

# NDPS Act 1985: A Study with Special Reference to Investigation

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## Abstract

Even in the most extreme situations, where there is sufficient evidence proving an accused guilty, the courts have chosen to acquit them, frequently on technical grounds resulting from the improper application of the provision of Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 particularly those relating to the seizure of illegal substances and the arrest of the person in possession of them. The common consensus is that if someone is found in possession of narcotics, the inquiry that follows should lead to the accusation of guilt. Thus, it is crucial that the applicable provisions of the Act be administered impartially and in accordance with the well-established principle of criminal law, which requires that the accused be presumed innocent until and unless proven guilty.

This paper seeks to investigate the practical application of the NDPS Act in drug cases in India. It aims to examine the legal and procedural aspects of drug-related offenses, the investigation process, the role of law enforcement agencies, and the challenges faced in prosecuting offenders also examine the effectiveness of the NDPS Act in achieving its intended objectives and suggest potential reforms to enhance its effectiveness. The study will draw on a comprehensive review of the relevant literature, including case laws and legal provisions, as well as interviews with law enforcement officials and legal experts.

## INTRODUCTION

The Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 was passed by the Indian Parliament and restricts citizens' capacity to create, manufacture, cultivate, own, sell, buy, store, transport, or consume any narcotic drug or psychotropic substance, aside from for medical and scientific uses.

The act was passed in order to provide tougher guidelines for the management and oversight of activities related to narcotic drugs and psychoactive substances, according to the Prologue of the Act, with the intention of consolidating and amending the laws relating to narcotic drugs. The legislation also includes provisions for forfeiting assets produced from or utilised in illegal drug and psychiatric substance trafficking, as well as concerns related to that traffic. The Act therefore addresses the following offences:



**Fig. 1:** Various Stages of Investigation

1. Illegal Trafficking in Banned Medicines and Substances.
2. Using any type of narcotic or psychoactive substance.

The statute also has provision of stern penalties for drug trafficking offences, as the majority of these crimes are not subject to bail. The act imposes penalties that vary from one year to twenty years in prison, a fine of up to two lacs rupees, and, if the offender has previously been found guilty of an offence involving a commercial quantity, the death penalty is sentenced.<sup>1</sup> The Act also outlines the rules governing the process of searching for and seizing criminals.

The police, a crucial component of the criminal justice system, is tasked with carrying out a variety of tasks, including preventing crime, maintaining law and order, conducting investigations into crimes, presenting cases for preliminary hearings to the courts, and monitoring offenders after they have been sentenced.<sup>2</sup> In a society where the rule of law prevails, the police are governed by the municipal and constitutional laws, which primarily include the Police Act, the Protection of Human Rights Act of 1993, the Indian Evidence Act of 1872, and the Indian Constitution.

## Meaning of Investigation

Section 2(h) of the Criminal Procedure Code defines what is meant by ‘investigation’ as follows: “every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the state governs”. The F.I.R. has been regarded by courts as the cornerstone of the

<sup>1</sup> Shweta Sharma, Gyanendra Singh and Kapil Kumar, “An Overview on Narcotic Drugs and Psychotropic Substances Act, 1985” 4(4) *Journal of Forensic Science & Criminal Investigation* 55 (2017).

<sup>2</sup> P. Joy, *How to Get an Acquittal in Criminal Cases* (Karnataka Law House, 2009).

prosecution case.

## Various Stages of Investigation

The investigation’s goals include separating the wheat from the chaff, separating the truth from half-truths, and eradicating factual misunderstandings. The Supreme Court ruled in *Mohan Lal v. State of Punjab*<sup>3</sup> that, ‘An investigation is a systemic collection of data with the goal of demonstrating what occurred and justifying why it occurred’. The term ‘systemic’ implies that it is a more complex procedure. As a result, investigation refers to a thorough search or inspection to ascertain facts.

