

LAW ON
NDPS ACT, 1985

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1(A-1). Search of person & something carried by accused in his hand u/s 50 of

the NDPS Act--- Search of person u/s 50 of the NDPS Act does not include search & recovery from bag, briefcase and container etc. Sec.50 applies where personal search of a person is involved. See---

1 A - Jarnail Singh vs. State of Punjab, 2011 CrLJ 1738(SC)1.Ajmer

Singh Vs. State of Haryana, (2010) 3 SCC 746

2. Madna Lal Vs. State of HP, (2003) 7 SCC 4653.State of Punja Vs.

Baldev Singh, (1999) 6 SCC 172 (Five-Judge Bench)

4-State of Punjab Vs. