



This article is brought to you for “free” and “open access” by Beyond Briefs Law Review. It has been accepted for inclusion in Volume 1 Issue 2 of Beyond Briefs Law Review after due review.

The Copyright of the Article duly remains with the Author and the Journal.

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of the Publishing Editor of Beyond Briefs Law Review. The Editorial Team of Beyond Briefs Law Review and the Author holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of Beyond Briefs Law Review. Though all efforts are made to ensure the accuracy and correctness of the information published, Beyond Briefs Law Review shall not be responsible for any errors caused due to oversight or otherwise.

UNTANGLING THE NDPS GORDIAN KNOT: A BASTION OF DEFENSE OR A CONDUIT TO CULPRITS

~ Parth Shinde & Aaditya Bajpai ¹

Abstract

The United States has been advocating for a drug-free state, raising concerns about the existence of such a world. However, the majority of people reject this idea. The National Drug Policy and Security Act (NDPS Act) in India is seen as a torchbearer in preventing drug consumption. The act aims to instill deterrence in citizens by punishing those who break the drug policy. This study aims to examine the implementation of the NDPS legislation in India, focusing on whether its provisions reduce drug crimes or provide a pathway for accused individuals to escape prosecution. The primary objective is to examine the NDPS act's provisions and demonstrate how the public may face significant problems due to complete or partial noncompliance with the law.

Keywords

NDPS, Narcotics, Drugs, Law, Policy, Security.

¹ You may contact the author at the following email address: parthshinde@nlunagpur.ac.in & aadityabajpai@nlunagpur.ac.in.

INTRODUCTION

Ever since the United States started with its propaganda peddling a drive of a drug free state, serious questions have been imposed as to whether this could actually be a thing, i.e., “a drug free world”. The answer to the same by a majority of the population has been a big NO. Even though there is a multitude of data that exhibit the ethical and plausible bankruptcy of this approach, the rhetoric about conquering a “war on drugs” persists to be propagated.² Despite efforts to eradicate the illegal cultivation of these drugs, such as the United Nations General Assembly Special Session on Drugs in 1998, which committed to doing away with the cultivation of coca, cannabis, and opium poppy by the year 2008, the global production and consumption of these drugs have remained relatively unchanged from a decade ago. However, things have changed in such a way that these producers have gotten more skilled at what they do, which has resulted in heroin and cocaine being more readily available and more affordable.

When it comes to the prevention of drug usage, the National Drug Policy and Security Act (NDPS Act) has been characterised as the torch-bearer in India. With the intention of ensuring that those who violate the drug policy are subject to punishment, this act was enacted as an additional means by which the government of India³ might instil a sense of deterrence in the minds of its inhabitants. An example of the same in India could be taken from the fact that prior to the passage of the Narcotics, Drugs, and Psychotropic Substances (NDPS) Act in 1985, Mephedrone (MEPH) was not included on the list of substances⁴ that were prohibited from being used under the law in India. This is an example of how drug abuse continues to occur despite the many efforts that have been made to stop it. It was later when the government realised their error, that they included the same in the NDPS act from February 2015.⁵

COMPLIANCE WITH DATA PROTECTION REGULATIONS

Data protection regulations, such as the European Union’s General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA), have elevated the importance of data privacy and imposed strict compliance requirements on businesses. Corporate lawyers play a

² Ankush Laxman Rathod, Sandeep Singh Sahota & Rakesh Kumar Garg, *Mephedrone – an emerging drug of abuse in India*, 112 CURRENT SCIENCE ASSOCIATION 2212, 2214 (2017).

³ S.V. Joga Rao, *Drug Addiction: Penal Policy*, 34 JOURNAL OF THE INDIAN LAW INSTITUTE 275, 280 (1992).

⁴ Ankush Laxman Rathod, Sandeep Singh Sahota & Rakesh Kumar Garg, *supra* note 1, at 2215.