### **F.I.R. (First Information Report)**

An investigation begins when a police officer learned about an offence. A FIR being a cardinal document which does not includes every aspect of the prosecution’s case but includes the initial information which is sufficient to constitute a case. The information given orally to the head of the police station about the commission of a cognizable crime must be limited to him or under his direction in writing, read aloud to the informant; all such information, whether in writing or reduced to writing as previously stated, is usually signed by the person providing the information; and the contents thereof shall be entered in a book kept by such officer in such form as the State Government may prescribe in his behalf. The F.I.R. has been regarded by courts as the cornerstone of the prosecution case.

### **Station Diary**

Every police station keeps a station journal, which is a permanent record of events that take place there or are reported to the police. Every officer is required to enter all movements, especially arrivals and departures, in the station logbook. He must record the investigation’s progress in his diary if he goes back to the police station following the investigation.

<sup>3</sup> *Mohan Lal v. State of Punjab*, AIR 2018 SC 3853.

By doing this, the senior police officer will be able to monitor the activities of staff.

### **Arrest, search, and seizure**

To gather the evidence while investigating a case search, seizure and arrest are the cardinal way available for the authorities. It includes all of these following steps;

1. Getting there;
2. Learning the situation's facts and circumstances
3. Locating and apprehending the suspect
4. Gathering evidence pertaining to the commission of the offence, this may include:
  - Statements from different parties (including the accused);
  - Conducting any searches or seizing any materials deemed essential to the investigation and to be submitted at the trial; and
  - Reaching a conclusion as to whether or not there is sufficient evidence to bring the accused before a magistrate for trial, and if so, on what grounds.

This calls for the submission of a charge sheet in line with Section 173 of the Criminal Procedure Code, the proper course of action.

### **Panchanama**

Any independent witness who is available at the appropriate moment is enlisted for support, and they are deemed as Panch.

The document known as "Panchanama" is written by police officer. Panchanama can take several different forms, including Arrest Panchanama, Seizure Panchanama, and Spot Panchanama. It is a record of the evidence and conclusions an investigating officer creates at the crime scene and has to sign the same. Many law enforcement agencies create panchanama in accordance with the unique requirements of the Act for which it is being created. As a result, there would be variations in how police approached the panchanama under the IPC, Customs Act, NDPS Act, etc.<sup>4</sup>

- Section 161 of the Cr.P.C states that, any investigating officer or officer not below such

4 C. D. General, *Drawing of Panchanama* (National Academy of Customs, Excise and Narcotics, 2015), available at: <https://nacin.gov.in/resources/file/e-books/Panchnama.pdf> (last visited on April 4, 2023)

grade may examine witnesses, to the extent permitted by general or special order of the state government, any officer acting at the request of such officer may conduct an oral examination of any individual who appears to be exonerated of the allegations based on the facts and circumstances of the case.

- Any individual being asked must provide truthful answers to the officer's questions about the case, with the exception of those for which a truthful answer could result in criminal charges, a fine, or forfeiture.
- If the police officer chooses to document any oral statements given to him during an examination under this subsection in writing. He shall write down every word that person dictates.

