to determine the appropriate sentence and not just the weight of the pure L.S.D. on the blotter.

50. **Michell Ram Calame** writing in the Louisiana Law Review (Article 8, Vol.52, 5th May 1992), records that all District Courts in the United States addressing the issue except one have held similarly. Thus, an overwhelming number of Courts in the United States have decided to include the weights of the pure drug or psychotropic substances to determine sentences. As noted earlier, such decisions of the District Courts and the Court of Appeals have been affirmed by the United States Supreme Court in *Chapman (supra)*.

51. In *Finch (supra)*, decided by the Criminal Court of Appeals for New South Wales (**Australia**), L.S.D. was impregnated within a cardboard square. There was evidence that the cardboard square was designed to be swallowed and, accordingly, the cardboard impregnated with L.S.D. was ingested by a user. The cardboard was not analogous to a container or syringe from which the user extracted a drug. A much closer analogy would be the non-drug content of a film coating or a gelatin capsule used in producing lawful drugs as described by the Full Federal Court in *Sigma Pharmaceuticals (Australia) Pty Ltd vs. Wyeth*²¹. That film coating or gelatin capsule is an integral part of the ingestion by the user of the drug. In the same way, the Court held that the cardboard impregnated with L.S.D. was an integral part of the ingestion by the user of the drug and thus a "preparation" or a "substance" within the meaning of Section 4 of the Drug Misuse & Trading Act, 1985.

52. On this factual aspect, even *Hira Singh (supra)*, in paragraph 10.3, records that illicit drugs are seldom sold in pure form. They are almost always adulterated or cut with other substances. For example, caffeine mixed with Heroin causes that Heroin to vaporize at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed

²¹ (2011) 119 IPR 194

tablets, could have enough powder to amend reversal doses of drugs. Take the example of Heroin. It is known as a powerful and illegal street drug and opiate derived from morphine. This drug can easily be "cut" with a variety of different substances. This means that drug dealers will add other drugs or non-intoxicating substances to the drug so they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substance is only about 20% heroin. The Heroin is mixed with other substances like chalk powder and zinc oxide; brown sugar is cheaper but more dangerous because of these impurities in the drug. These are only a few examples demonstrating that even a mixture of narcotic or psychotropic substances is more dangerous.

53. The Supreme Court noted that, therefore, what is harmful or injurious is the entire mixture/tablets with neutral substances and Narcotic Drugs or Psychotropic Substances. Therefore, going only by the weight of the pure drug or psychotropic substance would frustrate the intention and purpose of enacting the NDPS Act. There may be few punishments for "commercial quantity". Indeed, that would not have been the intention of the Legislature.

54. The Supreme Court noted that even considering the definition of "manufacture", "manufactured drug", and the

"preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material, is required to be considered while determining the small quantity or commercial quantity. Only such an interpretation would achieve the objectives and purpose of the NDPS Act. Any other interpretation to defeat the object and purpose of enactment of the NDPS Act as a deterrent.

55. Thus, both Nationally as well as Internationally, there appears to be a common ground as to the mode or how L.S.D. is usually dealt with in the market or on the streets or the mode or manner in which L.S.D. is consumed by impregnating it into a blotter and after that, at least in most cases, ingesting L.S.D. along with the blotter. Mr Merchant, however, did urge that the users place the L.S.D. impregnated into the blotter either on or below their tongue or simply lick the same, and what remains is a benign blotter free from any traces of L.S.D.

56. However, no material was produced in support of the above submission except to say that there are instances where the blotter is not actually ingested but spat out. Suffice it to state that the Legislature is presumed to know the existing state of affairs, including the market or the street conditions, before it enacts any legislation.

57. Therefore, the swallowing or chewing of the blotter cannot become a significant distinguishing factor. Besides, the extreme instances or examples raised in the abstract cannot govern statutory interpretation in all cases. Nevertheless, the review of precedents, Nationally and internationally, establish that the combined weight of the blotter and the L.S.D. is crucial to the quantification upon which the punishment depends.

58. Coming to the statutory provisions and the regime in the NDPS Act, there is no dispute about L.S.D. being a psychotropic substance as defined under Section 2(xxiii) read with Entry 4 in the Schedule, where it is described as L.S.D., LSD-25. The international non-proprietary name specified in the Schedule is (+) - LYSERGIDE. The chemical name is specified as (+)-N. N-Diethyllysergamide (D-lysergic acid diethylamide).

59. Section 2(xxiii) defines "psychotropic substance" means any substance, namely 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. Thus, a psychotropic substance includes a preparation thereof. Alternatively, the preparation of psychotropic substances is also covered under the definition of psychotropic substance.

60. The term "preparation" is defined under Section 2(xx). The same reads as follows:-

*"preparation", in relation to a narcotic drug or psychotropic substance means **any one or more** such drugs or substances in dosage form or any solution **or mixture, in whatever physical state, containing one or more such drugs or substances"***

61. The expressions "*small quantity*" and "*commercial quantity*" are defined under Section 2(xxiii) and Section 2(viia) of the NDPS Act as meaning quantities lesser than or greater than the quantity specified by the Central Government by Notification in the Official Gazette. The Central Government has issued a notification S.O. 1055(E) dated 19.10.2001 in the exercise of powers conferred by clauses (viii) and (xxiii) of Section 2 of the NDPS Act specifying the small and commercial quantities. The subject of L.S.D. is dealt with in entry 133 of the Table below the Notification dated 19.10.2001.

