

Government of Tripura.
Office of the Director General of Police.
Tripura :: Agartala.

No. 3192-3203/R-105/DGP/LC/2012(L), Dated, the 19th, Nov, 2019.

To
The Superintendents of Police,
West/Khowai/Dhalai/Unokoti/North/
Sipahijala/Gomati and South Districts, Tripura.

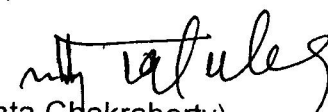
The Superintendent of Police (Anti Narcotic).
Tripura, Agartala.

Subject:- Some important aspects, provisions, Case Laws for proper investigation and prosecution under the Narcotic Drugs and Psychotropic Substances Act, 1985.

Please find enclosed copy of Home Department, Govt. of Tripura letter No.F.15(2)-PD/2018(L)/3660 dated 18-11-2019 alongwith guidelines dated 25-01-2019 of the Police Accountability Commission, Tripura on the above mentioned subject, contents of which is self explanatory.

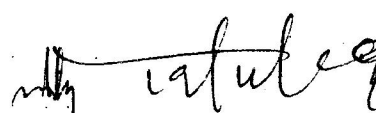
2. It is requested to circulate the guidelines dated 25-01-2019 of the Police Accountability Commission, Tripura to all the O/C PSs, SDPOs and field level officers for proper investigation and prosecution on the NDPS cases.

Enclo:- As stated.


(Subrata Chakraborty)
Asstt. Insp. Genl. of Police(Crime).
For Director General of Police.
Tripura.

Copy along with its enclosures to :-

1. The DIGP(S/R), Tripura, Agartala for information please.
2. The DIGP(N/R), Tripura, kumarghat for information please.
3. The I/C, E-Governance Cell, PHQ for uploading the same in the Tripura Police Website.


(Subrata Chakraborty)
Asstt. Insp. Genl. of Police(Crime).
For Director General of Police.
Tripura.

RECEIVE

No. 4526/DGP/PS

Dated 18/11/19

No.F.15(2)-PD/2018(L)
Government of Tripura
Home Department

3660

Dated, Agartala the 18th November, 2019.

To
The Director General of Police,
Tripura, Agartala.

The Additional Director General of Police,
Tripura, Agartala.

The Superintendent of Police,
West Tripura/ Sepahijala/Gomati/South Tripura/
Khowai/Dhalai/ Unakoti/North Tripura.

Subject:- Some important Aspects, Provisions, Case Laws for proper investigation and prosecution under the Narcotic Drugs and Psychotropic Substances Act, 1985.

Sir,

I am directed to enclose herewith a copy of the guidelines dated 25th January, 2019 as received from Police Accountability Commission, Tripura on the subject mentioned above and to request you to kindly take necessary action on the matter in this regard.

Enclo:-As stated.

Yours faithfully,

Amb
(A. Deb) 16/11/2019

Deputy Secretary to the
Government of Tripura

No 1624/ATNLC
DA 19/11/2019

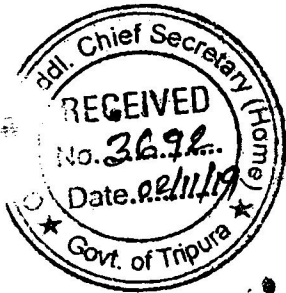
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Justice (Retd.) S. C. Das
Chairperson
Police Accountability Commission
Tripura.
Dated 25th January, 2019



**SOME IMPORTANT ASPECTS – PROVISIONS – CASE
LAWS – FOR PROPER INVESTIGATION AND
PROSECUTION UNDER THE NARCOTIC DRUGS AND
PSYCHOTROPIC SUBSTANCES ACT 1985.**

Almost every now and then we see in the electronic media and in the print media that huge quantity of drugs of different form has been recovered and seized in different parts of our State. In the national level also drugs are seized in different parts of the country. Drug addiction is a curse for the society. It is a menace which threatens the public health and dissolutes human personality. It degrades human dignity and also encourages crime and lawlessness. The escalation of illicit production and trafficking of narcotic drugs and psychotropic substances (for short, NDPS) apart from human degradation causes premature death and also is a source of other deadly diseases. The other most dangerous disaster of drugs is generation of black money apart from destroying the young generation. The drug money often goes to the hand of extremists and the enemies of the society who indulge in illegal activities in the society and thereby disbalance and destroy the social fabric.

