
EVOLUTION OF BAIL JURISPRUDENCE UNDER THE NDPS ACT: A CRITICAL ANALYSIS OF SECTION 37 OF THE NDPS ACT VIS-À-VIS LANDMARK SUPREME COURT JUDGMENTS

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ABSTRACT

Judicial interpretation has been used to develop the jurisprudence of bail under the Narcotic Drugs and Psychotropic Substances Act, 1985 especially concerning Section 37 of the Act where it has put strict requirements to allow bail to be granted on a case concerning commercial quantity of narcotic drugs. Section 37 also brings in the concept of the twin conditions of bail which greatly limits the discretion of the judicial system and provides a hard time getting bail. This paper is analytical in its study of the development of bail jurisprudence under the NDPS Act by reviewing case landmark Supreme Court decisions. It examines the interpretation of the judiciary in relation to the criterion of reasonable grounds and the trade-off between individual freedom in the provisions of Article 21 of the Constitution and the social concern on stopping drug trafficking. This paper also assesses the constitutional issues, problem of long imprisonment, presumption of innocence, and the change in judicial interpretative philosophy to a more rights-focused one in extraordinary circumstances. It is concluded as the study points out that though Section 37 is still a strict practice, the Supreme Court has over the years evolved to have an intermediate approach in order to ensure that the limitations of the NDPS Act do not lead to unwarranted denial of personal liberty thus forming part of the burgeoning jurisprudence of bails in India.

Keywords: NDPS Act, Section 37 NDPS Act, Bail Jurisprudence, Twin Conditions, Commercial Quantity, Article 21, Personal Liberty, Supreme Court Judgments, Narcotics Law, Criminal Justice System, Prolonged Incarceration, Presumption of Innocence, Reasonable Grounds, Constitutional Liberty, Drug Offences, Bail Restrictions

1. Introduction

Bail is a basic element of criminal justice and is directly related to the preservation of individual freedom. The concept of bail is taken under control by the principle of presumption in general criminal law that an accused individual is innocent until proven guilty and thus, jail should be an exception and bail should become the rule. Nevertheless, there should be a considerable deviation of this general principle in the proceedings of narcotic crimes under Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). NDPS Act lays down strict conditions especially in Section 37 where the granting of bail is limited in the event of offence dealing with commercial quantity of narcotic drugs and psychotropic substance.

This is because section 37 of the NDPS Act has one of the strictest bails under the Indian criminal law. It brings in the widely known twin conditions of bail, in that the court needs to be convinced that there are reasonable grounds to suspect that the accused remains innocent of the crime and that the accused is unlikely to reoffend, or commit any crime whilst on bail. Such provisions make the bailing really hard and severely restrict the discretion of the judge. This has made bail under NDPS Act exception and not the rule, most especially when it comes to commercial quantity.

There exist constitutional implications in the harsh bail regime established in the NDPS Act mostly concerning Article 21 of the Constitution of India that guarantees the right to life and personal liberty. One of the main concerns of NDPS bail jurisprudence has been the conflict between the personal freedom and the state interest in regulating drug trafficking. Section 37 has been construed, and some principles have been established over the years by the Supreme Court of India in its landmark decisions on who ought to be granted bail in a NDPS case.

The jurisprudence of bail under NDPS Act is a gradual change of the judicial practice. At the onset, the courts took a very rigid interpretation of Section 37, where drug offences were very serious and in order to prevent drug trafficking there was a need to reduce them. In subsequent rulings however, the courts started to factor in the prolonged incarceration, trial delay, procedural irregularities and weak evidence granting bail hence bringing about a more balanced and rights-focused practice.

This paper will critically review the development of judge-established bail jurisprudence in reference to the NDPS Act in Section 37 and landmark judicial decisions of the Supreme Court.

The article explores the law making purpose of Section 37, judicial meaning of the twins conditions, constitutional meaning of tough bail terms, and the shifting trends of judiciary in NDPS bail terms cases. The paper is also aimed at assessing whether the stringent bail requirements of Section 37 are a reasonable strike between the accused rights and the societal interest.