62. The Notification dated 19.10.2001, the relevant extracts of entries 133, 239 and the notes below the Table inserted *inter alia* by S.O. 822(E) dated 27.02.2018 and S.O. 2941(E) dated 18.11.2009 are quoted below for the convenience of reference:

T A B L E

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

S.I. No.	Name of Narcotic Drug and Psychotropic Substance (International and non-proprietary name (INN))	Other non-proprietary name	Chemical Name	Small Quantity (in gm.)	Commercial quantity (in gm/kg)
1	2	3	4	5	6
1				
2				
133	(+)LYSERGIDE	LSD, LSD-25	9, 10-didehydro-N, N-diethyl-6-methylergoline-8 Beta-carboxamide	0.002	0.1 gm.
134				
135				
239	Any mixture or preparation that of with or without a neutral material, of any of the above drugs		_____	*	**

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

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

Note: (1) The small quantity and the commercial quantity given against the respective drugs listed above apply to isomers, within specific chemical designation, the esters, ethers and salts of these

drugs, including salts of esters, ethers and isomers; whenever existence of such substance is possible.

(2) The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparation of substances of note 1 above.

(3) "Small Quantity" and "Commercial Quantity" with respect to cultivation of opium poppy is not specified separately as the offence in this regard is covered under clause (c) of section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

²*[(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to **the entire mixture** or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible **and not just its pure drug content.**]*

1. Inserted by S.O. 822(E), dated 27-2-2018.

2. Inserted by S.O. 2941(E), dated 18-11-2009.

63. Thus, on a plain reading of the above definitions, it is apparent that the term "preparation", in relation to a narcotic drug or psychotropic substance, means not only any one or more such drugs or substances in dosage form or any solution but also a mixture, in whatever physical state, containing one or more such drugs or substances. Therefore, the contention that a preparation or mixture must contain two or more narcotic drugs or two or more psychotropic substances or a combination of a narcotic drug

and psychotropic substance is untenable on a plain reading of the definition in Section 2(xx) as quoted above. Moreover, such a contention is unsustainable given Entry 239 in the Table below the Notification dated 19.10.2001 and the notes below the same. In any case, such an argument was squarely raised but rejected by the Supreme Court in *Hira Singh (supra)*.

64. There is an express indication in the NDPS Act about taking into account the entire quantity of the drug or the psychotropic substance seized in a case for determining the quantum of punishment and not just the pure drug content alone. This is evident from the following :

(i) The statement of objects and reasons to the amendment Act 16 of 2014, in terms provides that since the NDPS Act duly provides for punishment for the preparation of drugs also, this amendment seeks to clarify the legislative intent to take the entire quantity of drug seized in a case for determining the quantum of punishment and not the pure drug content. As noted hereafter, "preparation" in relation to a narcotic drug or psychotropic substance specifically includes "mixture" in whatever physical state containing one or more such narcotic drugs or psychotropic substances. Thus, the

legislative intent is clear that the entire quantity of the preparation is to be taken into account and weighed for determining the quantum of punishment and not merely the pure drug content for such preparation or mixture;

(ii) Section 2 (xx) defines "preparation" in relation to a narcotic drug or psychotropic substance means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances. Thus, it is evident that "preparation" includes a mixture, in whatever physical state, containing one or more such drugs or substances. So, the L.S.D. and a substance that may or may not be either a drug or a psychotropic substance, i.e., a neutral substance. The definition explicitly provides that such mixture may be "in whatever physical state", but as long as such a mixture contains one or more such drugs or substances, the same would constitute a "preparation" under Section (xx) of the NDPS Act.

(iii) Section 2 (xxiii) defines "psychotropic substance" to mean 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. The Schedule at Entry 4 includes L.S.D., L.S.D. 25. Therefore, there is no dispute about the L.S.D. being a psychotropic substance. However, Section 2(xxiii) includes not only a psychotropic substance specified in the Schedule but also a "preparation" of such substance or material included in the list of psychotropic substances specified in the Schedule. As noted earlier, the definition of "preparation" explicitly includes a mixture, in whatever physical state, containing one or more psychotropic substances. Thus, it is clear that a mixture of L.S.D. and blotter would constitute a psychotropic substance as defined under Section 2(xxviii) of the NDPS Act.

(iv) Section 2(xxiii) refers to a list of psychotropic substances specified in the Schedule. As noted earlier, the L.S.D. finds a mention in Entry 4. Entry 111 of this Schedule refers to "salts and preparations of the above". This means Entry 111 refers to salts and preparations of the psychotropic substances listed in Entries 1 to 110. A preparation, as noted earlier, would include a mixture containing L.S.D. Thus, even the preparation of L.S.D. will amount to a psychotropic substance in terms of Section 2(xxiii) of the NDPS Act.

(v) Even the definition of "manufacture" in Section 2(x) includes making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances. The expression makes it clear that even making a preparation (which includes a mixture) with L.S.D. or containing L.S.D. would constitute "manufacture" as defined under Section 2(x) of the NDPS Act.

