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STUDY MATERIAL ON THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

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INTRODUCTION

Crimes are generally of two kinds:

- (a) Traditional crimes affecting individual persons, like murder, theft, assault, etc.;
- (b) White Collar Crimes or Socio-Economic Crimes affecting the public at large like smuggling, hoardings, adulteration, illicit trafficking and sale of narcotic drugs and psychotropic substances etc. White collar crimes are of recent origin and may be defined as all illegal acts committed by unlawful means- the purpose being to obtain money or property or business or personal gain or profit. Such crimes are committed by the organised gangs having influence.

Some of the salient features of the white collar crimes are as under:—

- (a) There is no social sanction against such white collar crimes;
- (b) These crimes are committed by organised gangs equipped with most modern technology;
- (c) There is generally a nexus between the politicians, law enforcing agencies and the offenders indulging directly in such crimes;¹
- (d) There is no organised public opinion against such crimes; and
- (e) The traditional crimes are isolated crimes, while the white collar crimes are part and parcel of the society.

Genesis and Development of Drug Trafficking in India

- The genesis and development of the Indian drug trafficking scenario are closely connected with the strategic and geographical location of India which has massive inflow of heroin and hashish from across the Indo-Pak border originating from "Golden Crescent" comprising of Iran, Afghanistan and Pakistan which is one of the major illicit drug supplying areas of the world.²
- On the North Eastern side of the country is the "Gold Triangle" comprising of Burma, Laos and Thailand which is again one of the largest sources of illicit opium in the world. Nepal also is a traditional source of cannabis, both herbal and resinous.
- Prior to the enactment of the Narcotic Drugs and Psychotropic Substances Ad, 1985, the statutory control over narcotic drugs was exercised in India through a number of Central and State enactments.

HISTORICAL DEVELOPMENT OF LAW ON DRUGS AND NARCOTICS IN INDIA

- Prior to the enactment of the Narcotic Drugs and Psychotropic Substances Act, 1985, the statutory control over narcotic drugs was exercised in India through a number of Central and State enactments. The principal Central Acts were—
 - (a) The Opium Act, 1857,
 - (b) The Opium Act, 1878 and
 - (c) The Dangerous Drugs Act, 1930.
- India is a signatory to the UN Single Convention on Narcotics Drugs 1961, the Convention on Psychotropic Substances, 1971 and the Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 which prescribe various forms of control aimed to achieve the dual objective of limiting the use of narcotic drugs and psychotropic substances for medical and scientific purposes as well as preventing the abuse of the same.

¹ Barowalia J.N. Commentary on the Narcotic Drugs and Psychotropic Substances Act, 1985, (1992), pp. 614-615.

² S.V. Joga Rao Law and Policy on Drug Trafficking: A Phenomenological study with special reference to Bangalore City, 35 JILL (1993), p. 56.

- The administrative and legislative setup in the field of Narcotics has been put in place in the country in accordance with the spirit of the UN Conventions.

CONSTITUTIONAL GOALS AND THE INTERNATIONAL CONVENTION ON DRUGS

- The Directive Principles of State Policy enshrined in part IV of the Constitution of India are fundamental in the governance of the country as laid down in Article 37 of the Constitution, which is reproduced below:

"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

- One of the Directive Principles of the State Policy enshrined in **Article 47** of the Constitution of India lays down as under:

"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health."

International Conventions on Narcotic Drugs (1912-1953)

To control and regulate the supply of opium and other narcotic drugs, the following International Conventions were entered into between 1912-1953:—

- 1912- International Opium Convention (the Hague, 2-3-1912).
- 1925- Agreement Re: manufacture, international trade and use of prepared opium (Geneva, 13-7-1925).
- 1931-Conception, manufacture and distribution of narcotic drugs (Geneva, 13-7-1931), Agreement Re: Opium smoking in the Far-East (Bangkok, 27-11-1931).
- 1936- Convention for the suppression of illicit traffic in dangerous drugs (Geneva, 26-6-1930).
- 1946-Protocol amending the 1912, 1925, 1931 and 1936 instruments (Lake Success, 11-12-1946).
- 1948-Protocol extending the 1931 Convention to synthetic narcotic drugs (Paris, 19-11-1948).
- 1953-Protocol Re cultivation of the Opium Poppy and Production Trade and Use of Opium (New York, 23-6-1953).

Single Convention on Narcotic Drugs, 1961

- In the second half of 20th century, the white collar crimes assumed alarming proportions. Under white collar crimes also the 'drug addiction' and the 'illicit traffic in narcotic drugs and psychotropic substances' became such a menace that the dangers following illicit traffic in narcotic drugs affected the world community and the same became the subject of International Convention.
- India as a party to the "Single Convention on Narcotic Drugs, 1961" the preamble of which briefly out-lined the importance of effective measures against abuse of narcotic drugs in the following words:

"The parties, concerned with the health and welfare of mankind,

Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,

Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, Conscious of their duty to prevent and combat this evil,

Considering that effective measures against abuse of narcotic drugs require co-ordinated and universal action,

Understanding that such universal action calls for international co-operation guided by the same principles and aimed at common objectives,

Acknowledging the competence of the United Nations in the field of narcotics control and desirous that the international organs concerned should be within the framework of that organisation.

Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives."

- The Convention after laying down in Article 33 that the party was not permitted the possession of drugs except under legal authority, provided for action against the illicit traffic in Article 35 and for penal provision in Article 36 of the convention.

AIM AND OBJECT OF THE ACT

- The Preamble to NDPS states that it is,

“An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances [to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances] and for matters connected therewith.”

- The Hon’ble Supreme Court in **State of Rajasthan v. Udai Lal (2008) 11 SCC 408** held that,

“In order to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, the Parliament enacted NDPS Act in the year 1985. This is a special Act and it has been enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances.”