Therefore, the introduction establishes the platform to comprehend the development of the jurisprudence of bails under the NDPS Act by legislative provisions and judicial interpretation, and why Section 37 is currently one of the most controversial sections of Indian criminal law.

2. NDPS Act legislative Background

The Narcotic Drugs and Psychotropic Substances Act NDPS Act was brought in place to unify and modify the prevailing statutes concerning the narcotic drugs and psychotropic substances and so as to offer a rigid control of the drug trafficking and abuse of the drugs in India. Prior to the founding of the NDPS Act, there were a number of sporadic laws governing narcotic drugs which included Opium Act, 1857, Opium Act, 1878 and the Dangerous Drugs Act, 1930. Such laws were deemed to be ineffective enough to contain the increasing threat of narcotics trafficking and organized crime in drugs. Thus, it was necessary to have an all-encompassing law that would control and regulate narcotics drugs and psychotropic substances.¹

The NDPS Act was enacted with the sole purpose to accomplish the international obligation of India, that is, the Single Convention on Narcotic Drugs, 1961, the Convention on Psychotropic Substances, 1971, and eventually the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. According to these conventions, the signatory states had to make tight legislative and administrative practices in controlling the production, manufacture, possession, sale, purchase, transport, storage and consumption of narcotic drugs and psychotropic substances. The NDPS Act therefore serves as an indicator of the Indian resolve to collaborate with other nations in combating illicit drug trafficking.²

The Act is a special law that attracts strict penalties on drug related offences. The NDPS Act punishment is much severe compared to the punishments under criminal law in general. The

¹ Narcotic Drugs and Psychotropic Substances Act, No. 61 of 1985, Statement of Objects and Reasons (India).

² Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151; Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

Act stipulates strict jail terms of up to 10 years, 20 years or even longer in some instances together with onerous fines. The level of penalty is designed on the amount of the narcotic substance which is categorized into small quantity, intermediate quantity and commercial quantity as a measure to provide proportionality in sentencing which took effect in the 2001 Amendment.

Strict bail provisions in the NDPS Act as largely introduced in Section 37 of the Act is one of the most important aspects of the Act. Section 37 ensures that some offences become cognizable and non-bailable and the limitations are placed on the ability of the courts to offer bails, especially those involving commercial quantity. This section starts with non-obstante clause, which gives an understanding that the section overrides the general provisions of bail by the Code of Criminal Procedure, 1973.³ This demonstrates the intention of the legislature to make bail hard in grave NDPS crimes.

Legislation behind such high bail was meant to restrain the increasing issue of drug trafficking as well as to ensure that an accused individual does not persist in unlawful traffic of drugs on bail. Drug trafficking is regarded as a criminal act against a person, and it is a criminal act against the society and health. As such, the legislature used a deterrent strategy by ensuring that the provisions of bail were very strict.

The NDPS Act has been amended a number of times, especially in 1989, 2001, and 2014. The law was further tightened by the 1989 Amendment to include a minimum level of punishments and increased bail requirements. The Amendment of 2001 added the issue of the quantity based punishment to make the distinction between small offenders and drug addicts on one hand and large bound drug peddlers on the opposite. The 2014 Amendment further rationalized the sentencing policy and extended the list of controlled substances.⁴ These amendments indicate that the legislature has been relentlessly trying to balance the deterrence to proportionality.

The other significant aspect of the NDPS act is the presumption of culpable mental state under the act in Section 35 and presumption based on possession of the act in Section 54. These are clauses that shift the onus of proof on the accused in some cases and goes against the general

³ Code of Criminal Procedure, 1973, No. 2 of 1974, § 439 (India); Narcotic Drugs and Psychotropic Substances Act, 1985, § 37 (India).

⁴ S. Chandra Mohan, *NDPS Act: Law and Practice* 110–125 (2d ed. 2018).

rule of criminal law that guilt must be proved beyond reasonable doubt by the prosecution.

Therefore, the legislative history of the NDPS Act is a clear indication that the Act was put in place as a special legislation with strict clauses regarding bail, search and seizure, presumption of guilt, and punishment. The main aim of the Act is to regulate drug trafficking and secure popular health even with the restrictions on the main principles of criminal jurisprudence, including bail and presumption of innocence. The strict bail condition under Section 37 should be then interpreted within the frames of the comprehensive policy of deterrence and strict measures directed to fight narcotic crimes.