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2. The Narcotic Drugs and Psychotropic Substance Act 1985, (for short, NDPS Act) is a special law enacted by the parliament with an object of controlling and regulating the operations relating to narcotic drugs and psychotropic substances and controlled substances as well as stringent punishment of the offenders. It was felt that the country should be saved from the disastrous effect of narcotic drugs and under world criminals. The

Act has prescribed stringent punishment for the offenders and also prescribed special procedures to be followed for detection and prosecution as well as for disposal of such substances. Under the Act, specific procedure has been laid down for arrest, search, seizure, custody of seized articles, collection of sample etc. The Act further prescribes that the provisions of Cr.P.C., in so far as the same which is not inconsistent with the provisions of the Act shall apply. The legislature also prescribed some provision with an object of giving some safeguards to the accused persons also so that one is not unnecessarily harassed. The provision prescribed in the NDPS Act has to be strictly followed in the course of investigation and prosecution. Ignorance and/or non-compliance of the prescribed provisions is considered to be fatal. Any defect in the investigation or prosecution and/or non-compliance of the provisions will consequently facilitate a wrong doer to escape a punishment and, therefore, investigating agency as well as the prosecuting agency require to be sensitive, well conversed and equipped with the judicial pronouncements up-to-date.

3. At the outset, I would like to quote the statement of object and reasons of the Act which read as follows :-

"The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, many deficiencies in the existing laws have come to notice, some of which are indicated below :

(i). The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organized gangs of smugglers. The Dangerous Drugs Act, 1930 provides for

(32)

a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been some times let off by the courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighbouring countries and destined mainly to Western countries.

(ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc., with the power of investigation of offences under the said laws.

(iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotic control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligation which are not covered or are only partly covered by the present Acts.

(iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national governments. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded.

2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drug abuse,

(3)

considerably enhance the penalties particularly for trafficking offences, make provision for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3. *The Bill seeks to achieve the above objects."*

4. Let us first refer to some definitions which are very important for further reading of the relevant provisions so far as it is required for the investigators and/or prosecutors are concerned.

Section 2 of the Act prescribed definitions of the important words and phrases used in the Act out of which a few most relevant are quoted here

"2.(iii) cannabis (hemp) means –

(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) ganja, that is, the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"

2.(iv) "cannabis plant" means any plant of the genus cannabis;"

2.(v) "coca derivative" means –

(a) crude cocaine, that is any extract of coca leaf which can be used, directly or indirectly, for the manufacture of cocaine;

(b) ecgonine and all the derivatives of ecgonine from which it can be recovered;

(c) cocaine, that is. Methyl ester of benzoyl-ecgonine and its salts;

(d) all preparation containing more than 0.1 per cent of cocaine;"

2.(viiia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;"

2.(viid) "controlled substance" means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance;"

2.(viiia) "essential narcotic drug" means a narcotic drug notified by the Central Government for medical and scientific use;"

2.(viiib) "illicit traffic", in relation to narcotic drugs and psychotropic substances, means –

(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substance;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii);
or

(v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv);
other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder, and includes –

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

2.(x) "manufacture", in relation to narcotic drugs or psychotropic substances, includes –

- (1) all process other than production by which such drugs or substances may be obtained;
- (2) refining of such drugs or substances;
- (3) transformation of such drugs or substances, and
- (4) making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances;”

2.(xi) "manufactured drug" means –

- (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;
- (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug;

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;"

2.(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;"

2.(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;"

Regarding necessity of chemical analysis the Supreme Court in the case of Arjit Singh vs. State of Punjab (2011) 4 SCC 441) has observed, necessity of chemical analysis is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being comprehended by the senses. In case opium is not mixed up with any other material, its chemical analysis is not required at all.

In the case of Madan Lal and another vs. State of Himachal Pradesh (AIR 2003 SC 3642 : 2003 Cr.L.J. 3868) the Supreme Court has observed that if the seals were intact and there was no tempering very minimal variation in weight of sample sent for analysis for inference of tempering.

In the case of Balbir Kaur vs. State of Punjab (AIR 2009 SC 3036 ; 2009 Cr.L.J. 4139) the Apex Court observed that three days delay in sending sample the chemical analysis has no consequence.

In the case of M. Prabhulal vs. Assistant Director (AIR 2003 SC 4311) while considering the evidence on recovery the Supreme Court observed, confessional statement held voluntary, recovery cannot be doubted for want of non-examination of independent witness.

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5. The provisions in respect of prohibition, control and regulation of the Narcotic Drugs and Psychotropic Substance have been prescribed in Chapter –III in Sections 8 to 14. One may have a glimpse to those provisions to get a birds-eye-view in respect of the control and prohibition.

The Supreme Court in the case of Radha Kishan vs. Union of India (AIR 1965 SC 1072) observed that there need be no physical connection between the goods and the persons charged. A man may be miles and miles away from the goods and yet if proof is available that he had an interest in or was concerned in illegal importation of goods he would be guilty of the offence.

In the case of Ram Singh vs. Central Bureau of Narcotics (AIR 2011 SC 2490) the Apex Court observed, to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession.

6. The offences and penalties are prescribed in Chapter (iv) in Section 15 to 40 of the Act. The penal provisions covered all aspects of violations in respect of production, possession, use and trafficking of narcotic drugs, psychotropic substances and controlled substances.