### **Role of Police in criminal proceedings and the statement provided to them:**

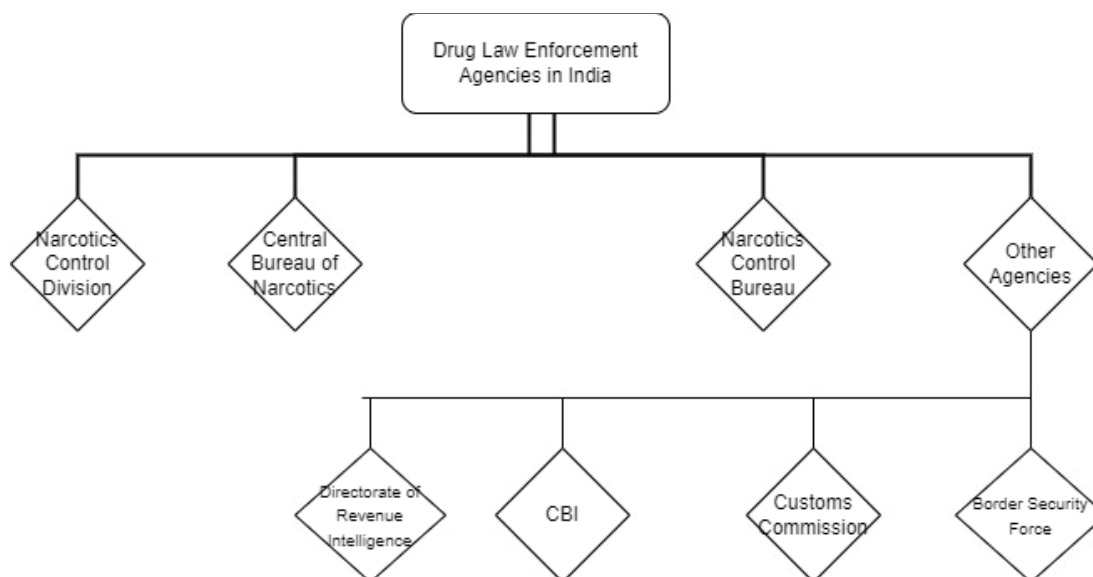
The statement made pursuant to Section 161 and 164 of the Cr.P.C, intends to inform the accused of the specific charges he will face during trial. The defendant must get ready to present his case. He needs to be aware of the witnesses who are testifying against him and what their alleged statements to the police are that have brought him before the court.<sup>5</sup>

### **Procedure of Investigation under NDPS Act, 1985**

The investigation under the NDPS Act is conducted by the officials of Central Government who are also granted extraordinary powers under the act which including but not limited to:

- Officers of the Central Excise, Narcotics, Customs, Revenue, Intelligence, or any other Central Government department;
- Officers of the Paramilitary Forces or the Armed Forces who may be authorised to do so by general or special order of the Central Government; or Officers under state government have the to delegate their powers related to investigate the drug-related cases to other officials under state government.

5 G. Srinivasan, "Filing of a Charge Sheet under the NDPS Act, 1985 Read with Section 173 of the Cr. P.C." *International Journal of Law Management & Humanities* (2022).



**Fig. 2:** Agencies authorized to enforce the drug law in India

### ***Investigative officials' authority***

The powers and processes for investigating offences under the NDPS Act are outlined in Chapter V (Sections 41 to 68). This chapter gives officially authorised officials the power to seize “narcotic narcotics and psychotropic substances,” to enter and search a property, to stop and search vehicles, to obtain statements from suspects, and to arrest those suspected of having committed an offence that is punished by the Act.

According to Section 41, magistrates and specially designated people have the authority to issue search and arrest warrants. officers of the federal and state governments with official status. This is intended to guarantee prompt and efficient response to any information. And any officer lawfully empowered by the Act may be entrusted by the federal and state governments as an officer-in-charge to investigate offences against the Act.

The powers of search, seize, and arrest is subject to procedural safeguard in the Cr.P.C which also includes requirement of independent witnesses who should be present during the procedure of investigation. After the investigation if the arrest of the person is made, he should be brought before the magistrate within 24 hours.<sup>6</sup>

6 K. Madant, *Procedural Compliances in Relation to Search, Seizure and Arrest under NDPS Act, 1985*, available at: <https://www.sconline.com/blog/post/2021/09/22/>

### ***Investigation process under the NDPS Act:***

Sections 41, 42, and 50 deals with search and seizure procedures that are all required during an investigation.

According to Section 41(1), only a magistrate with authority may issue a warrant for an arrest or a search in relation to an offence covered by Chapter IV of the Act.

In line with Section 41(2) of the NDPS Act, only empowered officers duly authorised officers may act when an empowered magistrate has reasonable cause to think that such offences have been committed or that such substances are maintained or concealed in any building, conveyance, or location. A warrant or other kind of authority is required for officer to enter, search, seize, and make an arrest, according to Section 41(3).