DIFFERENTIATION BETWEEN NARCOTICS AND PSYCHOTROPIC SUBSTANCES

- The term ‘narcotic’ in the legal sense is quite different from that used in the medical context which denotes a sleep inducing agent. Legally, a narcotic drug could be an opiate (a true narcotic), cannabis (a non-narcotic) or cocaine (the very antithesis of a narcotic, since it is a stimulant). The term ‘psychotropic substance’ denotes mind-altering drugs such as Lysergic Acid Diethylamide (LSD), Phencyclidine, Amphetamines, Barbiturates, Methaqualone, and designer drugs (MDMA, DMT, etc.).
- As per the definition provided in the NDPS Act under Section 2,

(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods

(xxiii) "psychotropic substance" means 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

PROVISION RELATING TO BAIL UNDER THE NDPS ACT

- It is a settled position of law that liberal approach in the matter related to the Narcotic Drugs and Psychotropic Substances is uncalled for (**State of Kerala v Rajesh AIR 2020 SC 721**) and the Hon'ble Supreme Court in many Judgments has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act.)
- *"....It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely."* (**Union of India v. Ram Samujh and Ors (1999) 9 SCC 429**)
- Section 37, which comes under Chapter IV of the NDPS Act, discusses the aspect of offences to be cognizable and non-bailable.
- Section 37 of the NDPS Act is a tool devised by the parliament to have a check on the menace of dangerous drugs flooding in the market and a sine qua non for granting bail to the accused under the NDPS Act.
- The detailed breakdown of Section 37 is as follows:
 1. The section states every offence punishable under the Act shall be cognizable.
 2. No person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also offences involving commercial quantity] shall be released on bail or on his own bond, unless the following conditions are met.
 3. For granting bail, the following conditions are to be met,
 - (i) there are reasonable grounds for believing that the accused is not guilty of such offence
 - (ii) that he is not likely to commit any offence while on bail
- It was observed by the Apex Court in **State of Kerala v. Rajesh AIR 2020 SC 721** that, *"The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates."*

Therefore to summarise the law relating to the rigors of Section 37 of NDPS Act, it can be pointed out as follows:

- a) The limitations on granting of bail come in only when the question of granting bail arises on merits. [**Customs, New Delhi v. Ahmadalievva Nodira, (2004) 3 SCC 549**].
- b) In case the Court proposes to grant bail, two conditions are to be mandatorily satisfied in addition to the standard requirements under the provisions of the CrPC or any other enactment. [**Union of India v. Niyazuddin & Anr, (2018) 13 SCC 738**].
- c) Apart from the grant of opportunity to the Public Prosecutor, the other condition which really has relevance is the Court's satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence. [**N.R. Mon v. Md. Nasimuddin, (2008) 6 SCC 721**].

- d) The satisfaction contemplated regarding the accused being not guilty has to be more than prima facie grounds, considering substantial probable causes for believing and justifying that the accused is not guilty of the alleged offence. [**Customs, New Delhi v. Ahmadalieva Nodira (2004) 3 SCC 549**].
- e) Twin conditions of S. 37 are cumulative and not alternative. [**Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549**].
- f) At the bail stage, all that could be seen by the Court is whether the statements of the prosecution witnesses, if believable, would not result in a conviction. [**Babua v. State of Orissa, (2001) 2 SCC 566**].
- g) At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed an offence under the NDPS Act and further that he is not likely to commit an offence under the said Act while on bail. [**Union of India v. Rattan Mallik @ Habul, (2009) 2 SCC 624**].
- h) While considering the application for bail concerning Section 37, the Court is not called upon to record a finding of not guilty. [**Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798**].
- i) In case of inconsistency, S. 37 of the NDPS Act prevails over S. 439 CrPC. [**Narcotics Control Bureau v Kishan Lal, 1991 (1) SCC 705**].
- j) Bail must be subject to stringent conditions. [**Sujit Tiwari v. State of Gujarat, 2020 SCC Online SC 84**].

Important Judgments of the Hon'ble Supreme Court

1. **Sheru v. Narcotics Control Bureau Criminal Appeal Nos. 585-586 of 2020**, decided on 11.09.2020
 - The Supreme Court has observed that mere passage of time during the pendency of the appeal cannot be a ground to suspend the sentence and grant bail in NDPS Cases.
2. **Sujit Tiwari v. State of Gujarat AIR 2020 SC 667**
 - Bail can be granted where there is reasonable possibility that accused may be acquitted.

Important Judgments of the Hon'ble Rajasthan High Court

3. **Devilal v. State of Rajasthan 2016 4 Crimes(HC) 96**
 - Narcotic Drugs and Psychotropic Substances Act, 1985—Section 37—Criminal Procedure Code, 1973—Section 439—Bail application on plea that medicinal preparations recovered from possession of petitioner could only be prosecuted under Drugs and Cosmetics Act—1150 tablets Alprazolam gross weight 172.50 grams and 1140 capsules Parvon spas were recovered from petitioner—Gross weight of drug was well above the commercial quantity—Gross weight of the drug was to be counted and not merely the net percentage/content of the salt in medicinal preparation for finding out the actual weight of drugs in reference to the schedule under NDPS Act,—As the quantity of psychotropic drug recovered from petitioner was well above the commercial quantity, restriction contained in Section 37 of NDPS Act, operated and petitioner did not deserve to be released on bail.
4. **Hakim@pilla v. State of Rajasthan S.B. Criminal Miscellaneous Bail Application No. 13195/2019**
 - Though, in the heading prefixed to Section 37 it is mentioned “offences to be cognizable and non bailable”. But the section begins with a non-obstante clause notwithstanding anything contained in Cr.P.C. every offence punishable under the Act shall be cognizable. There is nothing in the body to make every offence non-bailable.
 - Para II of Schedule I to Cr.P.C. deals with the offences under other laws. Item No.3 in the list (in Part II of the First Schedule) provides that if the offence concerned(under the other law) is punishable with imprisonment for less than three years, it is bailable and non-cognizable.
 - Now the offence of possession of a small quantity (upto 1 kg) of Ganja, under Section 21 of the NDPS Act, if proved, can lead to a sentence upto six months, and fine. By virtue of

Section 37(1) of the NDPS Act, the offence has become cognizable, however, as per Item No.3 in the list (In Part II of the First Schedule) offence is clearly bailable.