Some of the provisions under the chapter has some special feature and, therefore, I intend to discuss about a few:-

6A. Section 27A prescribed punishment for financing illicit trafficking and harbouring offenders which reads thus :-

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

fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

6B. Section 32 prescribes punishment for offence for which no specific punishment is provided in the Act and thereby all aspects of contravention in respect of narcotic drugs and psychotropic substances are covered.

6C. Section 32A prescribed that there shall not be any suspension, remission or commutation in any sentence awarded under the Act whereas those are available in respect of offences under the IPC.

6D. Section 33 prescribes that the provisions contained in Section 363 of Cr.P.C. and the Probation of Offenders Act 1958 shall not apply in respect of offences under the NDPS Act.

6E. Section 35 is an exception to general rule of crime jurisprudence. The provision prescribed thus :-

"35. Presumption of culpable mental state. – (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

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

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

The presumption of culpable mental state of accused arises only after the evidence proved beyond reasonable doubt that the accused had the knowledge that the vehicle owned by him was being used for transporting narcotics. (Bhola Singh Vs. State of Punjab, (2011) 11 SCC 653.

6F. Section 36 prescribes the provision of Constitution of Special Court to try the offences under the NDPS Act with a view to attach importance and special care for early disposal of the cases under the Act.

6G. Section 36C prescribes as to what extent the provisions of the Code of Criminal Procedure shall apply. It reads as follows :-

“36C. Application of Code to proceedings before a Special Court - Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.”

6H. Section 37 prescribe that the offences under the Act shall be cognizable and non-bailable.

7. Let us now discuss the most important aspect relevant for the investigators and the prosecutors. It is in Chapter V, Sections 41 to 68, wherein the procedures have been prescribed which requires strict compliance by the investigators and prosecutors.

7A. Section 41 prescribes general power to issue warrant and authorisation.

Section 41(1) prescribes that a Metropolitan Magistrate or a Magistrate of the first class or second class may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the Act, or for the search, whether by day or night of any

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building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property which is liable for seizure or freezing or forfeiture is kept or concealed.

Sub-Section 2 prescribes that an officer of the gazetted rank of the department of Central Excise, narcotic, customs, revenue intelligence or other department of the Central Government including the para-military forces or armed forces, empowered by the Central Government or any such officer of the revenue, drug control, excise, police or any other department of the State Government, specially empowered by the State Government has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under the Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence has been committed or any document or any article which may furnish evidence of the offence, or any illegally acquired property or document which may furnish evidence or any property liable to seizure or freezing or forfeiture kept or concealed in any building, conveyance or place may authorise any officer subordinate to him but superior in the rank of peon, sepoy or constable - to arrest such a person or search a building, conveyance or place whether by day or night or himself arrest such a person or search a building, conveyance or place.

Sub-Section (3) prescribes that an officer who is authorised by an warrant under sub-section (2) shall have all the powers of an officer acting under Section 42.

If we summarise the above provision, it would be clear-

- (a). A empowered magistrate may issue a warrant addressed to an officer to arrest an offender or make search in respect of

narcotic drugs and psychotropic substances or controlled substances.

(b). A officer of the gazetted rank of the respective departments of the Central Government/State Government may authorise any officer subordinate to him, superior in the rank of peon, sepoy or constable to arrest a person or to search and seizure any such article or document etc.

(c). The arrest, search or seizure may be done at any time by day or night.

(d). Any building, conveyance or place may be searched by such officer having warrant or authorised, as aforesaid.

(e). There must be sufficient material/information to have reason to believe to issue a warrant or authorise an officer to have the arrest/search/seizure.

(f). The personal knowledge or information received by an officer, as prescribed under Sub Section (2), shall be taken in writing.

(g). The officer addressed under sub-section (1) or the officer authorised under sub-section (2) shall have all powers of an officer under Section 42.

8. Section 42 of the Act prescribed the general power of entry, search, seizure and arrest without warrant or authorisation.

Sub-Section (1) prescribes that any officer above the rank of peon, sepoy or constable of the departments of Central Excise, narcotics, customs, revenue intelligence, para-military or armed forces of the Central Government, or any officer above the rank of peon, sepoy or constable of the revenue, drugs control, police or any other department authorised by the State Government has reason to believe from persons knowledge or from information and taken down in writing that any narcotic drug, psychotropic substance, or controlled substance in respect of which an offence punishable

under the Act has been committed or any document or other article which may furnish evidence of such offence or illegally acquired property or a document kept concealed which is liable to seizure or forfeiture may between the sunrise and the sunset enter into and search any building, conveyance or place in case of resistance, break open the door and remove the obstacle, seize such drug or substance and all materials related thereto, detain and search and, arrest any person whom he has reason to believe have committed an offence punishable under the Act.

If the search, seizure or arrest is in respect of a licence holder, such power shall be exercised by an officer not below the rank of Sub-Inspector.

If such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or for the escape of an offender, he may enter and search such building, conveyance or place at any time between sunset and sunrise after recording the grounds of his belief.