⁵ Ahmed Ali, *Meow Drugs Comes Under NDPS Ambit*, THE TIMES OF INDIA (Feb. 22, 2015), <https://timesofindia.indiatimes.com/city/mumbai/meow-drugs-comes-under-ndps-ambit/articleshow/46334174.cms>.

crucial role in ensuring organizations adhere to these regulations, conducting privacy impact assessments, drafting privacy policies, and establishing mechanisms for consent, data subject rights, and breach notification.⁶

PROCEDURAL RIGOUR: SECTION 42'S CRITICAL COMPLIANCE & JUDICIAL INSIGHTS

Section 42 deals with search, seizure and arrest without warrant. It states that in cases where a gazetted officers, mentioned in the section have reason(s) to believe or has information that any contraband has been found which would be punishable under the act, after recording such reasons in writing, the empowered officer can search, seize and even arrest the suspects if required. It is mandatory that such reasons recorded shall be forwarded to his immediate senior in 72 hours of such recording. *An officer is permitted to conduct an arrest or search under Section 42⁷ if, based on their own knowledge or information, they have probable cause to consider that it is required. Both the officer's specific rank and the existence of "reason to believe" are necessary conditions. The Magistrate or the officials designated therein must first get a warrant before they may make an arrest or search someone. Secondly, they must have reasonable suspicion that an offence under Chapter IV has been committed, or that such action is necessary to achieve another objective listed in the Act, as mentioned by the Rajasthan High Court.*⁸ This provision can be used in cases where there is immediate need for search of a place, so the investigation agency may not have proper time to get the warrant, but there are still some requirements which shall be complied with, and non-compliance of this would have severe effects on the investigation and the ultimate motive of getting the accused convicted of the offence. The said provision has been upheld by the Constitution bench in *Karnail Singh vs State Of Haryana* ,⁹ wherein the Apex Court and stated that the requirements of Section 42 are mandatory in nature.

⁶ Ani, *Cybersecurity in the digital age: Protecting your customers' data*, ETCIO.com (May 17, 2023), <https://cio.economicstimes.indiatimes.com/news/digital-security/cybersecurity-in-the-digital-age-protecting-your-customers-data/100297988>.

⁷ § 42, Narcotics Drugs and Psychotropic Substances Act, 1985.

⁸ Udit Singh, *S.42 NDPS Act | Non-Compliance With Search, Seizure & Arrest Procedures Fatal To Prosecution: Rajasthan High Court*, LIVE LAW (Sept. 8, 2023), <https://www.livelaw.in/high-court/rajasthan-high-court/rajasthan-high-court-grants-bail-non-compliance-section-42-ndps-act-237307>.

⁹ *Karnail Singh v. State of Haryana*, Criminal Appeal No. 36 of 2003.

It is very important in such special legislations, wherein the burden is on the accused to prove the innocence, that the authorities would comply with the statutory requirements, as non-compliance of these provisions lead to severe consequences.¹⁰ Various Courts have had the opportunity to deal with cases wherein there was non-compliance of the section, wherein the courts have time and again stated that such non-compliance would lead to grant of bail. The Apex Court while dealing with an appeal observed that non-compliance of provisions for search and seizure would vitiate the conviction.

The Rajasthan High Court¹¹ while dealing with a bail application, wherein the seizing officer on reasons to believe arrested the accused, but he did not send the reasons to his immediate senior in stipulated time, the court held that *the NDPS Act is a piece of law with rigorous restrictions that must be observed to in every way, including the way searches, seizures, and arrests are conducted. Any kind of noncompliance with these criteria will not be accepted.* Thus, the court granted bail to the accused for non-compliance of provisions of Section 42, it further held that such non-compliance to the provisions would be fatal to the prosecutions.

In another case, the Calcutta High Court¹² was dealing with a bail application wherein, the reasons recorded by the seizing officer were in the General Diary maintained by the police officers thus the court held that it would amount to non-compliance of section 42. “*Overlooking Section 42 is against the law*”, the judge concluded. “*We hold the view that the report stipulated in Section 42(1) must be presented by the authorised official in the form of a clear and unambiguous written statement and cannot be included in a document that is not accessible to the public. Our case is strengthened by the fact that the NDPS Act is novel legislation that contains several limitations on remedy awards.*”

The Jammu & Kashmir High Court¹³ while dealing with an appeal has again reiterated that non-compliance of Section 42 would vitiate the trial and thus the acquittal was upheld. The same was

¹⁰ Anthony Davidson Gray, *The Presumption Of Innocence Under Attack*, 20 NEW CRIMINAL LAW REVIEW: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 569, 600 (2017).

