

A Little Clerical Error

DECEMBER 15, 2021

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PLEASE see Section 27A of the ***Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985***

(the Act which became as famous as a Bollywood thriller, because somebody thought that a star-son was a drug addict through WhatsApp) -

27A. Punishment for financing illicit traffic and harbouring offenders

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

Till 01.05.2014, clause (viii) of section 2, read as:

"illicit traffic" in relation to narcotic drugs and psychotropic substances, means-

- (i) cultivating any coca plant or gathering any portion of coca plant;
- (ii) cultivating the opium poppy or any cannabis plant;
- (iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;
- (iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or
- (v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv),

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

- (1) financing, directly or indirectly, any of the aforementioned activities;
- (2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and
- (3) harbouring persons engaged in any of the afore-mentioned activities.

In 2014, Parliament amended the ***Narcotic Drugs and Psychotropic Substances Act*** by which ***inter alia:***

The above clause (viiiia) was re-lettered as clause (viiiib) and before, clause (viiiib) as so re-lettered, the following clause was inserted:- '(viiiia) **"essential narcotic drug"** means a narcotic drug notified by the Central Government for medical and scientific use;'.
Here enters our little clerk with his little clerical error. He forgot to amend Section 27A. Now what happened is, as per Section 27A:

Whoever indulges in financing, directly or indirectly, any, of the activities specified in sub-clauses (i) to (v) of clause (viiiia) of section 2 is liable for imprisonment up to twenty years, but BUT, there are no activities specified in **clause (viiiia)** ; this clause defines **essential narcotic drug**.

The activities are listed in clause numbered (viiiib). So the position is that Section 27A has become useless and whoever is engaged in the heinous activities relating to drugs cannot be punished - all because of a little clerical error.

This error was noticed by two High Courts, Bombay, and Tripura. The Bombay High Court ignored the error, but Tripura High Court thought otherwise.

The High Court observed,

In this regard, we may turn to Article 20 of the Constitution of India which enshrines protection in respect of conviction. No person shall be convicted of any offence, unless he violated a law in force at the time of commission. Therefore, at the time of commission of the act which constitute offence, the law must be predictable and predictability comes from the plain words. While interpreting the penal statute that aspect of the matter cannot be forgotten in the anxiety of replenishing any omission in the penal statute. The right of the individual emanating from Article 20 cannot be forgotten.

And the Court held,

that until the appropriate legislative change occurs by amending Section 27A of the NDPS Act appropriately, sub-clauses (i) to (v) of clause (viiiia) of Section-2 of the NDPS Act shall suffer effect of deletion and bringing in sub-clauses i-v of the clause viiiib of Section-2 of the NDPS Act in that place.

And further observed,

We have only given effect of deletion and conjunction. As the same time, we are constrained to observe that Central Government has failed to introduce the Amendment Act for amending the NDPS Act for purpose of removing that omission and bringing in the substitution by sub-clause i to v of clause (viiiib) of Section-2 of the NDPS Act. In this circumstance we are persuaded to direct the Central Government in the Ministry of Home Affairs to take appropriate steps for amendment as required in Section-27A without further delay.

This judgement came on 04.06.2021 and the Government rather quickly brought in the **Narcotic Drugs and Psychotropic Substances (Amendment) Ordinance, 2021** on 30.09.2021 to make the correction - retrospectively with effect from the 1st day of May, 2014 - the date when the clerical mistake originally became the law. And in this session of parliament, they brought in the **Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2021** , which was passed by the Lok Sabha on Monday (13.12.2021).

Moving the Bill, the Finance Minister Ms Nirmala Sitharaman said, **"It was as a result of a little clerical error , an error in which some of the cross-referencing Sections were not corrected when an Amendment was being brought in sometime in 2014."**

Some quotes from the debate in Lok Sabha:

SHRI BHARTRUHARI MAHTAB: When we accept it was a mistake, why should we commit another mistake by making it retrospective? We are all for the change, by adding this provision in Section 27A, but by making it retrospective, we will make another mistake. There is a flaw in the law. You correct the flaw. It is necessary. We are all for it. I am for it, but by making it retrospective, you are making another mistake which will also be challenged in the court of law and we will wait.

