

# Enforcement of the Narcotic Drugs and Psychotropic Substance Act, 1985 : Judicial Trend Analysis

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The Narcotic Drugs and Psychotropic Substance Act, 1985 has replaced two Central Acts., i.e The Opium Act,1878 and The Dangerous Drugs Act,1930. An urgent need was felt for a comprehensive legislation to deal with the Narcotic Drugs and Psychotropic Substances and for exercising control to strengthen enforcement measures on drug abuse and illicit drug trafficking. It was also aimed to incorporate therein certain provisions of international conventions.

The primary aim of the Act is to protect the public health from the onslaught of the evil. The offence under this Act are very serious and hence dealt with very stringently as the allegations if proved, could end with rigorous imprisonment with fine and in extreme cases may include "Capital Punishment". The Law Enforcing Agencies play vital role in curbing the drug menace and as such needs special care while enforcing the law.

It is a fact that while most of the decisions concerning the NDPS Laws have gone in favour of the accused and lot of benefit of doubt under various sections of the Act has been given to the most of the accused suspected on committing offences punishable under various sections of NDPS law yet the accused whose guilt has been established are punished stringently and the judiciary has not shown any sympathy for such offenders.

The Supreme Court and High Courts have been strict in the interpretation and enforcement of provisions of NDPS laws and at the same time progressive even, in evolving definite principles for complying with the provisions of some sections of NDPS laws, specifically directing the enforcement authorities to strictly follow the procedures laid down by the NDPS Laws in respect of possession, search, seizure, confessional statements, personal search under Section 50, in granting bails, safe custody of samples under Section 55, reduction of information in writing, informing the superior officers, presumptions, conviction solely on the basis of police/prosecution witness, false prosecution, vexatious search and seizure, preventive detentions, forfeiture of properties- almost every point of importance has been touched and decided by the Court in extreme fairness and highest judicial principles of law.

Eventhough the NDPS Act is very stringent, the Courts have tried to reduce the stringency by applying the principles of fairness and equity giving them a chance to reform. The provisions of Cr. PC, 1973 and the Constitution of India have been given primacy in considering and deciding on the facts and points of law in NDPS Act.

The Constitution of India has been given predominance in protecting the rights of the accused involved in committing the offence under NDPS Laws. Its protective shield has been extended to them for their personal liberty and violation of fundamental rights of life and liberty.

Every effort has been made to present the NDPS Laws in their various dimensions by emphasizing the Supreme Court and High court interpretations of various issues involved in establishing the guilt/innocence of the accused under various sections of NDPS Act.

Most of the debatable legal issues like Conscious Possession, search of the person, admissibility of confessional statements in evidence, commercial and small quantity determination, conditions precedents for grant of bail, search and seizure procedure, informing the accused person about his right during search before an Executive Magistrate or Gazetted Officer, confiscation of properties, conveyance etc., value of police/prosecution witness, search and seizure without warrant, procedure followed during chance recovery, confiscation of properties acquired through illegal means, preventive detention and legality of detention order, doctrine of double jeopardy, applicability of Amendment Act 2001, applicability of Cr.PC, 1973 almost every aspect of NDPS Law have been duly interpreted by the Supreme Court and other High Courts of India.

### **Constitutional Validity of NDPS (Amendment) Act, 2001:**

The amendments made to the Narcotic Drugs and Psychotropic Substance Act, in 2001 satisfy the test of constitutionality and the reasonable and logical in their character and application.

The Hon'ble Supreme Court in the case of Basheer vrs. State of Kerala,<sup>1</sup> reported in

wherein their Lordships took a close look into the Amendments introduced in 2001, the repercussions of the amendments and reasonableness of laws incorporated by such Amendments. The Apex Court observed :-

“In the result, we are of the view that the proviso to Section 41 (1) of the Amending Act, 9 of 2001 is Constitutional and is not hit by Article 14. Consequently, in all cases, in which the trials had concluded and appeals were pending on 2.10.2001, when Amending Act 9 of 2001 came into force, the amendments introduced by the Amending Act 9 of 2001 would not be applicable and they would have to be disposed off in accordance with the NDPS Act, 1985, as it stood before 2nd October, 2001.”

In the case of Kadem Sheikh vrs. State of West Bengal,<sup>2</sup> the Full Bench of Kolkata High Court upheld the Constitutional validity of the Amendment Act of NDPS Act, 2001 and observed “The amendments made to the Narcotic Drugs and Psychotropic Substances Act, in 2001 satisfy the test of Constitutionality and are reasonable and logical in their character and application.”