Judgment of the Hon'ble Bombay High Court on Bail, holding all offences under NDPS Act as non-bailable

5. Rhea Chakraborty v. The Union of India and Ors. Criminal Bail Application (Stamp) No. 2386 of 2020 decided On: 07.10.2020

- *"Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail", the Supreme Court observed in State of Punjab v. Baldev Singh (1999) 6 SCC 172, noted Justice Kotwal.*
- *"The situation has not changed since 1999 when these observations were made by the Hon'ble Supreme Court. In fact, the situation has become worse. Therefore, these observations apply to today's scenario with more force", Justice Kotwal added.*
- *"The same situation continued even after amendment of year 2001 made to Section 37 of the NDPS Act. Wherever there was no inconsistency between the provisions of Section 37 and the provisions for bail under CrPC then only it was permissible to look at the Cr.P.C. for bail provisions. Therefore, other procedural aspects concerning bail provisions, for example, execution of bail bonds etc. will be governed by the provisions of CrPC.*
- *If the accused claims bail as of right in case of possession of small quantity then no investigation can be carried out to find the source and trade of the contraband. This defeats the object of the Act. Considering all this discussion, I am of the firm view that the observations made by the Hon'ble Supreme Court in Baldev Singh (supra) are binding and all offences under the NDPS Act are non-bailable."*

PROBATION OF OFFENDERS ACT VIS-À-VIS NDPS ACT

As per Section 33 of the NDPS Act,

S.33: Application of section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958

"Nothing contained in section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable under section 26 or section 27."

As per the Hon'ble Bombay High Court in **Modaram Purohit v. State of Maharashtra (1999) 2 MhLJ 719**, A perusal of section 33 of the N.D.P.S. Act, would show that the provisions contained in section 360 of Code of Criminal Procedure and Probation of Offenders Act, would only apply to a person convicted under the N.D.P.S. Act, if

- (i) such person is under 18 years of age, or
- (ii) the offence for which such person is convicted is punishable under section 26 or section 27 of the N.D.P.S. Act.

The provisions contained in section 33 of the N.D.P.S. Act cannot be construed to mean, that persons falling in (i) and (ii) have mandatorily to be given the benefit of this provision.

PROVISIONS RELATED TO SEARCH, SEIZURE AND ARREST UNDER THE NDPS ACT

It has been recently held by the Hon'ble Supreme Court in **Mukesh Singh v. State (Narcotic Branch of Delhi) (2020) 5 KHC 1**, decided on 31.08.2020 that with regards to search, seizure and arrest under NDPS Act:

1. Section 50 of the NDPS Act provides that when any officer duly authorised under section 42 is about to search any person under the provisions of section 41, 42 or 43, he shall inform the

person to be searched in the presence of a Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such person so desires, he shall take such person without unnecessary delay to the nearest Gazetted Officer as mentioned in sub-section 1 of Section 50.

2. As per Section 50 (5), when an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.
3. Section 50 (6) provides that after a search is conducted under subsection (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.
4. Section 52 of the NDPS Act mandates that any officer arresting a person under Sections 41, 42, 43 or 44 to inform the person arrested of the grounds for such arrest.
5. Sub-section 2 of Section 52 further provides that every person arrested and article seized under warrant issued under sub-section 1 of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.
6. As per sub-section 3 of Section 52, every person arrested and article seized under sub-section 2 of Section 41, 42, 43, or 44 shall be forwarded without unnecessary delay to the officer in charge of the nearest police station, or the officer empowered under section 53. That thereafter the investigation is to be conducted by the officer in charge of a police station.
7. Section 53 of the NDPS Act provides that the Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer in charge of a police station for the investigation of the offences under the NDPS Act.
8. Sub-section 2 of Section 53 provides that the State Government, may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any other department or any class of such officers with the powers of an officer in charge of a police station for the investigation of offences under the NDPS Act.

Important Judgments of the Hon'ble Supreme Court on Section 42 of the NDPS Act (Power of entry, search, seizure and arrest)

6. **Mukesh Singh v. State (Narcotic Branch of Delhi) (2020) 5 KHC 1**, decided on 31.08.2020
 - "Merely because the informant and the investigating officer is the same, it cannot be said that the investigation is biased and the trial is vitiated", the bench observed while specifically overruling **Mohan Lal v. State of Punjab (2018) 17 SCC 627**.
 - **In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case.** Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of **Mohan Lal v. State of Punjab (2018) 17 SCC 627** and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.
7. **State of Rajasthan v. Sahi Ram (2019) 10 SCC 649**
 - "If the seizure of the material is otherwise proved on record and is not even doubted or disputed the entire contraband material need not be placed before this Court. If the seizure is

otherwise not in doubt, there is no requirement that the entire material ought to be produced before the Court."

8. Abdul Rashid Ibrahim Mansuri v. State of Gujarat (2000) 2 SCC 513

- Section 50-Right of accused to be informed about his right to be searched before Magistrate or Gazetted Officer-Gunny bags transported in auto rickshaw searched and charas found hidden therein-Place where gunny bags were found stacked in vehicle not inextricably connected with person of accused-Non-compliance with Section 50 did not arise.
- Section 42-Search and seizure on basis of information-Conditions precedent-Information must be taken down in writing and copy thereof must be sent to immediate official superior-Above conditions are imperative-Failure to comply with conditions would render action of searching officer suspect though trial may not vitiate on that score alone-Non-recording of information would deprive accused as well as Court of material to ascertain what was precise information.

9. Kader Alias Kader Babu v. State Of Kerala (2001) 3 RCR(Cri) 347

- Unlike usual cases under the Criminal Procedure Code, in cases under the NDPS Act, by the time of arrest, main part of investigation will be completed and duty of the Investigating Officer is mainly in sending the samples for chemical analysis and other routine work and there is no likelihood of any prejudice in usual circumstances. Therefore, we are of the opinion that merely because a detecting officer himself is Investigating Officer or the officer of the same rank as that of the detecting officer is investigating the case and files report before the Court will not vitiate the proceedings under N.D.P.S. Act in the absence of proof of specific prejudice to the accused.

10. S.K. Raju @ Abdul Haque @ Jagga v. State of West Bengal (2018) 9 SCC 708

- Section 42 does not apply where the place of occurrence is a public place. As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not.

11. State of Rajasthan v. Bheru Lal (2013) 11 SCC 730

- Section 42(1) cannot be interpreted literally - Notification by State Government specifying "any Sub Inspector posted as Station House Officer" - The expression would also include the temporary in charge of the police station - Trap, search and seizure by such temporary SHO if complying with the procedure will be valid - Such act cannot be invalidated merely because the operations were not carried out by the SI posted as SHO but the person to whom the SHO had handed over charge temporarily - For that period the person concerned was the SHO.