3. Section 37 of the NDPS Act: The Twin Conditions of Bail.

Section 37 of Narcotic Drugs and Psychotropic Substance Act, 1985 is one of the strictest provisions that concern the bail in Indian criminal law. The section starts with a non obstante clause which implies that it prevails over the general rules of bail in the Code of Criminal Procedure, 1973. Consequently, the general principles that apply to the issue of bail, including the default position of innocence and the rise of bail, do not hold the same implications regarding crimes that fall under the NDPS Act, especially a crime that is of commercial quantity.⁵

Section 37 states that commercial quantity of offences made under the NDPS Act shall be cognizable and non-bailable. The provision also adds that no accused person will be put on bail pending fulfilment of various requirements by the court. This is also commonly referred to as the twin conditions of bail.

The initial one is that the court has to be convinced that there are reasons which are reasonable in suspecting that the accused is innocent of the crime. This is a very strict condition since by the time the court gets to the point of bailing one, one does not expect the court to seek on the evidence extensively and conduct the trial in a more detailed manner. Section 37 however asks the court to give a prima facie opinion of the innocence of the accused unlike the general rules of criminal law.⁶

The second is that the court should be convinced that the accused will not necessarily commit

⁵ Narcotic Drugs and Psychotropic Substances Act, 1985, § 37 (India); Code of Criminal Procedure, 1973, § 439 (India).

⁶ Id. § 37(1)(b).

any crime on bail. In this circumstance, the court must evaluate the prospective behaviour of the accused and this again is a challenge to decide during the bail period. A combination of these two conditions renders the issue of the bail being given on the basis of the NDPS Act highly challenging, particularly when it deals with commercial quantity.

It has been consistently stated by the Supreme Court that conditions specified in Section 37 are obligatory and are set to be fully observed prior to bail being granted. The Court in *Union of India v. Ram Samujh*, stated that the NDPS Act had been passed after paying attention to the threat of drug dealing and thus the bailing provisions are to be interpreted literally. The Court noted that the liberal attitude of the bail considerations under the NDPS Act is not wanted.⁷

On the same note, in *Union of India v. Shiv Shanker Kesari*, the Supreme court explained that the term reasonable grounds conveys more than the prima facie grounds. It implies that there must be significant probable cause to think that an accused is not guilty of the crime. It was under this interpretation that the bail requirements of Section 37 were stricter than ever.⁸

The Supreme Court once again in the *State of Kerala v. Rajesh* case noted that under Section 37, the courts are limited on the issue of granting a bail and that the satisfaction of the two conditions is obligatory. The Court determined that the liberal treatment in the issue of providing bail is unacceptable in NDPS cases of commercial quantity.⁹

In this way, Section 37 establishes some kind of statutory limitation on the authority of courts to award bail and turns around the standard rule that the bail should be awarded in criminal law. Section 37 transforms the customary rule that creates the exception of *dido* “bail being the rule, jail being the exception into a new rule that creates an exception, namely, jails becoming the rule and bails becoming the exception, where the quantity is commercial of the narcotic drugs at issue.

However, despite the stringent provisions, the Supreme Court in several cases has granted bail on constitutional grounds such as prolonged incarceration, delay in trial, and weak evidence. This shows that while Section 37 is stringent, it is not absolute and must be interpreted in light of Article 21 of the Constitution of India.

⁷ *Union of India v. Ram Samujh*, (1999) 9 S.C.C. 429 (India).

⁸ *Union of India v. Shiv Shanker Kesari*, (2007) 7 S.C.C. 798 (India).

⁹ *State of Kerala v. Rajesh*, (2020) 12 S.C.C. 122 (India).

Therefore, Section 37 represents a strict legislative policy to combat drug trafficking, but its judicial interpretation shows an attempt to balance the strict provisions with the fundamental right to personal liberty.

4. Judicial Interpretation and Evolution of Bail Jurisprudence

The Supreme Court of India has played a crucial role in interpreting Section 37 of the NDPS Act and in developing bail jurisprudence in narcotics cases. Through various landmark judgments, the Court has attempted to balance the stringent provisions of the NDPS Act with constitutional safeguards, particularly the right to personal liberty under Article 21 of the Constitution. The evolution of bail jurisprudence under the NDPS Act can be understood through important judicial decisions discussed below.