Sub-Section (2) prescribes that in case of taking down an information in writing under sub-section (1) or record grounds for the belief under proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior.

The provision of Section 42 may be summarised thus –

- (a). That an officer superior in the rank of peon, sepoy or constable of the respective department of the Central Government or State Government, if has reason to believe based on his personal knowledge or information given by any person shall first take down the information or knowledge in writing in respect of any offence relating to narcotic drug, psychotropic substances or controlled substances.
- (b) If such officer has scope to obtain a warrant from a court or an authorisation from a gazetted officer as prescribed in Section 41, he shall obtain such warrant or authorisation;

(c). If spending of time to obtain an warrant or authorisation will afford opportunity for the concealment of evidence and facility of the offender to escape, he may conduct the search or arrest the offender recording grounds of his belief for doing so;

(d). Such search, seizure etc. may be made only between the sunrise and sunset.

(e). If the search and seizure is in respect of a holder of a licence, the power shall be exercised only by an officer not below the rank of Sub-Inspector.

(f). The officer taking down any information in writing under subsection (1) or recording the grounds under the proviso, of Section 42 shall forward a copy of the same to his immediate official superior within 72 hours of such taking down.

8A. Section 41 & Section 42 should be read together meticulously to understand the requirement of law. The provisions contained therein has certain departure from the provisions as contained in chapter VII of Cr.P.C. (Section 91 to 105). The provisions contained in that chapter of the Cr.P.C. shall apply mutatis mutandis which is not in conflict with the provision contained in Section 41, 42 & 43 of the Act.

9. While exercising the power under Section 41 & 42 whether it is a empowered Magistrate or a gazetted officer of the particular department as prescribed in Section 41, or an officer as prescribed in Section 42, they shall exercise power only after recording the "reason to believe" to do so.

10. The word "reason to believe" means that even though formation of opinion may be subjective but it must be based on material on record. It cannot be arbitrary, capricious or whimsical. It is thus a check on the exercise of power of seizure (1994) 6 SCC 205.

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Believe must be that of a honest and reasonable person based upon reasonable ground. (1972) 3 SCC 239.

11. The arrest, search and seizure by a person to whom a warrant is addressed or a person who is authorised by gazetted officer may be exercised at any time by day or night whereas the exercise of power by an officer under Section 42 shall be between sunrise and sunset.

12. Where a police officer exercise power of entry, search, seizure and arrest without warrant or authorisation as prescribed under Section 42(1), he is bound to comply sub-section (2) of Section 42.

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 contest have to be observed strictly. Therefore those 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. u/s 42(2) of such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case. (State of Punjab vs. Balbir Singh (1994) 3 SCC 299).

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The effect of non-compliance of Section 42(2) has been elaborately discussed by the Supreme Court in (2008) 2 SCC 370, 2010 AIR SCW 5905. In the case of Karnail Singh Vs. State of Haryana (2009) 8 SCC 539 the Supreme Court has observed about substantial compliance which was followed in the subsequent decisions reported in (2013) 2 SCC 212 (Sukhdev Singh Vs. State of Haryana), (2013) 2 SCC 502 (Kishan Chand Vs. State of Haryana). One may also see the case reported in (2016) SCC 3041 (State of Rajasthan Vs. Jag Raj Singh).

In the case of State of West Bengal and others Vs. Babu Chakraborty, (2004) 12 SCC 201 the Supreme Court has observed that the provision of Section 42 of the Act are mandatory and must be complied with. Wherever they are attracted compliance is mandatory.

In the case of Roy V.D. Vs. State of Kerala, AIR 2001 SC 137 the Supreme Court observed that search and seizure and collection of evidence by unempowered officer is inherently illegal. In the same case the Supreme Court also observed that where criminal proceedings are initiated based on illicit material collected on search and arrest which are illegal and vitiate not only a conviction and sentence based on such material but also the trial itself the proceeding cannot be allowed to go on as it cannot be but amount to abuse of process of court in such a case not quashing the proceeding would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused.

In the case of M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence (2003) 8 SCC 449 the Apex Court has observed – Where a search is conducted the gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42.

There is no reason to suspect the evidence adduced by an official witness only because of the fact that he is an officer of the department his

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evidence can very well be accepted to maintain a conviction if the same is otherwise found reliable (Amarjit Singh Vs. State of Orissa, 1987 Cr.L.J 1988)).

Where heroin from the package of the accused was recovered in pursuance of secret information with intelligence officer report, search and seizure and the statement of the intelligence officer to the effect that he had informed the superior remained unshaken and there was even no cross-examination to point out any falsity in the said statement and the note of intelligence information was placed on record to substantiate the testimony of the said intelligence officer, the High Court was justified in holding that the provisions of Section 42(2) of the Act had been complied with (Saikou Jabbi Vs. State of Maharashtra, (2004) 2 SCC 186).