(vi) Sections 2(xxiiia) and 2(viia) define "small quantity" and "commercial quantity" in relation to narcotic drugs and psychotropic substances. In terms of these definition clauses, the Central Government has issued a notification dated 19.10.2001, as amended from time to time. Entry 133 of this Notification specifically refers to L.S.D., L.S.D. 25. However, what is more relevant is Entry 239, which refers to any mixture or preparation with or without a neutral material or any of the above drugs. From the context, it is apparent that the expression "drugs" would include both the narcotic drugs and psychotropic substances listed in Entries 1 to 238. Therefore, no contrary contention on this aspect was even raised before us. Thus, it is clear that the Notification contemplates not only the narcotic drugs and psychotropic substances but also any mixture or preparation that of with or without neutral

material of any of the narcotic drugs and psychotropic substances listed in entries 1 to 238 of the Notification.

(vii) The Notification dated 19.10.2001, in the context of Entry 239, provides the mode of determining the small or commercial quantity of the mixture or preparation. It provides that lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture will have to be considered. The same also applies to the determination of commercial quantities. Note 4 below this Notification is most important because it states that the quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomer, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

65. The statutory provisions and the scheme of the NDPS Act referred to above clearly provide, in more places than one, that the weight of the entire mixture and not just its pure drug

content must be taken into account for determining whether the quantity is small, intermediate quantity or a commercial quantity. Moreover, the statement of object and reasons for introducing the amendment to the NDPS Act in 2014 explicitly clarifies the legislative intent to take the entire quantity of drug seized in a case for determining the quantum of punishment and not just the pure drug content.

66. This amendment was introduced after the decision of the Division Bench of the Supreme Court in *E. Michael Raj vs. Narcotics Control Bureau*²² which held that a pure drug content and not the entire weight of the mixture being relevant is also a significant factor. Ultimately, *E. Michael Raj* (supra) was overruled by *Hira Singh* (supra). *Hira Singh* (supra) held that the legal position before *E. Michael Raj* (supra) that the entire quantity of the drug seized would be relevant to determine the quantum of punishment and not just the pure drug content. Thus, considering the legislative intervention after *E. Michael Raj* (supra) and the judicial overruling of *E. Michael Raj* (supra) by *Hira Singh* (supra), any argument that only the weight of pure L.S.D. is relevant to determining the quantum of punishment, would not not sustain.

²² (2008) 5 SCC 161

67. In the context of the definition of "preparation" in Section 2(xx), the expression "*mixture, in whatever physical state*" cannot be ignored. This expression would include a mixture of L.S.D. and blotter. Ultimately, there is no dispute that the L.S.D. dissolved in a solution like alcohol is dropped on the blotter. The mixture of L.S.D. on the blotter is then ingested. Therefore, the expression "*in whatever physical state*" cannot be ignored or rendered meaningless or redundant. The fact that the Legislature chose to use this expression expressly will have to be respected and given some meaning.

68. Similar is the position of the statutory provisions referred to above or the statutory Notification issued under the NDPS Act. The suitable meaning having regard to the context, will have to be assigned to expressions like "*mixture or substance*" and "*containing one or more such drugs or substances*". The expression "*one or more*" cannot be read or construed as "two or more". In the statutory Notification dated 19.10.2001, the expression in Entry 239 of the Table concerning "*any mixture or preparation that of with or without a neutral material*" must be considered and respected. Similarly, in note 4, a reference to "*entire mixture*" and "*not just its pure drug content*" must be considered and respected. If the interpretation or construction suggested by the learned Counsel for the accused persons is

accepted, most of these expressions used by the Legislature or the Executive in the statutory Notification would be rendered otiose or meaningless.

69. By now, it is very well settled that just as a court of law must not add words or fill in gaps or a lacuna, an effort should also be made to give meaning to each and every word used by the Legislature. In *Aswini Kumar Ghose vs. Arabinda Bose*,²³ the Supreme Court held that it is not a sound construction principle to brush aside words in a Statute as being inapposite surplusage if they can have appropriate application in the circumstances conceivably within the contemplation of the Statute.

70. In *Rao Shiv Bahadur Singh vs. State of U.P.*,²⁴ the Supreme Court held that it is incumbent on the Court to avoid construction, if reasonably permissible, on the language which would render a part of the Statute devoid of any meaning or application. In *J.K. Cotton Spinning & Weaving Mills Co. Ltd. vs. State of U.P.*²⁵, the Supreme Court held that the Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the Statute should have an effect.

23 AIR 1952 SC 369

24 AIR 1953 SC 394

25 AIR 1961 SC 1170

71. In *Quebec Railway, Light, Heat & Power Co. vs. Vandry*²⁶, followed in *Union of India vs. Hansoli Devi*²⁷, the Privy Council and Supreme Court held that the Legislature is deemed not to waste its words or to say anything in vain. Consequently, a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons.

72. Except for submitting that the L.S.D. has some unique characteristics or properties, no compelling reason was presented before us to exclude the explicit expressions used in the NDPS Act or the statutory Notification issued thereunder. Moreover, this is a case where the statutory provisions align with the legislative intent expressed in the statement of objects and reasons. The S.O.R expressly clarified the legislative intent to take the entire quantity of the drug to determine the quantum of punishment and not just the drug content.