12. State of Rajasthan v. Jag Raj Singh @ Hansa (2016) 11 SCC 687

- When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with – Section 42 is mandatory – Instantly section 43 not attracted.

13. Mohan Lal v. State of Rajasthan (2015) 6 SCC 222

- Meaning of possession would depend upon the object and purpose of the enactment. Under NDPS Act, once possession is proved, the burden shifts to the accused to explain the same. Non-compliance of section 42 is impermissible, but sufficient compliance or delayed compliance in exceptional circumstances is permissible. Section 27 of Evidence Act does not require that the accused must be arrested in connection with the same offence. Delay in sending the sample for forensic analysis is not fatal.

14. Union of India v. Mohanlal & Anr. (2012) 7 SCC 712

- Section 52A r/w Article 47, Constitution of India and section 451, Cr. P.C. – Destruction of seized narcotic drugs is not only a statutory duty but a constitutional mandate – Procedural difficulties – Huge piling up of seized drugs – Directions given for collection of information on seizure, storage, disposal/destruction and judicial supervision.

Important Judgments of the Hon'ble Rajasthan High Court on Section 42 of the NDPS Act (Power of entry, search, seizure and arrest)

15. Gurmeet Singh Rai Sikh and Ors. v. State of Rajasthan 2018 (3) RLW 2460 (Raj.)

- Narcotics Drugs and Psychotropic Substances Act, 1985, Sec. 41, 42, 43--Seizure made during a routine nakabandi--Distinction between search u/Sec. 41, 42 and Section 43--Search u/Sec. 41, 42 of the NDPS Act are essentially conducted in furtherance of information either received personally or from any other source regarding commission of the offence under the NDPS Act--Search u/Sec. 43 of the Act are basically surprised checks without any prior information regarding commission of such offence--Held--A surprise check may be made by any police officer from a public place or while the contraband is in transit without being specially empowered in this behalf--Search conducted in furtherance of information/knowledge either personal or received from other source has to be made by an officer specially empowered in this behalf--Seizure officer was authorised to conduct the search.

16. State of Rajasthan v. Khinvre Khan (2016) 4 CriLR(Raj) 2125

- Narcotics Drugs and Psychotropic Substances Act, 1985, Section 42(1), (2) - The opium were seized – weight of the seized item was 2900 kg from the accused – the information which was received was not put in writing which is the clear violation of the law and moreover Section 42(1) and (2) were also not complied with – samples that were sent for checking were also not same in weigh as the one collected sample was 30 gm and the one sent was 47 gm. Hence, due to these discrepancies the accused cannot be framed beyond any reasonable doubt- Hence Appeal was dismissed.

CONDITIONS UNDER WHICH SEARCH OF PERSONS SHALL BE CONDUCTED

Important Judgments of the Hon'ble Supreme Court on Section 50 of the NDPS Act (Conditions under which search of persons shall be conducted)

17. Rajesh Dhiman and Ors. v. State of Himachal Pradesh 2020 (II) OLR 957

- The safeguards for search of a person would not extend to his bag or other Article being carried by them. Given how the narcotics have been discovered from a backpack, as per both the prosecution and defence versions, there arises no need to examine compliance with Section 50 of NDPS Act.

18. State Of Punjab v. Baljinder Singh & Anr. (2019) 10 SCC 473

- The Supreme Court has observed that merely because there was non-compliance of Section 50 of the Narcotic and Drugs and Psychotropic Substances Act as far as "personal search" of the accused was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle.
- “The mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.”

19. Abdul Rashid Ibrahim Mansuri v. State of Gujarat (2000) 2 SCC 513

- Section 50-Right of accused to be informed about his right to be searched before Magistrate or Gazetted Officer-Gunny bags transported in auto rickshaw searched and charas found hidden therein-Place where gunny bags were found stacked in vehicle not inextricably connected with person of accused-Non-compliance with Section 50 did not arise.
- Section 42-Search and seizure on basis of information-Conditions precedent-Information must be taken down in writing and copy thereof must be sent to immediate official superior-Above conditions are imperative-Failure to comply with conditions would render action of searching officer suspect though trial may not vitiate on that score alone-Non-recording of information would deprive accused as well as Court of material to ascertain what was precise information.

20. Arif Khan @ Agha Khan v. State of Uttarakhand AIR 2018 SC 2123

- Section 50 – Provisions mandatory – Instantly, search and the recovery made from appellant by police officers – None of them a Gazetted officer – Appellant not produced before either a Magistrate or a Gazetted Officer – Section 50 not complied with – Conviction not justified.

21. Ashok Kumar Sharma v. State of Rajasthan (2013) 2 SCC 67

- The fact that accused person had a right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate was not made known to him. Non-compliance of mandatory procedure vitiated the entire proceedings initiated against the accused- appellant. Special Court as well as High Court committed an error in not properly appreciating the scope of Section 50 of the NDPS Act. Conviction and sentence imposed by Sessions Court and affirmed by High Court was set aside. Appeal was allowed.

22. Jarnail Singh v. State of Punjab (2011) 3 SCC 521

- Section 50 – Search - In case recovery of narcotic is made from container being carried by individual, provisions of Section 50 would not be attracted - Section 50 can be invoked only in cases where narcotic substance is recovered as a consequence of body search of accused.
- Unintentional delay in sending sample of narcotic to office of Chemical Examiner would not be sufficient to conclude that sample has been tampered with.

23. Gurbax Singh v. State of Haryana (2001) 3 SCC 28

- Held that when an empowered officer or a duly authorised officer acting on prior information is about to "search a person", it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest magistrate for making the search. However, such information may not necessarily be in writing.
- Section 50 of NDPS Act, 1985 would be applicable only in those cases where the search of the person is carried out.
- Although provisions of Sections 52 and 57 of NDPS Act, 1985 are directory yet there violation makes the investigation by the prosecution faulty and it is not safe to convict the accused for a serious offence under Section 15 for possessing poppy husk on the basis of evidence tainted with said violations.

24. Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) 1 SCC 609

- Section 50 - Search of accused-Obligation of authorised officer under Section 50(1) is mandatory - If person intended to be searched expresses to authorised officer his desire to be taken to nearest gazetted officer or Magistrate, he cannot be searched till gazetted officer or Magistrate, directs authorised officer to do so-Failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate trial but would render recovery of illicit article suspect and vitiate conviction and sentence of an accused.