In order to comply with Section 42(1), the authorised official must document any oral or written statements made by any individual in the past. However, if he has reasonable suspicion based on personal knowledge that crimes under chapter IV have been committed or that objects concealed in a building, etc. may provide evidence of the commission of such crimes, he may make an arrest or conduct a search without a warrant. Under

[procedural-compliances-qua-search-seizure-and-arrest-under-ndps-act-1985/](https://www.sconline.com/blog/post/2021/09/22/procedural-compliances-qua-search-seizure-and-arrest-under-ndps-act-1985/) (last visited on April 4, 2023).

this clause, he need not keep any records to back up his suspicions. In this regard, the regulations are obligatory, as any deviation would undermine the prosecution's case and may have an impact on the fairness of the trial.<sup>7</sup>

The empowered officers of any agency shall have the authority to seize and make arrests in public places, as stated in Section 43.

According to past knowledge, an officer operating in accordance with Sections 41(2) or 42 should adhere to Sec. 50 requirements before conducting a search of a person. The person should be informed that, if necessary, he must appear before a magistrate or gazette officer as specified in Section 50. Such an officer is required to notify the individual who will be searched. There would be a question of fact if the person being searched was not informed and, if necessary, taken to the gazetted officer or the magistrate. It is an absolute need that the officer planning the search advise the subject of the search that, if the subject so chooses, the search will take place in front of a gazetted officer or a magistrate.<sup>8</sup>

## The Differences Between Search and Seizure Procedures under The Cr.P.C And NDPS Act

1. In accordance with the Criminal Procedure Code, police officers are authorised to search and seize a property as part of a routine investigation into an alleged or actual crime.
  - The NDPS Act mandates that the empowered officer conducts an investigation in accordance with its requirements if there is a likelihood of recovering narcotics or psychotropic substances (*Section 50*).
2. The police officer who is not authorised should alert the authorised officer if there is a risk that any illegal drugs or psychoactive substances may be found during the search or arrest. The authorised officer then follows the guidelines set forth in the NDPS Act. If the police officer

7 A. R. Bahuguna, "Analysis of the Ambiguities in Interpretation of Narcotic Drugs and Psychotropic Substances Act, 1985" *Journal of East China University of Science and Technology* 99-120 (2022).

8 Surender Malik and Sandeep Malik, *Supreme Court on Narcotics and Drugs* 51-52 (Eastern Book Company, 2011).

- is an empowered officer, he must conduct the investigation in line with the other rules set forth in the NDPS Act while moving forward.
3. Under Sections 100 and 165 of the Cr.P.C., a search conducted by an empowered officer or one who has been granted authorization under Section 41(2) is legal. However, a search would not be unlawful if the Cr.P.C. rules were not strictly followed.
4. According to Section 42(2) of the NDPS Act, every empowered officer who documents information in writing or records the reasons specified in Section 42(1) proviso must immediately provide a copy of the document to his immediate superior.
5. If there is a delay, it will be a question of fact in each case as to whether it was caused by the Cr.P.C. or whether it has been explained or not. Even if a police officer is "empowered," he must strictly abide by the provisions of Sec. 100 and 165 of the Cr.P.C when making an arrest or conducting a search as part of a routine investigation into an offence. The necessity to explain such failure would just constitute an anomaly.
6. The police would be operating in accordance with the requirements of the Cr.P.C. if they had to make an arrest or conduct a search or searches while carrying out surveillance or looking into other offences. At this point, any violation of Sections 100 and 165 of the Cr.P.C cannot be used as a sole reason to dismiss the prosecution's case.
  - Depending on the specifics of each case, the impact of such non-compliance may affect how the official witness testimony and other evidence is evaluated. If they discover any substance covered by the NDPS Act while conducting such searches, it would not be necessary to immediately comply with Section 50 or any other provisions of the NDPS Act.
  - When the NDPS Act provisions are invoked by the contraband discovered during such searches or arrests, the remaining applicable NDPS Act provisions are also invoked.
7. Neither Section 41(2) nor Section 42 of the NDPS requires such an empowered officer to record

the reasons for his conviction. The only part of Section 42(1) that requires him to document the basis for his view/suspicion is the proviso when read with Section 42(2).