73. The so-called unique properties of L.S.D., referred to by the Counsel for the accused persons, far from being sufficient to exclude the application of the statutory provisions, lend support to the argument that the Legislature was quite clear about including not only all kinds of drugs and psychotropic substances

²⁶ AIR 1920 PC 181

²⁷ (2002) 7 SCC 273

but also their preparations, which would consist of the mixture of one or more narcotic drugs or psychotropic substances, together with or without neutral substances, in whatever physical state. Based on all this, the contentions of the learned Counsel for the accused persons are hard to accept. Such contentions find support neither from the text nor the context. Such arguments run contrary to the exact words in the Statute & Statutory notifications and derive no support from the legislative intent stated in the S.O.R.

74. The precedents on the subject also overwhelmingly support the inclusion of the weight of the blotter and not just the weight of the pure L.S.D. Before *E. Micheal Raj (Supra)*, that was the consistent view, as observed by the Supreme Court in *Hira Singh (Supra)*. In *E. Michael Raj (supra)*, the Division Bench of the Supreme Court, however, held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s) for the imposition of punishment, it is the content of narcotic drug or psychotropic substance which shall be taken into consideration (see paragraphs 15 and 19).

75. Disagreeing with the above view, another Division Bench of the Supreme Court in *Hira Singh (supra)* referred *inter alia* the following question for consideration by a Three Judge Bench:-

"Does the NDPS Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?"

76. Before the Three Judge Bench that ultimately decided the reference in *Hira Singh (supra)*, the Counsel for the accused persons and the intervenor – Indian Drug Manufacturers' Association, raised arguments substantially similar to those now raised by Mr Merchant, Ms Collasso and Mr Poulekar before us. All such arguments were considered and rejected by the Supreme Court in *Hira Singh (Supra)*. The ruling in *Hira Singh (Supra)* refers to the Scheme of the NDPS Act in the context of narcotic drugs and psychotropic substances. This is clear from the discussion in paragraphs 6 and 10 of the said ruling. Therefore, any attempt to limit this ruling to Heroin may be inappropriate.

77. In paragraph 10.3 of *Hira Singh (supra)*, the Court noted that illicit drugs are seldom sold in a pure form. Instead, they are almost always adulterated or cut with other substances. Therefore there was no reasonable ground to focus only on the weight of the pure drug or psychotropic substance instead of the weight of the mixture of one or more drugs or substances and a neutral material. The Court, therefore, approved the Legislature adopting a market-oriented approach similar to the one adopted by

Congress in the United States. In addition, such a market-oriented approach was evaluated and approved in *Chapman (supra)*, decided by the United States Supreme Court to consider the combined weight of the L.S.D. on the blotter for graded sentencing.

78. *Anuj Keshwani (supra)*, in paragraph 26, observes that *Chapman (supra)* was relied upon by the Additional Solicitor General of India in *Hira Singh (supra)*; however, there is no reference to *Chapman (supra)* while answering the reference. Mr Merchant had also submitted that *Chapman (supra)* was merely referred to in *Hira Singh (supra)* but not relied upon or followed. However, the observations and the reasonings in paragraph 10.3 suggest that the three-Judge Bench adopted the reasoning in *Chapman (supra)* in the precise context of L.S.D. This is another indication that *Hira Singh (supra)* was not restricted only to the narcotic drug heroin or that its ratio should not be extended to a blotter impregnated with L.S.D.

79. Therefore, the attempt to distinguish *Hira Singh (supra)* by restricting its scope only to the narcotic drug "Heroin" or only to narcotic drugs as defined under Section 2(xiv) and not extending it to psychotropic substances in general and L.S.D. in particular, cannot pass muster. Based on such a distinction, the binding

effect of the *ratio decidendi* in *Hira Singh (supra)* cannot be whittled down or bypassed.

80. *Hitesh Malhotra (supra)* has not held that *Hira Singh (supra)* is distinguishable because it was concerned only with the drug "*Heroin*". However, *Hitesh Malhotra (supra)* has held that the papers containing dried L.S.D. drops of L.S.D. solution were not a "*mixture*", and further, the blotter was not a "*neutral substance*". Therefore, *Hira Singh (supra)* had no application in the facts of the case.

81. Again, with the utmost respect, we cannot agree with the above reasoning or the distinguishing of *Hira Singh (supra)* based upon the above reasoning. First, as noted earlier, there is no discussion on why the paper containing dried L.S.D. drops of the L.S.D. solution cannot be regarded as a mixture, particularly when the NDPS Act provides no statutory definition of the expression "*mixture*". Instead, the Act refers to a mixture in whatever state. The Counsel for the accused persons, however, contended that since there was no chemical fusion between the L.S.D. and the blotter paper to give rise to some different substance, L.S.D. impregnated in a blotter was not a mixture.

82. The above contention overlooks that chemical fusion is not essential in the context of a mixture. In a mixture, the mixed elements retain their original properties. When two or more substances are combined by physical methods in any proportion and no new substance is formed, it is called a mixture. This is the difference between a mixture and a compound. Mixtures can be homogeneous or heterogeneous. For example, in a mixture of heroin and chalk powder, it is not as if the Heroin is chemically fused with chalk powder or loses its properties.