25. Dilbagh Singh v. State of Punjab (2017) 11 SCC 290

- If contraband is not recovered from the person, section 50 will have no application. Section 57 not being mandatory in nature, a substantial compliance thereof is sufficient. The recovery of the contraband from car by which accused were travelling establishes conscious possession of the contraband.

26. Dilip & Anr. v. State of M.P. (2007) 1 SCC 450

- It is now well settled that the offence committed under the Act is a grave one. Procedural safeguards provided therefor in terms of Sections 41, 42 and 50 of the NDPS Act should be complied with. In NDPS Act case effect of a search carried out in violation of the provisions of law would have a bearing on credibility of evidence of official witnesses..

27. Kashmiri Lal v. State of Haryana (2013) 6 SCC 595

- Narcotic Drugs & Psychotropic Substances Act, 1985-Sections 18 and 50-Seizure of opium- Conviction-If testimony of police officer is found to reliable and trustworthy, court can definitely act upon same-There is no absolute command of law that police officers cannot be cited as witnesses and their testimony should always be treated with suspicion- Ordinarily, public at large show their disinclination to come forward to become witnesses- Seizure had taken place from tool box of scooter belonging to appellant-When a vehicle is searched and

not person of accused, Section 50 is not attracted-As appeal was pending in 1996, ameliorative provision brought by way of amendment in year 2001 would not be applicable to accused-appellant-Appeal dismissed.

28. State of Rajasthan v. Parmanand & Another (2014) 5 SCC 345

- Section 50 – Provision is mandatory – But it applies to search of the person of the accused only – Does not apply to search of a bag carried by him – However, if the bag carried by him is searched and his person is also searched, Section 50 applies.
- Two accused persons – Not informed of their rights individually – Joint notice communicated – One of the accused signing for both – Conviction vitiated.

29. The State of Punjab v. Baldev Singh etc. etc. (1999) 6 SCC 172

1. When an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Subsection (1) of Section 50 of the NDPS Act of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

2. A search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

3. Failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50 of NDPS Act may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

4. An illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

5. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the NDPS Act.

Important Judgments of the Hon'ble Rajasthan High Court on Section 50 of the NDPS Act (Conditions under which search of persons shall be conducted)

30. Parmanand v. State of Rajasthan (2017) 2 CriCC 57

It cannot be disputed that before personal search is made of a person for recovery of a narcotic drug or psychotropic substance as provided under the provisions of the Act, mandatory provisions of Section 50 are required to be complied with and in absence thereof the entire search and recovery becomes suspect and vitiated and the accused is entitled to be acquitted on that ground alone. Sub-section (1) of Section 50 of the Act provides that when any officer duly authorised under Section 42 of the Act is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

PRESUMPTION OF CULPABLE MENTAL STATE UNDER NDPS ACT

“Presumption of Innocence” (hereinafter referred to as “the principle”) is one of the fundamental principles of criminal jurisprudence which axiomatically enunciates that an accused is presumed to be innocent until proven guilty. This fundamental principle is underpinned by the maxim *‘semper necessitas probandi incumbit ei qui agit’*: the necessity of proof lies with the person who levels the charges.

Section 35 of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act) deals with presumption of culpable mental state of an accused requiring the Court to presume the existence of such mental state for a prosecution under the Act. Furthermore, an explanation is provided in the provision which states-

“In this section “culpable mental state” includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.”

This essentially means that a person charged with an offence under the NDPS Act would have to rebut the presumption against him and the burden of proof would lie on him to show that he has not committed the act constituting an offence.

Important Judgments of the Hon’ble Supreme Court on Presumption of culpable mental state under NDPS Act

31. Naresh Kumar alias Nitu v. State of Himachal Pradesh (2017) 15 SCC 684

- “The presumptions against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt.”
- “Section 35 (2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.”

32. Noor Aga v. State of Punjab and Ors. (2008) 16 SCC 417

- "Section 35 and 54 of the Narcotics Act which imposes a reverse burden on the accused is constitutional as the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution."
- Constitution - Burden of proof - Reverse burden - Legality of - Section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 - Whether Section 35 and 54 of the Narcotics Act which imposes a reverse burden on the accused is constitutional or against the human rights ethos - Held, Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused - A bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied - Initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift - Standard of proof required for the accused to prove his innocence is not as high as that of the prosecution - Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability on the accused - With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused - Provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt - Hence, provisions of Section 35 of the Act as also Section 54 thereof cannot be said to be ex facie unconstitutional.

33. Abdul Rashid Ibrahim Mansuri v. State of Gujarat AIR 2000 SC 821

- Held that where an accused admits that narcotic drugs were recovered from bags that were found in his possession at the time of his apprehension, in terms of Section 35 of NDPS Act the burden of proof is then upon him to prove that he had no knowledge that the bags contained such a substance.
- 22. The burden of proof cast on the accused Under Section 35 can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the Appellant could not have had the knowledge or the required intention, the burden cast on him Under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

Important Judgments of the Hon'ble Rajasthan High Court on Presumption of culpable mental state under NDPS Act

34. Puran Ram Nayak v. State of Rajasthan 2019 (4) RLW 2738 (Raj.)

- Narcotic Drugs and Psychotropic Substances Act, 1985, Sec. 8/25 - Unsustainability of conviction--Conviction of owner of vehicle--265 kg of poppy straw recovered from the car-- Prosecution failed to prove that the appellant knowingly permitted the vehicle to be used by another person for transporting the contraband--Presumption u/Sec. 35 of the N.D.P.S. Act applies only when the prosecution discharges the initial burden cast upon it--Held-- Conviction u/Sec. 8/25 set aside. Appeal allowed.

CONSCIOUS POSSESSION AND PRESUMPTION WITH RESPECT TO CONSCIOUS POSSESSION UNDER THE ACT

35. Madan Lal and Ors. v. State of Himachal Pradesh (2003) 7 SCC 465

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in Gunwantlal v. The State of M.P. 1972 CriLJ 1187 possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

25. The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561. In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness 1976 (1) All ER 844.)

26. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

36. Mohan Lal v. State of Rajasthan (2015) 6 SCC 222

When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a

narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

9. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second; it refers to the animus or intent which has reference to exercise of the said control.