¹¹ Srinjoy Das, *Mere GD Entry For Recording ‘Reason For Search’, ‘Intimation To Senior’ Not Sufficient Compliance Of S. 42 NDPS Act*, LIVE LAW (Aug. 29, 2023), <https://www.livelaw.in/high-court/calcutta-high-court/calcutta-high-court-judgment-individually-owned-vehicle-private-place-section-42-ndps-act-236514>.

¹² JN BAROWALIA & ABHISHEK BAROWALIA, COMMENTARY ON THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT (2nd ed., Lexis Nexis, 2023).

¹³ *Id.*

observed by the Bombay High Court ¹⁴ while dealing with an appeal wherein the reasons were not deduced in writing by the seizing officer while seizing the contraband. The Orrisa High Court ¹⁵ while dealing with an appeal held that that the accused should be acquitted since section 42 was not followed, as there is no proof as to who got the previous information or why the authorised office conducted the so-called search and seizure. The Punjab Haryana High Court ¹⁶ had also held that in case when the contents of section 42 haven't been obliged by, the same entitles the accused to bail despite the fact that recovery is of commercial quantity of contraband.

BALANCING ENFORCEMENT & RIGHTS: SECTION 50 IMPERATIVE IN PERSONAL SEARCHES

Section 50 is yet another provision which has major compliance under NDPS, it states that in cases of personal search, the officer in charge is duty bound to let the accused know of his right that his personal search could be done before a magistrate or a Gazetted Officer, this is to prevent malicious prosecution by the investigation agencies. The Apex Court in state of *Punjab v. Baldev Singh* ¹⁷ constitutionally upheld the provision and observed that due to severe punishment, extra caution is needed, thus a personal search before a Gazetted Officer or a Magistrate can be done. The court at another occasion while dealing with *Vijaysinh Chanduha Jadeja v. State of Gujrat* ¹⁸ again constitutionally upheld the section and held that strict compliance of section 50 shall be done by investigation agencies and in case the accused waives off his right, it shall be held that the mandate is completed. Similar to Section 42, non-compliance of this provision would lead to sever consequences including vitiation of the prosecution's case, the consequences are either grant of bail or even acquittal in most cases.

The apex court in *case of Arif Khan* ¹⁹, held that the accused be acquitted since provision of Section 50 were not properly followed, but what court failed to observe was that the accused had waived off his right to be searched before a Magistrate, but the court held that since no proper search was done, it ordered acquittal. We can see that the SC has specifically held that even if the accused

¹⁴ Akshay Gudinho, *Non-Compliance Of Section 42 Of NDPS Act Vitiates Trial: Bombay High Court*, LIVE LAW (Jan. 2, 2021), <https://www.livelaw.in/news-updates/section-42-of-ndps-act-vitiate-trial-bombay-high-court-167860>.

¹⁵ Raghu @ Rahul Rajput Thakur v. State of Odisha, BLAPL No. 2430 of 2021.

¹⁶ Pankaj v. State of Punjab, 2022 SCC OnLine P&H 1296.

¹⁷ Punjab v. Baldev Singh (1999) 6 SCC 172.

¹⁸ Vijaysinh Chanduha Jadeja v. State of Gujrat (2011) 1 SCC 609.

¹⁹ (2018) 18 SCC 380.

waives off his right, he be searched before the Magistrate. The Delhi High Court in *Sumit Rai v. State (NCT of Delhi)*²⁰, held that since the facts of that case were similar to that of Arif Khan, it had to award for acquittal of accused despite the fact that he had waived off his right to be searched before a Magistrate. The Punjab and Haryana High Court²¹ was dealing with a bail application, where the accused was not informed about his rights under Section 50. The Court held that it is mandate under Section 50 and its non-compliance would only vitiate the case of prosecution thus, it granted bail to the accused.²²

In another bail case, the Kerala High Court²³ reiterated that conditions u/s 50 are mandatory in nature and shall be complied with, and its non-compliance would entitle the accused to be granted bail, as such non-compliance would satisfy the first condition laid down in section 37 which states that prima facie the accused shall not be guilty of the offence, and when the investigation agency doesn't comply with the provisions, it would be good to assume that the accused is prima facie not guilty of the offence. Delhi High Court in another case held that non-compliance of the provisions vitiates the trial and thus it is right of the accused to get the benefit of doubt that since the search was not before the Gazetted officer, it is a possibility that the contraband may be planted by the agency, thus this doubt shall go in favour of the accused and thus he shall be acquitted of all the charges.