83. Secondly, there is no discussion about why the blotter cannot be regarded as a "*neutral substance*", particularly considering the observations in *Hira Singh (supra)*, not to mention *Chapman (supra)* and *Finch (supra)*. Mr Merchant had fairly accepted that where a drug is in a capsule, the weight of the capsule cannot be excluded. However, in the precise context of L.S.D. impregnated blotter, *Finch (Supra)* holds that a much closer analogy would be the non-drug content of a film coating or a gelatin capsule used in producing lawful drugs as described by the Full Federal Court in *Sigma Pharmaceuticals (Australia) Pty Ltd (supra)*. The Full Federal Court held that film coating or gelatin capsule is an integral part of the ingestion by the user of the drug. In the same way, the Court held that the cardboard impregnated with L.S.D. was an integral part of the ingestion by

the user of the drug and thus a "preparation" or a "substance" within the meaning of Section 4 of the Drug Misuse & Trading Act, 1985.

84. Besides, with the utmost respect, we find that the conclusion about the blotter impregnated with L.S.D. not being a mixture or about the blotter not being a neutral substance is not backed by any reasoning. Moreover, the conclusion, with respect, does not advert the scheme of the NDPS Act, both before and after its amendment and before or after the issue of Notification dated 19.10.2001 and the notes below the same. Therefore, based on such a conclusion, we think the binding precedent in *Hira Singh (supra)* could not have been distinguished or held as inapplicable in the context of L.S.D. on a blotter.

85. Most of the contentions now urged by the Counsel for the accused persons, including the argument about *Hira Singh (supra)* being restricted only to Heroin, were considered and ably answered in *Anuj Keshwani (supra)*. We endorse the reasoning. The most relevant discussion is in paragraphs 29 and 30, and the same is quoted below for the convenience of reference:

'29. Although, the drug which was considered by the Apex Court in Hira Singh (supra) was "heroin", the principle underlying the said conclusion will have to be considered

and borne in mind. Infact, the submissions advanced by the learned Counsel for the Respondent No.1 with respect to 'Note 4' in the Notification dated 18/11/2009 and the Standing Order dated 19/10/2001, have been dealt with by the Apex Court in *Hira Singh (supra)* and, hence need not be adverted to again.

30. *L.S.D. put on a blotter paper, is capable of being swallowed, after placing it on the tongue. It is thus evident that the blotter paper is capable of being swallowed and is used as one of the methods for consuming L.S.D. Merely because the said blotter paper can be licked or put in a glass of water, does not necessarily mean that the blotter paper has to be excluded whilst determining the L.S.D. on the blotter paper. Take for example, a capsule containing a drug or a psychotropic substance. The said capsule is capable of being opened and its contents, can either be consumed directly or added to any other mixture/swallowed with the cover. The fact remains that if a drug is put in a capsule, the same will have to be weighed as a whole. It is important to bear in mind the legislative intent, the object and reasons, and, the preamble of the NDPS Act, whilst considering, whether L.S.D. is to be weighed sans the blotter paper. As noted in **Hira Singh** (supra), it was never the intention of the Legislature to exclude the quantity of the neutral substance and to consider only the actual content by weight of the offending drug. It is also pertinent to note that illicit drugs are seldom sold in a pure form. They are always adulterated or cut with other substance or put in a gelatin or blotter paper, as in the present case. Heroin, for example, is capable of being mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown-sugar is cheaper but more dangerous. The blotter paper impregnated or ingested with L.S.D. is, in a sense, a dose. The blotter paper is made out*

*of an extra-absorbent material and generally includes ingredients such as rice, cotton and even flax seed, thus, making it edible and as such, a substance in a dosage form/a mixture for consumption. It is thus evident, that a blotter paper, a carrier material, ingested with L.S.D., forms an integral part of the ingestion by the user of the drug and thus, constitutes preparation of the psychotropic substance i.e. L.S.D., which is capable of being consumed, and as such, forms a substance in a dosage form or a mixture. Infact, at the first blush, one may ask 'how paper?', but once it is accepted that a blotter paper ingested/impregnated with L.S.D., is used as a medium of consumption, the same will squarely fall within the definition of the term 'preparation', as defined in Section 2 (xx) of the NDPS Act. Like cutting agents used with other drugs that are ingested, the blotter paper, gelatine capsules or sugar cubes carrying L.S.D. can be and often is ingested with the said drug. The object of the NDPS Act is to deal with the street weight of the drug in the diluted form in which they are sold and not only the weight of the active component. Thus, having regard to the dictum of the Apex Court in **Hira Singh** (supra), and the legislative intent of the NDPS Act, the blotter paper impregnated or ingested with L.S.D. will have to be considered as a whole, whilst determining whether the quantity is a small or commercial quantity."*

86. Most decisions or the material referred to also speak about the blotter being made up of extra absorbent material, including ingredients like rice, cotton, and flax seeds. Such blotters absorb L.S.D. in their tiny perforations, separable only on dipping it into a liquid or placing it on the tongue. The blotter becomes an

integral part of the mixture of the L.S.D.-impregnated blotter. Moreover, blotters made up of rice, flax seeds etc., are consumable. They qualify as neutral substances in ordinary parlance, just as chalk or talcum powder would, in the context of the drugs with which they are mixed. The ruling in *Hira Singh (Supra)* is quite clear on the status of such neutral substances. The NDPS Act also refers to psychotropic substances, including preparations of one or more psychotropic substances. Preparation includes a mixture in whatever state.