4.1 Union of India v. Ram Samujh (1999)

In *Union of India v. Ram Samujh*, the Supreme Court emphasized the seriousness of offences under the NDPS Act and held that drug trafficking poses a serious threat to society and public health. The Court observed that persons involved in drug trafficking are a hazard to society and therefore the liberal approach to bail applicable in ordinary criminal cases should not be applied in NDPS cases. The Court further held that the conditions laid down under Section 37 are mandatory and must be strictly complied with before granting bail.¹⁰

Significance: This case established the principle that bail under the NDPS Act must be granted only in exceptional circumstances and that Section 37 must be strictly interpreted.

4.2 Union of India v. Shiv Shanker Kesari (2007)

In *Union of India v. Shiv Shanker Kesari*, the Supreme Court interpreted the expression “reasonable grounds” appearing in Section 37 of the NDPS Act. The Court held that the expression means something more than prima facie grounds and requires substantial probable cause for believing that the accused is not guilty of the offence. The Court clarified that satisfaction of the court must be based on reasonable belief and not mere suspicion.¹¹

Significance: This judgment made the grant of bail under the NDPS Act more difficult by

¹⁰ *Union of India v. Ram Samujh*, (1999) 9 S.C.C. 429 (India).

¹¹ *Union of India v. Shiv Shanker Kesari*, (2007) 7 S.C.C. 798 (India).

giving a strict interpretation to the term “reasonable grounds.”

4.3 Supreme Court Legal Aid Committee v. Union of India (1994)

In *Supreme Court Legal Aid Committee v. Union of India*, the Supreme Court dealt with the issue of prolonged detention of undertrial prisoners under the NDPS Act. The Court held that undertrial prisoners cannot be kept in jail for an indefinite period and that prolonged incarceration without trial violates Article 21 of the Constitution. The Court directed that undertrial prisoners who had been in jail for a long period should be released on bail.¹²

Significance: This case introduced the principle that prolonged incarceration can be a ground for granting bail even under stringent laws like the NDPS Act.

4.4 Tofan Singh v. State of Tamil Nadu (2020)

In *Tofan Singh v. State of Tamil Nadu*, the Supreme Court held that officers under the NDPS Act are “police officers” within the meaning of Section 25 of the Indian Evidence Act, 1872, and therefore confessional statements made to them are not admissible as evidence. This judgment had a significant impact on NDPS cases because many prosecutions were based on confessional statements made before NDPS officers.¹³

Significance: The judgment strengthened the rights of the accused and indirectly affected bail jurisprudence because if confessional statements are inadmissible, the prosecution case becomes weaker, thereby increasing the chances of bail.

4.5 State of Kerala v. Rajesh (2020)

In *State of Kerala v. Rajesh*, the Supreme Court reiterated that Section 37 of the NDPS Act is a stringent provision and the twin conditions must be satisfied before granting bail. The Court held that the satisfaction of the court must be recorded in the order granting bail and failure to do so would make the bail order illegal.¹⁴

Significance: This case reaffirmed the strict interpretation of Section 37 and emphasized

¹² *Supreme Court Legal Aid Comm. v. Union of India*, (1994) 6 S.C.C. 731 (India).

¹³ *Tofan Singh v. State of Tamil Nadu*, (2021) 4 S.C.C. 1 (India).

¹⁴ *State of Kerala v. Rajesh*, (2020) 12 S.C.C. 122 (India).

procedural compliance.

4.6 Mohit Aggarwal v. Narcotics Control Bureau (2022)

In Mohit Aggarwal v. Narcotics Control Bureau, the Supreme Court held that in cases involving commercial quantity, the court cannot grant bail without satisfying the twin conditions under Section 37. The Court emphasized that liberal bail approach is not applicable in NDPS cases and courts must apply the statutory restrictions strictly.¹⁵

Significance: This judgment reinforced the strict approach towards bail under Section 37 and clarified that the seriousness of the offence must be considered while granting bail.