- The empowered officer is required by the Cr.P.C. to record the reasons for their suspicions as specified in Section 165, although failing to do so does not invalidate the proceedings, especially when Sections 41 or 42 do not demand this. He is not compelled to record his reasons under Sections 41(2) and 42(1), which must be read in conjunction with Section 165 in this context.
8. According to Section 52 of the NDPS Act, every person detained and item seized under Sections 41, 42, 43, or 44 must be immediately forwarded to the officer in charge of the local police station or the officer designated with authority to dispose of the detained person or item in accordance with the law.

The requirements of Sections 52 and 57, which address the actions that are to be followed by officer after making an arrest or making a seizure in accordance with Section 41, are not by themselves obligatory. If there is any non-compliance or if there are errors, such as delays, it must be investigated to determine whether the accused has been harmed in any way. Failure of which will have an impact on how the evidence of the arrest or seizure is valued, as well as the case merits.

The provisions of these two parts outline specific procedural guidelines that the officers must strictly follow. Similar provisions are included in the provisions of the Cr.P.C. If there is a violation of any of these clauses, the court must consider the outcome.<sup>9</sup>

## Difficulties in Investigating NDPS Cases

The Act's execution presents a number of challenges for the enforcement authorities. It can be categorised as follows:

- Legal challenges
- Fieldwork-related challenges
- Other practical challenges

### Legal Challenges

1. Finding independent witnesses is difficult due to a variety of factors, including -

<sup>9</sup> *State of Punjab & Ors. v. Balbir Singh*, AIR 2005 SC 27.

- Threats from the accused. It is also challenging to get independent witnesses that volunteer themselves during searches and seizures.
- The length of time spent while visiting courts.
- A lack of awareness of the harm's drugs cause to society.

However, only absence of independent witness cannot by itself, make the actions taken by these officer's invalid. At best, it may have an impact on the admissibility of the evidence pertaining to the search or the arrest. That might render such an arrest or search invalid. Nonetheless, if there is other substantial evidence, this infringement alone does not render the trial or conviction illegitimate. Hence, it must be demonstrated that such non-compliance has led to bias and a deficient administration of justice.

2. It's not illegal to possess precursor chemicals: Sections 9A, 25A, and 54 of the NDPS Act can be read simply as follows:

#### **As stated in Section 54:**

According to Section 54, it may be assumed during a trial under this Act that the accused has violated this Act's provisions relating to:

- a. Any narcotic drug, psychiatric substance, or prohibited substance.
- b. Any coca, cannabis, or opium poppy growing on any ground he has farmed.

It doesn't convey the idea that unlawfully possessing a precursor chemical is a crime. The only people required by law to keep records and submit reports to the Zonal Director of the Drug Enforcement Administration about manufacturers, importers, exporters, consumers, and dealers. Just the buyer's identity and intended use must be verified by the vendor. He is not required to inform the Zonal Director of the Narcotic Control Bureau of the buyer's purpose. The person is not automatically presumed to have diverted the precursor chemical for the illegal manufacturing of narcotics, however, if there is a shortage of the substance. As a result, neither a person found in possession of excessive amounts, nor a person found in possession of insufficient amounts of any banned substance is punishable by law. If somebody is found in possession of unexplained stocks of a banned substance, a rebuttable presumption must be established that

they are intended for sale to illicit drug makers. On the other hand, it should be assumed that the short precursors have been diverted for the illegal production of drugs if the stocks are discovered to be short.<sup>10</sup>

#### **As stated in Section 52-A**

Pre-trial disposal is allowed under Section 52-A of the NDPS Act for narcotics, psychotropic substances, but not for prohibited substances. Precursor chemicals serve a purpose in society, and their prompt disposal reduces waste, delays deterioration, and benefits the government coffers. So, pre-trial disposition should be extended to include banned substances. The selling money rather than the seized item may be returned to the owner if the accused are found not guilty after a trial.