87. Thus, the text, precedents and the literature on the market or street practices in which L.S.D. is stored, transported, concealed, sold, purchased, consumed or otherwise dealt with support the discussion and construction in *Anuj Keshwani (supra)*.

88. *Hira Singh (supra)* notes that after the decision in *E. Micheal Raj (supra)* by Notification dated 18.11.2009, "Note 4" was added to the Notification dated 19.10.2001 specifying small quantity and commercial quantity of the narcotic drugs or the psychotropic substance covered under the NDPS Act. This Note 4 provides that *the quantities shown in Columns 5 and 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more*

narcotic drugs or psychotropic substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible *and not just its pure drug content*.

89. The Court noted that before its decision in *E. Micheal Raj (supra)*, the consistent view was that the weight of the entire manufactured drug/preparation/mixture seized, including that of the neutral substance, was required to be considered for determining the small quantity or a commercial quantity. However, it was for the first time in *E. Micheal Raj (supra)* that the Division Bench took a contrary view to exclude the weight of the neutral substance and consider only the weight of the pure drug content.

90. The three-judge Bench in *Hira Singh (supra)* disapproved of the reasoning in *E. Micheal Raj (supra)*. It held that the Division Bench '*has not at all considered the relevant entry in the Notification dated 19.10.2001. There is no specific finding given by this Court that it would fall under entry 239, namely, any mixture or preparation that of with or without the neutral material.*'. It further held that The Division Bench did not even consider Note 2 of Notification dated 19.10.2001, which provided that the quantities shown against the respective drugs

listed above also apply to the preparations of the drug and the preparations of the substances of Note 1 above. If Note 2 had been considered by the Division Bench, the conclusion might have differed. The Court, therefore, disagreed with the view taken in *E. Micheal Raj (supra)* on excluding the weight of the neutral substance.

91. The Court in *Hira Singh (supra)* also held that *E. Micheal Raj (supra)* had not properly appreciated and/or considered and/or properly construed the statement of objects and reasons concerning the Amendment Act 2001. The Court held that the Amendment Act of 2001 had provided a two-tier punishment, one for small quantity and the other for commercial quantity. From that, it could not be deduced that the Legislature intended only to consider the actual content by weight of the offending drug to determine whether it would constitute a small quantity or commercial quantity.

92. After quoting the Statement of Objects and Reasons concerning the Amendment Act 2001, the Court observed that on a bare reading of the same, it could not be said that the Legislature intended to consider the actual content by weight of the offending drug to determine whether it would constitute small quantity or commercial quantity. The Court, therefore,

opined that the Division Bench, while holding that it is only the actual content by weight of the offending drug to be considered to determine whether it would constitute a small quantity or the commercial quantity, the Division Bench has read more than what was stated in the Statement of Objects and Reasons of the Amendment Act 2001.

93. The Court, upon detailed consideration of the provisions of the NDPS Act as amended from time to time and the Statement of Objects and Reasons, held that neither the express provisions nor the legislative intent favoured the exclusion of the weight of the neutral substance to determine whether the mixture of the narcotic drugs or psychotropic substances with one or more neutral substance was of a small quantity or a commercial quantity. This reasoning is found in paragraph 10, which includes sub-paras 10.1 to 10.5.

94. Note 4 below Notification dated 19.10.2001 as introduced by Notification dated 18.11.2009 very clearly provides that quantities shown in Columns 5 & 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts or

esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

95. Thus, this Note clearly expresses that the weight of the entire mixture is relevant, not just the pure drug content in such mixture. The Legislature is presumed to be aware of the market or street conditions in which psychotropic substance like L.S.D. is dealt with on the streets and in the markets. The accused persons have not challenged any provisions of the NDPS Act or Note 4 below the Notification dated 19.10.2001. In any case, the validity of these provisions has already been upheld in *Hira Singh (supra)*. Therefore, any reference to this Note could not have been avoided by opining that L.S.D. drops on a blotter do not constitute a mixture or that a blotter is not a neutral substance.

96. Incidentally, *Hira Singh (supra)*, in paragraph 11, holds that Note 4 below Notification dated 19.10.2001 was clarificatory and added by way of abundant caution only. Even absent the Note, the Court concluded that while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), it includes the weight of the neutral substance(s) also and not only the actual content by weight of the offending drug has to be taken into account. The Court held that

theretofore even if Note 4, which was added by Notification dated 18.11.2009, were not to be added, the legal position would favour taking into consideration the combined weight of the offending drug and the neutral substance with which it is mixed.

97. Thus, according to us, *Hira Singh (supra)* is a complete answer to most of the contentions raised by Mr Merchant, Ms Collasso and Mr Poulekar on behalf of the accused persons. Based upon *Hira Singh (supra)*, therefore, their contentions cannot be accepted by us.