5. Constitutional Perspective: Article 21 vs Section 37

The greatest constitutional concern in the jurisprudence of the NDPS bail is the clash between the principles of personal liberty that is visible in Article 21 of the Constitution of India and the harsh content of bail as proposed in Section 37 of the NDPS Act. Article 21 also assures against deprivation of life or personal liberty by a man without having followed some procedure stipulated by law. Nevertheless, the strict conditions of authorizing bail are introduced in Section 37 of the NDPS Act because the Act refers to such strict conditions concerning commercial amount of narcotic drugs.¹⁶

This brings a legal dilemma between the personal freedom and the social good. On the one hand, it is the responsibility of the State to stop drug trafficking and ensure the health of people; on the other hand, the Constitution provides individual freedoms and the principle of presumption of innocence until a suspect is guilty.

Special statutes such as the NDPS Act notwithstanding, it has been ruled a number of times that the guarantee under Article 21 of the Constitution cannot be disregarded. In Supreme Court Legal Aid Committee v. Union of India, the Court stated that the long imprisonment of undertrial prisoners is a violation of Article 21 and the possibility of receiving bail is even in the case of the NDPS when the criminal is not tried within an outrageous period of time.¹⁷

¹⁵ Mohit Aggarwal v. Narcotics Control Bureau, (2022) 4 S.C.C. 713 (India).

¹⁶ INDIA CONST. art. 21; Narcotic Drugs and Psychotropic Substances Act, 1985, § 37 (India).

¹⁷ Supreme Court Legal Aid Comm. v. Union of India, (1994) 6 S.C.C. 731 (India).

Likewise, in the case of *Rabi Prakash v. the State of Odisha*, bail was granted to the accused by the Supreme Court based on extended incarceration and that rigours of Section 37 could not be applied to the obligation of constitutional courts to guard individual liberty under Article 21.

In the cases of weak evidence, unjust procedure of search and seizure, and in the cases where mandatory provisions of the NDPS Act are not observed, the courts have set bail in NDPS cases as well. But as an example, failure to follow requirements in the NDPS Act (Sections 42, 50, and 57) has been found to be a pertinent aspect in awarding bail due to protective procedural protection requirements being a mandate of the NDPS Act.

Thus, the judiciary has tried to create a balance between the rigid clauses of the Section 37 with the basic rights of the accused by setting the bail in such rare conditions like:

Delay in trial

Long incarceration

Weak evidence

Procedural irregularities

Violation of obligatory stipulations.

Therefore, although Section 37 is a strict rule, judicial interpretation reveals that this is not absolute and that it needs to be construed concerning the principles of the Constitution especially the Article 21.

6. Critical Analysis of Section 37

6.1 Issues with Section 37

The NDPS Act section 37 has received extensive criticism as being much too strict and failing to adhere to the fundamental tenets of criminal jurisprudence. Among the greatest points of criticism is that it breaches the doctrine of presumption of innocence which forms the basis of criminal law. Under section 37, the court must be content in that the accused is innocent before the bail is granted and this practically places the burden of proving guilt on the accused during

the bail posting.

Another significant flaw of Section 37 is that it forces the court to establish the innocence of the accused at the same stage of the bail hearings, this is virtually hard since evidence is not thoroughly investigated to this point. This causes several incidences of denial of bail as well as prolonged pre-trial detention of undertrial suspects.

These harsh bail conditions also play a role in the overcrowding of prisons since overtrial prisoners spend long time in the jail because of trial delays. The NDPS trials are long with most cases needing several years to be over and the accused is incarcerated longer than the potential sentence on minuscule or intermediate amount offences.

More so, the stringent terms of bail work towards disadvantaging poor and under trial inmates because they lack the necessary funds to hire good lawyers. The reason why many accused persons are in jail as opposed to being guilty is that they cannot meet the strict bail requirement as provided in Section 37.

Therefore, Section 37 has been attacked as ruthless, irrational and against the postulates of natural justice and individual freedom.