In the case of Indian Harm Reduction Network vrs. Zonal Director<sup>3</sup> the honourable Bombay High Court while considering Section 31-A as unconstitutional observed:

“To conclude, we hold that Section 31-A of the NDPS Act is violative of Article 21 of the Constitution of India, as it provides for mandatory death penalty. We, however, reject the challenge to the said provision on the stated grounds, being violative of Article 14 of the Constitution of India. Further, instead of declaring Section 31-A as unconstitutional, and void ab initio, we accede to the alternative argument of the respondents that the said provision be construed as directory by reading down the

expression “shall be punishable with death” as “may be punishable with death” in relation to the offences covered under Section 31-A of the Act. Thus, the Court will have discretion to impose punishment specified in Section 31 of the Act for offences covered by Section 31-A of the Act. But, in appropriate cases, the Court can award death penalty for the offences covered by Section 31-A, upon recording the reasons therefore.”

Constitutional validity of the provisions of Sub Sec (1) of Sec 41 of NDPS Act came up for consideration before the Hon’ble Apex Court and in the aforesaid Judgment reference was made to the case of Ratan Lal vrs. State of Punjab<sup>4</sup>, reported in, wherein it was held by the apex court that “an ex post fact Criminal law, which only mollifies the rigour of the law, is not hit by article 20(1) of the Constitution.

On the question of rationalization of quantum of sentence the Supreme Court of India in E. Michael Raj vrs. Intelligence Officer, Narcotic Control Bureau<sup>5</sup> observed :-

“13. It appears from the Statement of Objects and Reasons of the Amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms. and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears

to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gms. of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gms. is mixed with 50 kgs. of the powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a 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. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.

#### **Formulation of Guideline:**

The Supreme Court Judgments have been definite guideposts in arriving at definite conclusions on particular points of law relating to NDPS. If the law in its rational and logical character meets the demand of the Constitution, it has to be held to be Constitutional and the wisdom of legislature ought not be doubted.

In Sunil Kumar vrs. State,<sup>6</sup> the Honourable Apex Court clarified that it is the duty of the Court to scrutinize the evidence with great care and caution keeping in mind that it exists not only to ensure that no innocent person is punished but also to ensure that guilty persons do not escape scot-free.

In respect of search and seizure of Narcotic Drugs and Psychotropic substance or arrest of an accused under NDPS. Act the Apex Court in *State of Punjab vrs. Balbir Singh*<sup>7</sup> devised the guidelines, and to quote:

“The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions, which are as follows:

1. If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

2A. Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest is carried out would be illegal.

Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

2B. Under Section 41(2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person Page 1565 or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

2C. Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.”

The Non Compliance of Section 8(c), 42(1)(2), 50, 57 N.D.P.S. Act and 100, 165, 313 Cr.P.C., 1973 and its fatal effect on Prosecution have been discussed in several cases<sup>8</sup>.

During the analysis of several cases of trial, appeal up to Supreme court of Narcotic cases, the stand of Judiciary appears to be clear that Mandatory provisions under this Act must

be complied with for conviction of the accused person and non compliance of mandatory provisions will lead to acquittal. In the opinion of Judiciary, it is a case of technical nature and as the punishment provided under this act is heavy including Capital Punishment, non compliance of mandatory provision is unconstitutional and illegal.

**References :**

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4. AIR 1985 SC 444
5. (2008) 5 SCC 161
6. 1990 Cri L J 414: 1990 (2) EFR 367 (Del),
7. 1994 SCC (Cr) 634 : 1994 Cri LJ 3702.
8. State of Rajasthan v, Shanti: AIR 2010 SC 43; .Sarju v. State of U.P. AIR 2009 SC 3214; Karnail Singh v. State of Haryana [2009 (10) SCALE 255]; Ranvir Yadav v. State of Bihar: AIR 2009 SC (Suppl) 1439; Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513]; Dilip v. State of M.P. :AIR 2007 SC 369; Ganesh Gogoi v. State of Assam : AIR 2009 SC 2955; State of Punjab v, Hari Singh: AIR 2010 SC 1966, Sajan Abraham v. State of Kerala [(2001) 6 SCC 692], Union of India v. Shah Alam and others : AIR 2010 SC 1785.

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