98. The arguments based on the Convention and the consequent inapplicability of the United States or Australian rulings are also unacceptable. The law in the United States of America or Australia is certainly neither applicable nor binding in India. But the contention about such a law being *at a tangent* to the law in India is rather extreme. The Statutory scheme in the two countries also favours the inclusion of the weight of the carrier medium or the blotter in the case of L.S.D to determine punishment. At least in the United States, the expression "mixture" was not defined in the Statute. The same is the position under the NDPS Act. No significant distinctions about the market or street practices concerning storage, transport, concealing, selling, purchasing, or consumption were pointed out.

99. In fact, the Statutory scheme and provisions of the NDPS Act are pretty clear and clearly reflect the legislative intent on the subject. They are comparable, at least when it comes to the essentials. There is no doubt, however, that the precedents from the United States or Australia do not bind the Courts in India. Neither the Supreme Court in *Hira Singh (Supra)* nor this Court in *Anuj Keshwani (Supra)* say so. But they have a persuasive value considering the statutory schemes and the market practices. In the context of L.S.D. on a blotter, which appears to be a worldwide mode of dealing with L.S.D., such precedents are certainly not irrelevant. Even though they may not be binding, they have a persuasive value.

100. The contentions by the Counsel for the accused persons about the interpretation of the definition clauses or the entries and notes in the Notifications issued under the NDPS Act have been answered in *Hira Singh (Supra)*. The Notification dated 19.10.2001 has been explained in *Hira Singh (supra)* in paragraph 10.2, which reads as follows:

"10.2 However, in the case of mixture of the narcotic drugs/psychotropic drugs mentioned in column no.2 and any mixture or preparation that of with or without the neutral material of any of the drugs mentioned in Table, lesser of the small quantity between the quantities given against the respective Narcotic Drugs or Psychotropic

Substances forming part of mixture and lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substance forming part of the mixture is to be taken into consideration. As per example, mixture of 100 gm is seized and the mixture is consisting of two different Narcotic Drugs and Psychotropic Substance with neutral material, one drug is Heroin and another is methadone, lesser of commercial quantity between the quantities given against the aforesaid two respective Narcotic Drugs and Psychotropic Substance is required to be considered. For the purpose of determination of the "small quantity or commercial quantity", in case of entry 239 the entire weight of the mixture/drug by whatever named called weight of neutral material is also required to be considered subject to what is stated herein above. If the view taken by this Court in the case of E. Micheal Raj (Supra) is accepted, in that case, it would be adding something to the relevant provisions of the Statute which is not there and/or it was never intended by the Legislature."

101. The contention based on the definition of the expression "preparation" using the term "such drugs or substances" or the argument about the interpretation of entry 239 in Notification dated 19.10.2001, as now raised by Mr Merchant, was explicitly negated in *Hira Singh (supra)* while interpreting the statutory provisions and the precise entry 239 in Notification dated 19.10.2001.

102. There is no dispute that the expression "mixture" has not been defined under the NDPS Act. The same was the position before the United States Supreme Court in *Chapman (supra)*. The Counsel for the accused persons presented arguments similar to those raised in *Chapman (Supra)*. However, the majority (7:2) rejected such arguments in the following terms:

"14. We think that the blotter paper used in this case, and blotter paper customarily used to distribute L.S.D., is a "mixture or substance containing a detectable amount" of LSD. In so holding, we confirm the unanimous conclusion of the Courts of Appeals that have addressed the issue. Neither the Statute nor the Sentencing Guidelines define the terms "mixture" and "substance," nor do they have any established common law meaning. Those terms, therefore, must be given their ordinary meaning. See Moskal v. United States, 498 U.S. ----, ----, 111 S.Ct. 461, 468-70, 112 L.Ed.2d 449 (1990). A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 Oxford English Dictionary 921 (2d ed.1989). L.S.D. is applied to blotter paper in a solvent, which is absorbed into the paper and ultimately evaporates. After the solvent evaporates, the L.S.D. is left behind in a form that can be said to "mix" with the paper. The L.S.D. crystals are inside of the paper, so that they are commingled with it, but the L.S.D. does not chemically combine with the paper. Thus, it retains a

separate existence and can be released by dropping the paper into a liquid, or by swallowing the paper itself. The L.S.D. is diffused among the fibers of the paper. Like Heroin or cocaine mixed with cutting agents, the L.S.D. cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying L.S.D. can be and often is ingested with the drug."

103. The Majority in *Chapman (supra)* refused to accept the contentions that dictionary meaning should not be adopted because then even the weight of the vial or an automobile in which the drugs are being transported would have to be taken into account, rendering the process nonsensical. The Majority held that the term "mixture" does not include L.S.D. in a bottle or L.S.D. in a car because the drug is easily distinguished from and separated from such a "container". The drug is clearly not mixed with a glass vial or automobile, nor has the drug chemically bonded with the vial or car. It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug.

104. The Majority in *Chapman (supra)* also rejected the arguments based upon discrimination and unconstitutionality. The Majority held that the Statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme. This is as true with respect to L.S.D. as it is with respect to other drugs. Although L.S.D. is not sold by weight but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes L.S.D. easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic the drug; therefore, it was rational for Congress to set penalties based on this chosen tool. Congress was also justified in avoiding arguments about the accurate weight of pure drugs that might have been extracted from blotter paper had it chosen to calibrate sentences according to that weight. Nevertheless, the Court held that blotter paper seems to be the carrier of choice, and the vast majority of cases will therefore do exactly what the sentencing scheme was designed to do – punish those who deal in larger amounts of drugs more heavily.