In construing any fact to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. Law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic, the legislature, time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted to be mandatory. This is in order to balance the stringent for an accused by casting an obligation on the prosecution for its strict compliance. The courts, however, while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, should be examined with caution and circumspection (Sajan Abraham Vs. State of Kerala, AIR 2001 SC 3190).

When the search was conducted by a gazetted officer himself, compliance with Section 42 is not necessary. (Union of India Vs. Satrohan, (2008) 8 SCC 313).

13. In the course of search and seizure, often independent and respectable inhabitants of the locality are not found available, the people ordinarily may not agree to be a witness to the search and seizure.

The officer conducting the search and seizure shall in ordinary course, look for an independent and respectable inhabitant of the locality of the search and seizure to be a witness but if no such witness is available, and/or the search and seizure is made in an abandoned place, it should be mentioned in the case diary clearly about the location and absence of any such witness and if independent and respectable inhabitants are available, whereas no one is willing to be a witness even after approach by the police officer or the officer making the search and preparing the seizure list, shall record the fact in the case diary and also may file a prosecution report against such witness under Section 187 of IPC. It is also experienced that the independent witnesses of the locality turn hostile at the time of giving evidence and in such cases it may not be out of place to keep a videography of the place of occurrence and the search and seizure. The statement of the witness should be recorded on the spot and in case the witness goes back to the fact, the prosecutor should declare him hostile and cross-examine him and also refer to videograph.

13A. There is nothing in law that a police officer can not be a witness of credit. In a given case, where other witnesses are not available, and, where independent witness who are available but not willing to sign the seizure list or unwilling to associate with the search and seizure of the NDPS, the companion police personnel may be witness to the seizure and sign the seizure list. The Supreme Court in the case of Ajmer Singh Vs. State of Haryana (2010) 3 SCC 740 has observed that – testimony of official witness, even in absence of corroboration by independent witness can form the basis of conviction if court is satisfied that it is otherwise believable. Arrest and recovery made by police would not necessarily be vitiated if court finds that despite making reasonable effort police failed to associate public witnesses with the raid and arrest.

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It is not proper to disbelieve a police officer without cogent ground simply because he belongs to police. AIR 1956 SC 217, AIR 1973 SC 2783, AIR 1970 Tri 1, AIR 1974 SC 1024.

Evidence of I.O. may be relied upon even without corroboration. AIR 1971 SC 28.

14. In the case reported in AIR 1978 SC 1511 the Supreme Court observed that the evidence of seizure tendered by I.O. if found convincing,..... can not be rejected.

15. Section 41 and 42, as discussed above, prescribed the provision in respect of entry, search, seizure, arrest etc. by an officer of police or other department with or without warrant or authorisation.

15A. Now, Section 43 prescribes the power of search, seizure and arrest in public places. The same set of officers, as prescribed in Section 42, has the power to search and seizure in any public place or in transit, any NDPS or controlled substance in respect of which he has reason to believe an offence punishable under the Act has been committed, along with any animal, conveyance or article used for the purpose, which may afford evidence in respect of commission of offence and also detain and search any person whom he has reason to believe to have committed the offence and also arrest the person and any other companion of the person.

The word public place as explained under the section includes public conveyance, hotel, shop or any other such places which is accessible to the public.

16. A joint reading of Section 42 and 43 would make it clear that the search and seizure of NDPS and Controlled Substances, may be searched, seized and the person/persons who are found to be involved may be arrested. While exercising powers under Section 41, the arrest, search,

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seizure etc. may be made at any time, any place in day or night, whereas while doing so under Section 42 the power shall be exercised between sunrise and sunset. While exercising such power under Section 43, there is no restriction in respect of day or night, though the same set of officer as prescribed under Section 42 has been authorised to exercise the power of search, seizure and arrest.

17. Section 44, 45 & 46 have relation with the provision prescribed in Section 42 and 43. The same provision as prescribed in Section 41 & 43 shall apply to the plants in respect of coca, opium and cannabis. For the purpose of entry, search, seizure and arrest the same procedure shall be followed. Where it is not practicable to seize the goods the owners may be served with a notice not to remove the plants from the land without previous permission of the concerned officer. It has also been prescribed that a land holder is bound to give information to the authorised officer of the department about the cultivation of coca, opium, cannabis plants etc.

18. Section 47 prescribes the duty of government officers as well as the panch, sarpanch and village officers of whatever description, shall immediately give information to the officers mentioned in Section 42 in respect of illegal cultivation of coca, opium, poppy, cannabis plants if he has knowledge of such cultivation. If it is found that having knowledge, information was not given, it is a punishable offence under the provisions of the Act (general punishable as prescribed in Section 32).

So, in case it is found that such information has not been given by such officer/panches, prosecution should be initiated against such defaulters to prevent growing and trafficking of NDPS and controlled substances.