CONFISCATION UNDER NDPS ACT

37. Ganga Hire Purchase Pvt. Ltd. v. State of Punjab and Ors. (1999) 5 SCC 670

- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 60 (3)-Confiscation of vehicle-'Owner' what connotes?-Vehicle under hire purchase agreement-'Owner' means 'registered owner' of vehicle in whose name vehicle registered under Motor Vehicles Act- Vehicle under hire purchase agreement liable to confiscation if used for conveyance of contraband goods.
- *Ratio Decidendi:*

"Conveyance used in carrying any narcotic drug can be confiscated, if expression "owner" has been proved."

38. Kirta Ram v. State of Rajasthan 2007 (3) ILR (Raj) 555

- Criminal - Custody of vehicle - Order passed by Special Judge, NDPS Cases (trial Court) where application filed by Petitioner under Section 457, Code of Criminal Procedure (Cr. P.C.) seeking interim custody of vehicle was dismissed - Hence, present Criminal misc. petition - Held, in present case, undisputedly, it was owner, who was in possession of vehicle at relevant time of offence under an agreement for sale executed by Petitioner after receiving consideration of sale and he being owner of vehicle had not sought custody of vehicle but it was Petitioner, who claimed interim custody of vehicle - Vehicle found in contravention of NDPS Act transporting commercial quantity of poppy straw was liable to be confiscated from its owner and therefore, Petitioner was not entitled for interim custody of vehicle in question - Petition dismissed.

Hon'ble High Court of Punjab and Haryana

39. The Punjab Kashmir Finance Pvt. Ltd. v. State 1993 Cri LJ 498

- Criminal - Release of vehicle - Appeal under Section 454 of the Criminal Procedure Code, 1974 (Cr.P.C), read with Section 63(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S.) against the judgment of refusing to release the vehicle - Held, in present case, the truck was used without his knowledge and it took all precaution while giving the truck on hire as per agreement - Though in the hire purchase agreement ownership remained with the company and registration was joint - There was nothing on record showing that any proceedings had been taken against the hirer - Prosecution had neither filed any challan under Section 25 of N.D.P.S. nor led any evidence to the effect that Appellant knowingly permitted the said hirer to use the truck for illegal activities - Evidence had come that Appellant had no knowledge and had not committed any offence - It could not be said that Appellant had not proved that the truck was used without its knowledge or connivance Under Section 60(3) of N.D.P.S. - Order set aside - Appeal allowed.

EFFECT OF NON-COMPLIANCE OF SECTION 42(2) AND SECTION 50 OF THE NDPS ACT

40. State of Rajasthan v. Jag Raj Singh (2016) 11 SCC 687

- Narcotics-Acquittal-Mandatory provision-Non-compliance thereof - Sections 8, 15, 42(1), 42(2) and 43 of Narcotic Drugs and Psychotropic Substances Act, 1985 - Special Judge convicted Accused under Section 8/15 of Act, 1985 - However, High Court acquitted Accused from charges after setting aside conviction order - Whether High Court committed error in acquitting Accused - Whether there were sufficient material to support findings of High Court regarding non-compliance of Sections 42(1) and 42(2) - Whether Section 43 was applicable in present case - Whether recovery as claimed by Prosecution was supported from evidence on record and material and samples were properly sealed.

Held, while dismissing the appeal:

(i) Section 42(2) requires that where an officer takes down an information in writing under Sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication which was sent to Circle Officer was not as per the information recorded. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

(ii) Section 42(1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there was no case that any ground for belief as contemplated by proviso to Sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer, in his statement also, had not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere.

(iii) Special Judge coming to compliance of proviso to Section 42(1) held that vehicle searched was being used to transport passengers as had been clearly stated by its owner, hence, as per the explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court reversed the findings of the Special Judge.

(iv) Admittedly the vehicle was intercepted and was seized by the police. The vehicle could not be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

(v) The present was a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present was not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer had also come up with the facts and case to prove compliance of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with.

(vi) The present was not a case where Section 43 can be said to have been attracted, hence, non-compliance of Section 42(1) proviso and Section 42(2) had seriously prejudiced the Accused.

(vii) The present was not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. The High Court rightly held that non-compliance of

Section 42(1) and Section 42(2) were proved on the record and the High Court had not committed any error in setting aside the conviction order.

41. Sukhdev Singh vs. State of Haryana (2013) 2 SCC 212

- Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of Karnail Singh.
- The twin purpose of the provisions of Section 42 which can broadly be stated are that:
(a) it is a mandatory provision which ought to be construed and complied strictly; and
(b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

42. Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) 1 SCC 609

- Section 50--Compliance of provision--Validity--Held--In so far as the obligation of authorised officer under Section 50(1) N.D.P.S. Act is concerned it is mandatory and requires a strict compliance--Failure to comply with the provision would render the recovery of illicit article suspect and vitiate the conviction.

43. State of Delhi v. Ram Avtar (2011) 12 SCC 207

- Section 50 – The provision is mandatory – It is obligatory on the authorized officer to inform the person to be searched of his right about him being taken to a nearest gazetted officer and searched in presence of gazetted officer or a Magistrate – Non-compliance with the provisions would vitiate the trial.
- Theory of ‘substantial compliance’ would not be applicable to situations, where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured.

44. Rajender Singh v. State of Haryana (2011) 8 SCC 130

- Narcotics - Conviction - Section 18 and Section 42(2) of Narcotic Drugs and Psychotropic Substances Act, 1985 - Non-compliance of Section 42 of Act - Effect thereof - High Court confirmed conviction order passed by Trial Court against Appellant for offence punishable under Section 18 of Act, 1985 - Hence, this Appeal - Whether, order of conviction passed by High Court was justified - Held, Section 42(2) of Act called for interpretation in matter that information if taken down in writing would be sent to superior officer forthwith - However, it was clear that total non-compliance with provisions Section 42(1) of Act and Section 42(2) of Act was impermissible but delayed compliance with satisfactory explanation for delay could be countenanced - Further, PW-6 clearly admitted in his cross-examination that he had not prepared any record about secret information received by him in writing and had not sent any such information to higher Authorities - PW-5 did not utter single word about receipt of any written information from his junior officer Inspector PW-6 - Therefore, it was clear that there had been complete noncompliance with provisions of Section 42(2) of Act which vitiated conviction - Thus, order passed by Court below was set aside - Appeal allowed.