#### **Field-Related Challenges**

- A. Drug detection kits, which range in price from Rs. 3000 to Rs. 4000, have a shelf life of six months after the date of production. The kits are frequently not funded by the state police, and even when they are, due to the time lost in getting the kits to the field formation, they expired within 3–4 months after being given out. Field cops lack even in basic training how to use these kits. Effective use of kits requires a sufficient quantity of them, their prompt distribution, and training.
- B. Insufficient training in precursor identification: Most police officers are unaware of precursors. Therefore, even if they discover a precursor being moved or redirected, they might not even recognise its importance. These challenges require training for police officers to overcome.
- C. Report of the doctor under Section 27 of the NDPS Act, 1985: The NDPS Act makes it illegal to consume narcotic and psychotropic substances, however the investigating officer, government hospital staff members lack the training necessary to determine whether the suspect used drugs. When the doctor finally tests the suspect, it is too late to acquire a reliable result, as is often the case. Frequently, government

medical staff in hospitals and clinics merely provide reports on the general health of the accused, which is useless for presenting the case in court.<sup>11</sup>

#### **Additional Practical Challenges**

##### ***Sincere mistakes made by the police and witnesses***

Both the witnesses and the police may make sincere mistakes when taking or recording testimony. Inaccuracies can include giving the inaccurate name or description of the accused. A mistake in the order of events is another possibility.

##### ***No independent agency to oversee the recording of police statements***

At no stage does a third party organisation that is not affiliated with the police oversee the accuracy, thoroughness, or integrity of the investigation or conduct a random check of the witnesses.

Police are not permitted to administer oaths, according to a statement they recorded while conducting an inquiry. Just the investigation agency is what they are. They lack the authority to impose penalties. They record statements that are used in the inquiry. The court must determine that there is probable cause to think that the accused has committed an offence that is punishable by death, life in prison, or any other sentence before granting bail. The police statement taken at the time of the bail application is given a great deal of weight by the court. Based on the comments that the police have recorded while conducting their investigation, the bail may be rejected. Yet, the trial stage does not accept the same claim, it is paradoxical.<sup>12</sup>

##### ***Problems with procedure and evidence***

The police are encountering some issues, resulting from specific sections of the Indian Evidence Act and the Criminal Procedure Code. Every time the police enter a location for the purpose of a search or seizure, they are required by the Cr.P.C to be accompanied by at least two respected neighbourhood residents.

<sup>11</sup> United Nations Office on Drugs and Crime, "A Report on Precursor Control Laws: Challenges and Response" (2003), available at: <https://www.unodc.org/pdf/india/BOOK1.pdf> (last visited on April 21, 2023).

<sup>12</sup> S. Bhat, *Principles and Practice of Criminal Law* (Snow White Publication, Mumbai, 1<sup>st</sup> edn., 2009).

<sup>10</sup> Surrender Malik and Sandeep Malik, *Supreme Court on Narcotics and Drugs* 51-52 (Eastern Book Company, 2011).

The police often find themselves in a situation where they must try to execute the formality with the cooperation of some “respectable” people who may have questionable character and reputation because it is not always possible to find two respectable people who are willing to associate with the police for the purpose. The evidence obtained by a search and seizure is treated with extreme mistrust by the court because it is aware of such police procedures, and even legitimate prosecution cases suffer as a result.<sup>13</sup>

## CONCLUSION

A general perusal of the above text shall effectively lay down that there are significant gaps in the investigation procedure for the cases falling under the NDPS Act. These gaps may be expanded to such lengths that they may be misused by the concerned authorities to unnecessarily incarcerate the targets, with their fundamental rights being the ultimate casualty. It is pertinent to plug these holes and ensure that the civil liberties of the accused in such cases are not infringed upon as a result of the misinterpretation and consequent misuse of the established legal provisions. The legal mechanism has to be augmented with sufficient safeguards to manifest the fundamental protection given by the Indian constitution to the rights of an individual and prevent any miscarriage of justice.

However, none of the solutions offered or measures suggested will prove to be effective if the investigative agencies are not considerate towards the changing paradigms of the society and remain obstinate in dealing with the carriers of such drugs. The authorities will need to determine that whether

the quantity seized from a person falls within the ambit of unlawful possession and whether it merits any incarceration or not, as a significant number of cases in the recent times are not founded on the legal point of view as much as they are formed on the basis of the prejudicial mindset of the investigative authorities.

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<sup>13</sup> K.D. Gaur, *Criminal Law and Criminology* 60 (Deep and Deep Publications, New Delhi, 2002).