19. Section 49 has relation with Section 41, 42 & 43. Any officer authorised under Section 42 if has reason to suspect that any animal or

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conveyance is used or about to be used for transportation of any NDPS or controlled substances may stop the vehicle or animal including an aircraft and search the same after stopping the same through all lawful means. If the animal or conveyance defy the signal to stop, it may be even fired upon.

20. As we all know, the punishments prescribed under the NDPS Act are severe compared to the punishment as prescribed under the general penal law. Therefore, the law makers has prescribed certain sorts of safeguards so that the real culprits are only brought to book and, therefore, the provisions in respect of search, seizure and arrest are concerned a little bit strict and non-compliance of particular safeguards will lead to failure of the prosecution to prove the case.

21. Section 50 prescribes certain conditions in respect of search of persons by the empowered officers in exercise of the power under Section 42 of the Act. We have already discussed herein before the provisions contained in Section 41, 42 and 43 in respect of exercise of the powers of search, seizure, arrest etc.

Sub-section (1) of Section 50 prescribes that an authorised officer, if is in need of search of a person in respect of any NDPS or controlled substance, if the 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 and till the time of taking to the Gazetted Officer or the Magistrate such person may be kept in detention till he is brought before such officer or Magistrate.

After the person is brought before the Gazetted Officer or the Magistrate and such Gazetted Officer or Magistrate if found no reasonable ground to make a search, the person so detained may be discharged forthwith, otherwise may direct the search to be made.

No female shall be searched by anyone excepting a female.

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The authorised officer, if has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or the Magistrate without the possibility of the person to be searched, parting with possession of any NDPS or controlled substance or any other article or document, the authorised officer, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to conduct the search as per provision prescribed in section 100 of Cr.P.C., 1973.

After conducting the search under sub-section (5), as above, the authorised officer shall record the reasons for his belief which necessitated the search and within 72 hours send a copy thereof to his immediate official superior.

21A. **The following case laws should be looked into :-**

(i). A joint communication of the right available under section 50(1) of the Act to the accused would frustrate the very purpose of section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safe-guards available to an accused against the possibility of false involvement. The communication of this right has to be clear unambiguous and individual. The accused must be made aware of the existence of such a right. The right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. Therefore, accused must be individually informed that under section 50(1), he has a right to be searched before a nearest

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Gazetted Officer or before a nearest Magistrate; *State of Rajasthan v. Parmanand*, AIR 2014 SC 1384.

(ii) Provisions of section 50 of the Act do not apply to any search or seizure where the article was not being carried on the person of the accused; *State of Rajasthan v. Tara Singh*, (2011) 11 SCC 559; 2011 (9) SLT 638; 2011 (3) SCC (Cr) 407.

(iii) Section 50 can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of section 50 would not be attracted; *Jarnail Singh v. State of Punjab*, AIR 2011 SC 964; (2011) 2 SCC 521; JT 2011 (2) SC 120; (2011) 2 SCALE 401; 2011 Cr.LJ 1738.

(iv) Section 50 is applicable only where search of a person is involved and said section is not applicable nor attracted where no search of a person is involved. Thus search and recovery from a bag, brief case, container, etc., does not come within the ambit of section 50 of the Act; *Ajmer Singh v. State of Haryana*, (2010) 3 SCC 746; JT 2010 (2) SC 175; (2010) 2 SCALE 362.

(v) The safeguards mentioned in section 50 are intended to serve a dual purpose – to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer; *Beckodan Abdul Rahiman v. State of Kerala*; (2002) 4 SCC 229.

(vi) A contraband seized as a result of search and seizure made in contravention of section 50 cannot be used

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to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in a illegal manner. "Unlawful possession" of the contraband is the sine quo non for conviction under the Act and that fact has to be established by the prosecution beyond a reasonable doubt; *Ali Mustafa Abdul Rehman Moosa v. State of Kerala*, AIR 1995 SC 244.

22. Section 51 prescribes that the provisions of the Code of Criminal Procedure, 1973 shall apply in respect of warrant, arrest, search and seizure under the Act in so far as they are not inconsistent with the provisions of NDPS Act.

23. Section 52 prescribes certain further safeguards.

Sub-section (1) prescribes that an authorised officer arresting a person under section 41, 42, 43 or 44 shall, as soon as may be, inform the arresting person the grounds of arrest.

Sub-section (2) prescribes that every person arrested and article seized under warrant issued under section 41(1) shall forward without unnecessary delay to the Magistrate by whom the warrant was issued.

Sub-section (3) prescribes that every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to (a) the officer-in-charge of the nearest police station, (b) the officer empowered under section 53.

Sub-section (4) prescribes that the authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as

may be necessary for the disposal according to law of such person or article.

24. Section 52A has been inserted prescribing thereunder the rules for disposal of the seized NDPS. It is a common knowledge that narcotic drugs and psychotropic substances are substance of hazardous nature, vulnerability to theft, substitution, constraint of proper storage etc. remains. The Central Government has been empowered to specify the procedure for disposal of such substances by the officer in the manner as may be prescribed.