45. Karnail Singh v. State of Haryana (2009) 8 SCC 539

- Narcotics - Search - Seizure - Section 42 of Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act)- Present appeal is filed to resolve conflicting opinions regarding scope and applicability of Section 42 of NDPS Act in matter of conducting search, seizure and arrest without warrant or authorization-Whether Section 42 of NDPS Act allows search, seizure and arrest without warrant- Held, compliance with Section 42 of NDPS Act for writing down information received and sending a copy thereof to superior officer must precede entry, search and seizure by officer - In special circumstances, said requirement may get postponed

by a reasonable period - Question is one of urgency and expediency - Total non-compliance of requirements of Section 42 of NDPS Act is impermissible - Delayed compliance with satisfactory explanation about delay will be acceptable compliance - Whether there is adequate or substantial compliance with Section 42 of NDPS Act is a question of fact - It needs to be decided in each case - Reference answered.

46. State of Punjab v. Balbir Singh 1994 (3) SCC 299

- 15. The object of NDPS Act is to make stringent provisions for control and Regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

- Held:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

"On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a

Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial"

PREPONDERANCE OF PROBABILITIES UNDER NDPS ACT

47. Gangadhar alias Gangaram v. State of Madhya Pradesh (2020) 3 RLW(Raj.) 2013

- The stringent provisions of the Narcotics Drugs and Psychotropic Substances Act, Act do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt.
- It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. That the right of the accused to a fair trial could not be whittled down under the Act was considered in Noor Aga vs. State of Punjab, (2008) 16 SCC 417.
- The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of 10 years, absence of any provision for remission do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt after investigation, only where after which the burden of proof shall shift to the accused.

48. Naresh Kumar alias Nitu v. State of Himachal Pradesh (2017) 15 SCC 684

- "The presumptions against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt."
- "Section 35 (2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability."

EVIDENTIARY VALUE OF STATEMENT UNDER SECTION 67 OF THE NDPS ACT

49. Tofan Singh v. State of Tamil Nadu Criminal Appeal No. 152/2013, decided on 29.10.2020

- That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
- That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

50. Mohammed Fasrin v. State rep. by the Intelligence Officer (2019) 8 SCC 811

- Confession, even if it is admissible, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession. It is also well settled that a confession, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence. The confession of the co-accused, which was said to be a corroborative piece of evidence, has been discussed above and is of no material value.

51. Ram Singh VS Central Bureau of Narcotics (2011) 11 SCC 347

- Before solely acting on confession, as a rule of prudence, the Court requires some corroboration but as an abstract proposition of law it cannot be said that a conviction cannot be maintained solely on the basis of the confession made under Section 67 of the Act.

- When an accused is made aware of the confession made by him and he does not make complaint within a reasonable time, same shall be a relevant factor to adjudge as to whether the confession was voluntary or not.

Important Judgment of the Hon'ble Rajasthan High Court on Evidentiary Value of Statement under Section 67 of the NDPS Act

52. Babu Lal v. Union of India 2016 (2) RLW 1707 (Raj.)

- (a) Narcotics Drugs and Psychotropic Substances Act, 1985, Sec. 67 read with Evidence Act, 1872, Sec. 26 - Admissibility of statement of accused recorded u/Sec. 67 of the Act - Accused was confined to Police Station before recording his statement u/Sec. 67 - Held - Such statement recorded is hit by Sec. 26 of Evidence Act and cannot be read against him (accused). (Para)

SECTION 52A OF THE NDPS ACT

53. Union of India v. Mohanlal & Anr. (2012) 7 SCC 712

- Section 52A r/w Article 47, Constitution of India and section 451, Cr. P.C. – Destruction of seized narcotic drugs is not only a statutory duty but a constitutional mandate – Procedural difficulties – Huge piling up of seized drugs – Directions given for collection of information on seizure, storage, disposal/destruction and judicial supervision.

54. Union of India v. Jarooparam (2018) 4 SCC 334

- Prosecution failed to prove the case against the accused.
- The only course of action the prosecution should have resorted to is to for its disposal is to obtain an order from the competent Court of Magistrate as envisaged Under Section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application [See also: Noor Aga v. State of Punjab and Anr (2008) 16 SCC 417].
- There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor any such order was passed by the Magistrate. Even no notice has been given to the Accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial Court appears to have believed the prosecution story in a haste and awarded conviction to the Respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

55. Thana Singh v. Central Bureau of Narcotics (2013) 2 SCC 590

- Further, in light of Section 52A of the NDPS Act, which permits swift disposal of some hazardous substances, the time frame within which any application for re-testing may be permitted ought to be strictly defined.
- Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/resampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.

56. State of Punjab v. Makhan Chand (2004) 3 SCC 453

- Section 52A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

- Secondly, when the very same standing orders came up for consideration in **Khet Singh v. Union of India, (2002) 4 SCC 380**, this Court took the view that they are merely intended to guide the officers to see that a fair procedure is adopted by the Officer-in-Charge of the investigation.

Important Judgments of the Hon'ble Rajasthan High Court on Section 52A of the NDPS Act

57. Aladdin and Ors. v. State of Rajasthan 2016 (2) RLW 1040 (Raj.)

- Narcotics Drugs and Psychotropic Substances Act, 1985, Sec. 8/15, 52A read with Evidence Act, 1872, Sec. 27 - Seizure of 580 kgs. of contraband - F.I.R. against unknown person was registered - Investigating Agency has not prepared the inventory, photography and samples nor were the seized goods produced and exhibited in the Court in the self-same condition - Held -during trial under Act, leading primary evidence by producing and exhibiting Muddamal and samples in Court was essential to prove seizure - Only exception by which prosecution could avoid burden was by following procedure prescribed under Section 52A of Act. Prosecution evidence regarding alleged seizure discarded - Accused are acquitted of the charges.

58. Babu Lal v. Union of India 2016 (2) RLW 1707 (Raj.)

- (a) Narcotics Drugs and Psychotropic Substances Act, 1985, Sec. 67 read with Evidence Act, 1872, Sec. 26 - Admissibility of statement of accused recorded u/Sec. 67 of the Act - Accused was confined to Police Station before recording his statement u/Sec. 67 - Held - Such statement recorded is hit by Sec. 26 of Evidence Act and cannot be read against him (accused). (Para)
- (b) Narcotics Drugs and Psychotropic Substances Act, 1985, Sec. 52A - Scope - Failure to exhibit the Muddamal in the self-same condition in a case involving recovery of narcotics drugs and psychotropic substances- Prosecution withheld the photography, inventory and the samples prepared u/Sec. 52-A-Held-Adverse inference is drawn against the prosecution - Conviction of appellant is quashed and set-aside- Acquitted.