105. Thus, in *Chapman (supra)*, the Court supported its conclusion by approving the market-oriented approach adopted by Congress to punish drug trafficking, under which the total

quantity of what is distributed rather than the amount of the pure drug involved, was used to determine the length of the sentence. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug because such traffickers keep the street markets going.

106. The Court also held that L.S.D. applied to a blotter paper was, in fact, a "mixture or substance". Noting that neither the Statute nor the Sentencing Guidelines defined "mixture or substance", the Court adopted the dictionary meaning of "mixture". The mixture was defined as matter consisting of two or more substances that are so thoroughly blended together that the particles of one are diffused among the particles of the other but nonetheless maintain a separate existence.

107. The Court applied its definition of "mixture" to blotter paper and L.S.D. as follows:

"The L.S.D. Crystals are [diffused among the fibers of paper], so that they are commingled with it, but the L.S.D. does not chemically combine with the paper. Thus, it retains a separate existence.... Like Heroin or cocaine mixed with cutting agents, the L.S.D. cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying L.S.D. can be ...ingested with the drug."

108. In *Finch (supra)*, the Court of Criminal Appeal for New South Wales rejected similar contentions. It held that the cardboard impregnated with L.S.D was not analogous to a container or a syringe from which the user extracted a drug. A much closer analogy would be the non-drug content of a film coating or a gelatin capsule used in producing lawful drugs as described by the Full Federal Court in *Sigma Pharmaceuticals (Australia) Pty Ltd. (supra)*. The Federal Court held that film coating or gelatin capsules are an integral part of the ingestion by the user of the drug. In the same way here, the cardboard impregnated with L.S.D. was an integral part of the ingestion by the user of the drug and thus a "preparation" or a "substance" within the meaning of Section 4 that dealt with "admixtures".

109. The contention based on discrimination has been adequately answered in *Hira Singh (supra)* and *Chapman (supra)*. Besides, as was pointed out by Mr Bhobe, L.S.D. is not the kind of psychotropic substance that can, subject to specified conditions, be used after obtaining necessary licences in pharmaceuticals or other purposes. Moreover, there is no dispute that possessing or using L.S.D. is completely banned in India. Therefore, there is nothing wrong with our Legislature also adopting a market-oriented approach and requiring consideration of the weight of the entire preparation or the mixture and not just

the pure L.S.D. content when determining small or commercial quantities.

110. Mr Merchant submitted that penal statutes like the NDPS Act must be strictly construed. He proposed that if two interpretations are possible, the interpretation that benefits the accused persons must be adopted. Further, he submitted that statutes like NDPS must be literally construed and liberally interpreted.

111. Again, all these contentions have been adequately dealt with in *Hira Singh (supra)*. In particular, reference can be made to the discussion in paragraphs 10.1 and 10.2 on the issue of interpretation. In any case, even the literal interpretation of the provisions of the NDPS Act and the Notifications dated 19.10.2001, 18.11.2009 and the Notes below the same support the view taken in *Anuj Keshwai (supra)*. As noted earlier, the statutory provisions and the legislative intent, so to say, speak with one voice. Therefore the view we propose to endorse is backed by the letter and spirit of the NDPS Act. The binding and persuasive precedents on the subject also overwhelmingly support such a view.

112. In addition to the statutory provisions and schemes, reference is necessary to the Statement of Objects and Reasons of the Amendment Act 16 of 2014. This provides that the 2001 Amendment seeks to clarify the legislative intent to take the entire quantity of the drug seized in a case for determining the quantum of punishment and not the pure drug content. Thus, this is where the statutory provisions and the legislative intent align. Accordingly, this matter has no literal or liberal interpretation issue as was attempted to be raised.

113. For all the above reasons, we hold that a blotter paper forms an integral part of the L.S.D. (drug) when put on it for consumption and, as such, the weight of the blotter paper containing L.S.D. will have to be considered for determining a small or commercial quantity of the offending drug under the NDPS Act, 1985. Further, we also hold that the blotter paper that carries the drug (L.S.D. drops), which facilitates its consumption as a whole, is a preparation, mixture, or neutral substance within the meaning of the NDPS Act 1985.

114. Since the referral order refers to L.S.D. as a drug, we have continued to adopt that term when answering the two questions referred to. However, in terms of Section 2 (xxiii) of the

NDPS Act, there is no dispute that L.S.D. will have to be classified as a psychotropic substance and not a drug.

115. In conclusion, therefore, we endorse the view taken in *Anuj Keshwani (supra)* that the combined weight of the L.S.D. and the blotter is relevant to determine small or commercial quantities and not the view in *Hitesh Malhotra (supra)* and *Harsh Meshram (supra)* that only the weight of the pure L.S.D. is the determinative factor. The reference is answered accordingly.

116. The matter may now be placed before the learned Single Judge taking up Criminal Application (Bail) No.752/2021(F) at the earliest for consideration of the bail application.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.