The procedure, so prescribed, may be discussed in a different topic at a different time.

Sub-section (2) prescribes that when the authorised officer forwarded the NDPS/controlled substances to the officer-in-charge of the police station or the empowered officer under section 53, such officer-in-charge or the officer shall prepare an inventory of such NDPS or controlled substance or the conveyance etc. detailing therein the description, quality, quantity, mood of packing, marks or numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances etc. to identify the articles in the proceeding under the Act and the officer-in-charge or the empowered officer shall make an application, to the Magistrate for the purpose of --

- (a) certifying the correctness of the inventory so prepared;
- (b) taking, in the presence of the Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true;
- (c) allowing to draw representative samples of such drugs or substances, in the presence of the Magistrate and certifying the correctness of any of the sample so drawn.

Sub-section (3) prescribes that when an application has been made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

Sub-section (4) prescribes that notwithstanding anything contained in the Indian Evidence Act or Cr.P.C., every court trying an offence under the NDPS Act, shall treat the inventory, the photographs, list of samples which are certified by the Magistrate, as primary evidence in respect of such offence.

Primary evidence means the documentary evidence itself produced before the court for inspection as prescribed under section 62 of the Evidence Act.

25. Section 53 empowers the Central Government, after consulting the State Government, may, by notification invest any officer of the central excise, narcotics, customs, revenue intelligence or any other officer 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 the police station for the purpose of investigation of offences under the NDPS Act.

Sub-section (2) prescribes similar power to the State Government to an officer of drugs control, revenue, excise or any other department or any class of officers with the powers of an officer in charge of a P.S. for the investigation of offences under the Act.

26. Section 53A is a special power vested on the empowered officer. Sub-section (1) prescribes that a statement made and signed by a person before any officer empowered under section 53 may be used in any prosecution for the offence under the Act, in the special circumstances contained in clause (a) and (b), i.e., if the person making the statement is dead or cannot be found or is incapable of giving evidence or his presence cannot be obtained without an amount of delay or expense as well as in the

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circumstances when the person has been examined before the court but the court is of information that having regard to the circumstances of the case the statement should be admitted in evidence in the interest of justice.

Sub-section (2) prescribes that a statement recorded under sub-section (1) shall apply in respect to an offence under the NDPS Act only.

27. Section 54 also prescribes certain special feature in respect of presumption in consistent to the general law of presumption under the Indian Evidence Act.

Section 114 of the Evidence Act prescribes that the court may presume existence of certain facts when some other facts are proved.

Here under section 54 of NDPS Act it is prescribed that in a trial under the Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under the Act in respect of –

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
- (d) any materials which have undergone any process towards the manufacture of a NDPS or controlled substances etc., for the possession of which he fails to account satisfactorily.

27A. Section 54 and section 35 should be read together to draw an inference about the intention of the legislature regarding offences relating to NDPS and other controlled substance Act. It may be noticed that there is a remarkable departure from the normal principle of criminal jurisprudence.

It should be kept in mind that initial burden is always on the prosecution to prove the possession, and / or the planting, and / or growing

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of plants etc. Presumption would be attracted only when the initial burden of proving the fact is discharged by the prosecution.

NDPS Act was enacted having regard to the mandate contained in international conventions on narcotic drugs and psychotropic substances. Only because the burden of proof under certain circumstances is placed on the accused, the same by itself could not render impugned provisions unconstitutional (Noor Aga vs. State of Punjab, 2008 AIR SCW 5964).

28. The Officer-in-charge of the police station under the NDPS Act has a great role to play.

Section 55 prescribes that an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

This provision is often found to be not complied and non-compliance of the same is a serious violation of the provisions of the Act.

29. Section 56 prescribes that all officers of the several departments as mentioned in section 42 shall, upon notice given or request made, be legally bound to assist each other in carrying out the provisions of the Act.

30. Section 57 prescribes another important aspect in respect of arrest, search and seizure. It says that whenever any person makes any arrest or seizure, under the Act, he shall, within forty-eight hours next make a full report of all the particulars of such arrest or seizure to his immediate official superior.

31. Section 57A has been inserted by the amendment Act of 2014. It prescribes that an officer notified under section 53 in the event makes an arrest or seizure under the Act, and the provisions of chapter 5A are applicable thereto, the notified officer shall make a report of such illegal acquisition of properties by such person to the jurisdiction of competent authority within 90 days of arrest and seizure. This is a mandatory provision and should be complied by the notified officer.

32. To prevent vexatious entry, search, seizure and/or arrest under the Act, the law makers has prescribed provision in Section 58 wherein it is stated that any person empowered under section 42, 43 or 44 who –

(a) without reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;

(b) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44; or

(c) vexatiously and unnecessarily detains, searches or arrests any person,

the person shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Sub-section (2) of section 58 further prescribes that if any person wilfully and maliciously giving false information and thereby causing arrest or a search being made under the Act shall also be punishable for a term to the extent of two years or fine or both.