DETERMINATION OF QUANTITY OF THE NARCOTIC DRUGS OR PSYCHOTROPIC SUBSTANCES UNDER NDPS ACT

Important Judgments of the Hon'ble Supreme Court on determination of quantity of the Narcotic Drugs or Psychotropic Substances under NDPS Act.

59. Hira Singh v. Union of India (2020) 2 Crimes(SC) 119

- The decision in the case of *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161* taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law
- **In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and is to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances.**

Important Judgments of the Hon'ble Rajasthan High Court on determination of quantity of the Narcotic Drugs or Psychotropic Substances under NDPS Act.

60. Ravi v. State of Rajasthan 2016 (2) RLW 1455 (Raj.)

- Cr.P.C., 1973, Sec. 439 read with Narcotic Drugs and Psychotropic Substances Act, 1985, Sec. 37 and 8/21, 22 - Bail application - Petitioner was found in possession of 5000

Alprazolam tablets weighing 750 grams - Not having any license, permit or other documents showing that it was meant for therapeutic use - Held - In such situation the gross weight of the tablet be counted, which is above the commercial quantity.

61. Mohammed Alam v. State of Rajasthan S.B. Criminal Appeal No. 1242 of 2015 decided on 23.01.2017

- Narcotic Drugs and Psychotropic Substances Act, 1985—Section 8/20—Seizure of Ganja—Conviction and sentence—Substance recovered from appellant dry leaves and small branches of cannabis plant were also found mixed with flowering or fruiting tops of cannabis plant—When seeds and leaves are mixed with flowering or fruiting tops of plant, then entire substance is to be treated as Ganja although it contains seeds and leaves also—Entire substance i.e. 30 Kg and 500 gms. has to be treated as "Ganja" and same being commercial quantity, no illegality has been committed by trial Court for awarding minimum sentence of ten years to appellant—As per FSL report also sample was found to be "Ganja" which is admittedly a narcotic drug punishable under Section 8/20 of the Act—Appeal dismissed.

SENTENCING UNDER THE NDPS ACT

Important Judgments of the Hon'ble Supreme Court on Sentencing under the NDPS Act

62. Vijay Pandey v. State of Uttar Pradesh (2019) 3 RLW(Raj.) 2153

- The fact of an earlier conviction may be relevant for the purpose of sentence but cannot be a ground for conviction per se.
- The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be co-related.

63. Rafiq Qureshi v. Narcotic Control Bureau Eastern Zonal Unit (2019) 6 SCC 492

- The Court's discretion to consider such factors as it may deem fit is not taken away or tinkered. In a case a person is found in possession of a manufactured drug whose quantity is equivalent to commercial quantity, the punishment as per Section 21(c) has to be not less than ten years which may extend to twenty years. But suppose the quantity of manufactured drug is 20 times of the commercial quantity, it may be a relevant factor to impose punishment higher than minimum. Thus, quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment. Clauses (a) to (f) as enumerated in Section 32B do not enumerate any factor regarding quantity of substance as a factor for determining the punishment. In the event the Court takes into consideration the magnitude of quantity with regard to which an accused is convicted the said factor is relevant factor and the Court cannot be said to have committed an error when taking into consideration any such factor, higher than the minimum term of punishment is awarded.

64. Basheer @ N.P. Basheer v. State of Kerala (2004) 3 SCC 609

- Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001-Section 41-Constitutional validity of provision-Amendment Act rationalised structure of punishment under the Act by providing graded sentences linked to quantity of narcotic drug or psychotropic substance in relation to which offence was committed-Amended provisions of the Act were to apply to all cases pending before Court on 2-10-2001 and all cases pending investigation as on that date-Provido however excluded cases pending in appeal-Contention that proviso was unreasonable and violative of equality right guaranteed by Article 14 of Constitution, resulting in hostile discrimination. Held-that the proviso to Section 41(1) of the Amending Act 9 of 2001 is Constitutional and is not hit by Article 14.

Important Judgments of the Hon'ble Rajasthan High Court on Sentencing under the NDPS Act

65. Bhupendra Singh v. Union of India 2007 2 RLW(Raj) 1324

- Narcotic Drugs and Psychotropic Substances Act, 1985, Sec. 8/18; Narcotic Drugs and Psychotropic substances (Amendment) Act, 2001, Sec. 18(c) – Sentence in the case of recovery of opium lesser than commercial quantity – Opium recovered was 1 kg 900 gram – Convicted and sentenced to 10 years R.I. and fine of Rs. 1 lac – Co-accused were acquitted on the same set of evidence – Without challenging conviction prayed to reduce the sentence to the period already undergone in imprisonment i.e. 5 years and 10 months – Held – Indeed the recovered opium was lesser than commercial quantity, as per amended provisions of Sec. 18 of the Act in the ends of justice sentence reduced to 6 years R.I. with fine of Rs. 25,000/- – Conviction maintained.

NDPS ACT VIS-À-VIS DRUGS AND COSMETICS ACT, 1940

Important Judgments of the Hon'ble Supreme Court on prosecution under Drugs and Cosmetics Act, 1940 along with NDPS Act

66. State of Punjab v. Rakesh Kumar (2019) 2 SCC 466

- *N.D.P.S Act, should not be read in exclusion to Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law. In the present case, since the action of the accused-Respondents amounted to a prima-facie violation of Section 8 of the N.D.P.S Act, they were charged under Section 22 of the N.D.P.S Act.*
- The Supreme Court has held that persons who are found in bulk possession of manufactured drugs without any valid authorization can be tried under the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, apart from the Drugs and Cosmetics Act, 1940.

Important Judgments of the Hon'ble Rajasthan High Court on prosecution under Drugs and Cosmetics Act, 1940 along with NDPS Act

67. Salim Khan v. State of Rajasthan S.B. Criminal Revision Petition No. 1450/2019 decided on 20.11.2019

- The N.D.P.S. Act, should not be read in exclusion to Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law.
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