6.2 Judicial Trends

The judicial approach towards bail under the NDPS Act has evolved over time. The trend can be divided into different phases:

Phase	Approach of Courts
1985–2000	Very strict approach
2000–2010	Strict but interpretative
2010–2020	Balance between liberty and law
2020–Present	Rights-based approach emerging

In the early years after the enactment of the NDPS Act, the courts adopted a very vigorous and not likely to be put on bail in NDPS cases. Nevertheless, in 2000-2010 the courts started to

interpret the provisions more precisely, especially the meaning of the phrase of a reasonable grounds.

The courts began weighing the stringent provisions against the constitutional principles (primarily, Article 21) between the years of 2010 and 2020. Since 2020, the Supreme Court has grown more concerned with personal freedom, long periods of imprisonment and procedural rights and awarded bail in NDPS cases.

Accordingly, there is a legal tendency toward the reduction of the purely statutory approach in favor of a more constitutional and rights approach by the judicial process.

7. Recent Judicial Trend: Liberty-Oriented Approach

A subtle change has been witnessed in the recent years where the Supreme Court of India has leaned more towards a liberty-based perspective on the issue of bails under the NDPS Act. Although in the earlier decisions the main focus was put on the strict adherence of the requirements of Section 37 of the NDPS Act, recent rulings have focused on the fact that long imprisonment and trial stalling does not mean that one should not be charged on bail even on a commercial quantity case.

The concept of holding undertrial prisoners indefinitely without trial has really been identified to be against Articles 21 and 22 of the constitution which are the right to life and the right to personal liberty respectively by the Supreme Court. The Supreme Court, in *Rabi Prakash v. State of Odisha*, applied that since the accused had remained in custody over an extended period of time, the provisions of Section 37 were inapplicable to justify a perpetual custody of an undertrial prisoner.

Likewise, in *Satender Kumar Antil vs. CBI*, the Supreme Court has stated that the risk of bail being exploited and bailouts being used to curb the individual liberty, and overcrowding in the prisons held significant importance. Even though this case did not fall under the direct coverage of the NDPS Act, much of what was said concerning the issue of long-term imprisonment and bail has been applied to NDPS cases.

The delay in the trial, poor evidence, failure in observing mandatory procedural requirements and time taken by the accused in the custody, have also been factored in by the courts to grant bail in cases of NDPS. This symbolizes the increase of a purely statutory method of bail

jurisprudence to a constitutional method.

This change may be referred to as a change in a principle of bail as the rule that existed through the section 37 into a more equitable principle, in which bail is not unattainable, when another detention will entitle infringement on the basis rights. Accordingly, the recent judicial trend represents the rights-based understanding of the interpretation of Section 37 following Article 21 of the Constitution.

8. Conclusion

The judicial development of bail jurisprudence under the NDPS Act can be seen as the never-ending attempts of the judiciary to commit two competing notions, which is the necessity to curtail drug distribution and the maintenance of personal freedom. Section 37 of the NDPS Act is currently one of the most restrictive bail policies in the Indian criminal law provision since it proposes the twin requirements that are required to be fulfilled in cases of commercial quantity of narcotic drugs and psychotropic substances before a person is cleared to be given bail.

Creation of Section 37 by the courts indicates that during the initial years; the courts were very strict and easily denied bail in NDPS cases. But with time the Supreme Court has realized that the prolonged pre-trial detention and delay in prosecution might dictate against the very basic right to personal liberty specified in Article 21 of the Constitution. Consequently, the courts have over time cast a leeway in the interpretation of the meaning of Section 37 by granting bail in very special cases like subjecting the person to lengthy custody, insufficient evidence, or irregularities in the course of proceedings, and failure to adhere to the required provisions of the NDPS Act.

According to the recent judicial trend, there will be some shift to the more constitutional and rights-related one, as the courts will seek to reconcile Section 37 of the NDPS Act with Article 21 of the Constitution. It has been made clear by the courts that the stringent conditions that are required in accordance with Section 37 are not to be applied to lead to the indefinite confinement of the undertrial prisoners.

Consequently, the history of NDPS bail jurisprudence shows the gradual change toward an inflexible statutory approach to the more moderate approach that does not ignore the interests

of society but the liberty of any person. The court has been critical in seeing that the rigorous requirements of the NDPS Act do not lead to an unfair loss of personal liberty hence supporting the constitutional values of fairness, justice and liberty.

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