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This section makes the intention of the law makers clear to the extent that while a strict law is made in respect of search, seizure, arrest etc. there must be protection also under the law so that it is not misused. Therefore, protection has been given from vexatious entry, search, seizure or arrest under section 42, 43 & 44 as well as giving of false information and thereby insulating the law enforcing agencies in making vexatious entry, search, seizure or arrest.

A reading of the provision further makes it clear that in respect of entry, search, seizure, arrest etc. under section 41 of the Act has not been brought under the purview of section 58.

33. Section 59 of the Act makes it compulsory that an officer who has been entrusted with the charge of duties under any provision of the Act is bound to discharge his duty unless permitted by his official superior to withdraw from the performance of the duty.

34. Section 60 prescribes that any drug, substance, plant, articles or conveyance in respect of which an offence has been committed, shall be liable to confiscation.

Any conveyance which is found to have used for transportation of illegal drugs shall also be liable to confiscation unless the owner of the conveyance or the animal proves that it was so used without the knowledge or connivance of conveyance owner himself or his agents and that they have taken all reasonable precautions against such use.

35. Section 62 prescribes that if illicit drugs or substance are sold by person having knowledge or reason to believe that the drug or substance is liable for confiscation, the sale proceeds also liable for confiscation.

36. Section 63 prescribes the procedure for confiscation. It empowers the court to decide itself about confiscation irrespective of the accused is convicted or acquitted or discharged.

37. Section 64 empowers the Central Government or the State Government to tender immunity from prosecution under the Act or under the IPC on condition of the person making a full and true disclosure of the whole circumstances relating to such contravention.

The provision prescribed under this section has resemblance to that of the provision prescribed under section 306 of Cr.P.C. So, for a better understanding both the sections may be read together.

38. Under Section 64A immunity from prosecution has been prescribed to addicts in the event of volunteering for treatment.

The grant of immunity under Section 64 of the Act to an accused who was facing trial before the court to amount to vesting power of judicial authority in the Government (Jasbir Singh Vs. V. K. Jaggi, (2001) 8 SCC 289).

39. Section 68 protects an officer in respect of information he has received, of an offence under the Act and he cannot be compelled to disclose as to how when and from whom he got the information.

40. It has been repeatedly stressed that NDPS cases should be tried as early as possible because in such cases normally accuseds are not released on bail. (N. Patal Vs. State of Gujrat, AIR 2003 SC 2172).

Witness who had put signatures at relevant papers, turned hostile. However, presence of witness on the spot proved. Nothing stated by them that signatures taken by them under terror, pressure or without free consent. These material aspects not properly considered by High Court

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except discarding on the ground that they turned hostile. (State of Rajasthan vs. Udai Lal, (2008) 11 CC 408.

It is also settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since higher degree of assurance is required to convict the accused. (Mousam Singha Roy and others vs. State of West Bengal, (2003) 12 SCC 377.

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and could not long endure under such serious threats. AIR 2004 SC 827 : (2004) 2 SCC 590.

Regarding conscious possession of the contraband article the following decisions may be read :-

Balbir Kaur vs. State of Punjab, AIR 2009 SC 3036 : AIR 2010 SC 1557.

If possession is proved, burden shifts on the accused that the possession was not conscious possession in the logical background of Section 35 & 54 of the Act. (Megh Singh vs. State of Punjab, AIR 2003 SC 3184).

Mere knowledge does not constitute possession. Dominion and control has to be established. Bhura Singh vs. State of Punjab, 1997 Cr.L.J. 1892.

No effort was made by the accused to call for the records of information, if any, sent. The further question is whether in a case of these nature while the police officer on patrol duty stops the vehicle in transit in a public place and conduct search and seizure, Section 42 has no application to the fact of the case. State of Delhi vs. Malvinder Singh, AIR 2007 SC (Supp) 237 : 2007 Cr.L.J. 3512.

If there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any

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prejudice has been caused to the accused. Khet Singh vs. Union of India, (2002) 4 SCC 380.

All accused persons travelled together from the same destination in a vehicle which was not a public vehicle. Conscious possession has been established. Accused appellants knew about transportation of charas and driver also not on different footing merely because he was a driver.

Section 35 & 54 of the Act applies fact of the case. Madan Lal and another vs. State of Himachal Pradesh, AIR 2003 SC 3642.

Where two Kgs. of charas recovered from plastic bag carried by accused in his hand, therefore, conviction and sentence imposed by trial court can not be set aside on the ground of non-compliance of Section 40 of the Act and accused is not personally searched. State of Haryana vs. Ranbir, AIR 2006 SC 1796 : 2006 Cr.L.J. 2142.

41. By the Amendment Act No.16 of 2014 a new Chapter VA **"Forfeiture of Illegally Acquired Property"** has been added. Courts also monitoring the issues of disposal of NDPS and controlled substances etc. It is another important area which we may discuss in future in a separate article.