Thus, analysing the above two sections, we can see how both these provisions have to be strictly complied and its failure would lead only to vitiation of the prosecution's case thereby leading to acquittal of the accused.

²⁰ Sumit Rai v. State (NCT of Delhi), AIR ONLINE 2019 DEL. 1186.

²¹ Bhavya Singh, Punjab & Haryana High Court Sets Aside Conviction In Drugs Case, Says Compliance Of Section 50 Of NDPS Act Not Made, LIVE LAW (May 16, 2023), <https://www.livelaw.in/high-court/punjab-and-haryana-high-court/punjab-haryana-high-court-ndps-cases-standard-investigation-228825#:~:text=Section%2050%20of%20the%20NDPS,nature%2C%22%20the%20court%20said>.

²² Onkar Thakur, *To Search Or Not To Search: The Unceasing Confusion Surrounding Section 50 Of NDPS Act*, SCC ONLINE TIMES (Sept. 21, 2023), <https://www.sconline.com/blog/post/2023/09/21/to-search-or-not-to-search-the-unceasing-confusion-surrounding-section-50-of-ndps-act/>.

²³ Tellmy Jolly, *Kerala High Court Acquits NDPS Accused Citing Prosecution's Failure To Produce His Alleged Written Consent For Search In Absence Of Magistrate*, LIVE LAW (Nov. 10, 2023), <https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-section-50-ndps-act-search-absence-magistrate-gazetted-officer-acquits-accused-failure-prosecution-produce-evidence-242037>.

BALANCING JUSTICE: PROPOSALS FOR NDPS ACT REFORMS

As discussed above, these provisions have a very strict mandate of being followed by the investigation agencies. The failure would as seen above, result in vitiation of the prosecution's case. It is true that these provisions are provided for safeguard of the accused, to avoid malicious or vexatious prosecution by the agencies, but we shall also consider the fact that sometimes the officers have to act immediately. Sometimes, the situations could be such that they need not have enough time to fulfil all the mandate, but if they are successful in doing their job, that it to catch the people involved in violation of the Act that should suffice the purpose. The provisions could be made in a way so as to balance the burden on the investigation agency as well, sometimes the officers would act in bona fide manner and would may not be able to completely follow the procedure but because of this one little failure to completely adhere to the procedure, the accused might take advantage of it and may get acquitted. It is true that as per our criminal Jurisprudence, accused is innocent until proven guilty, but under these special legislations the burden is also on the accused to prove his innocence. Section 37 of the Act is somewhere parallel to Section 45 of the PML Act , where both of them deal with bail and has strict twin conditions of which the courts must be satisfied before granting the bail. Now, in some cases discussed above, the courts were satisfied of fulfilling the first condition that accused is prima facie not guilty just on the basis of nonfulfillment of the procedure in the sections, though it is true that they are mandatory in nature but that should not mean that the accused is not prima facie guilty of the offence. The courts ought to consider other relevant material on record as well, before coming to the conclusion that he is not guilty.

It is due to such stringent mandatory provisions that sometimes even acting in bona fide manner, the prosecution case may be vitiated due to non-compliance of such mandate, thus it would be important for the legislature to step in and analyse the situation to get in reforms in the Act, so as to balance both, the rights of the accused as well as have balanced mandates for the investigation agency by keeping in mind the impromptu acts they may have to take considering the crimes they deal with, this area would require impromptu actions to be taking by the officers so as to seize the contraband. The courts would have to follow the law, and if it is to be changed to gate more convictions then there is requirement of some changes in the law so as to make the procedure less

stringent. Just like the 2018 amendment in the Prevention of Corruption Act, 1988 which made huge changes in the act, almost making it a new one, the same is needed in NDPS Act so that the authorities can act lawfully and only then we could see an increase in the conviction rate under the Act.