SHRI MANISH TEWARI: with great responsibility, I would like to state that the Bill which has been brought now cannot validate a wrong which got committed in 2014. Between 2014 and 2021, unfortunately, if someone has to be sentenced in accordance with Section 27A of the NDPS Act, the fact is that he cannot be sentenced. And this is the consistent principle which has been upheld by the courts of law. There is a 1987 judgment in ***JK Spinning and Weaving Mills Vs. Union of India*** case - [2002-TIOL-559-SC-CX-LB](#)

. The judgment has made it well settled that there cannot be any retrospectivity in respect of penalty and confiscation.

The judgment exactly says:

"It will be against all principles of jurisprudence to impose penalty on a person or to confiscate his goods for an act or omission which was lawful at a time when such an act was performed or omission made but subsequently made unlawful by virtue of a provision of law."

SHRI ADHIR RANJAN CHOWDHURY: the new provision is being given retrospective effect from 1st May, 2014. It means that a criminal provision is being given retrospective effect, which will not hold good in law. It also violates the Fundamental Rights given in Article 20 because a person can be punished for an offence for which there is a law in existence at the time of commission of the offence.

SHRIMATI NIRMALA SITHARAMAN: I just want to add that 'retrospective effect' is not for going backwards unendingly. It is going backwards to the point when the notification of this amended law came up on 1st May, 2014 with an error. We have just gone back to that far only and not beyond.

Thus, the little clerical error resulted in several court cases, an ordinance, an Amendment Bill, and more than four hours of intensive debate in the Lok Sabha. This error's ripples spread through several layers of law involving lawyers, judges, bureaucrats, parliamentarians, law experts, Ministers and even the President of India. Maybe the little clerical error was not all that little; it was humungous. But I wonder what that clerk was doing drafting the law. Are our laws drafted by clerks? Black's Law Dictionary defines CLERICAL ERROR as

Generally, a mistake in writing or copying

. This was not a mistake in writing, copying, or typing. It was a clear drafting mistake. Anyway, we all err; and to err is not the exclusive privilege of a clerk. But one of the basic requirements of law drafting is to ensure that consequential amendments are made and these days with the search facility in computers, this is rather easy.

This whole incident brings a feeling of *dÃ©jÃ© vu* me.

When they abolished Service Tax:

Up to 30.06.2012, as per Section 68 of the Finance Act 1994, Service Tax was to be paid at the rates specified in section 66. In 2012, they amended the Act to specify that Section 66 will not apply from 1.7.2012 as a new Section 66B took its place. But they forgot to amend Section 68 which still stipulated that the tax has to be paid as per Section 66 which did not exist. I pointed this out on 15.06.2012 - [No Service Tax from 1.7.2012?](#)

My Report on Friday (15.06.2012) that Service Tax cannot be levied with effect from 01.07.2012 sent shock waves so intense that the Government came out with quick firefighting and issued a 'Removal of Difficulty' Order on the same day to rectify the massive blunder. By the order dated 15.06.2012, the Government substituted in Section 68, the figures "66", with the figures and letter "66B".

I wrote on 18.06.2012, that this was wrong:

If there is a difficulty, the Government can remove it, but can they amend an Act passed by Parliament? If the Parliament wanted the tax to be levied at a rate prescribed in one section of the Act, can a Babu in the North Block amend it to read as another Section in the name of removing a difficulty? If that could be so, they may as well make Parliament to pass a one-line Act that there shall be levied a Service Tax at such rates and under such conditions at the whims and fancies of the Under Secretary working for the time being in the TRU Section of the CBEC in the Revenue Department of the Finance Ministry . ([Service Tax from 1.7.2012 - Government hastily issues Order to Rectify Himalayan Blunder](#))

The Government finally realised that the removal of difficulty order was not enough and so they included in the Finance Act 2013 a provision which read as,

66BA. (1) For the purpose of levy and collection of service tax, any reference to section 66 in the Finance Act, 1994 or any other Act for the time being in force, shall be construed as reference to section 66B thereof.

(2) The provisions of this section shall be deemed to have come into force on the 1st day of July, 2012

The damage was rectified retrospectively with effect from 1.7.2012. Actually I had called up the top Revenue Officer at that time before writing that Service Tax was not leviable from 1.7.2012 - he took it very casually and said, "**we will issue a difficulty removal order**" - only when we carried the news, the jitters started. If the 'Removal of Difficulty' order was right and enough, what was the need to amend the Act retrospectively?

Anything can be corrected retrospectively - after all the country should not suffer for the incompetence of a clerk and his little error.

Until Next Week.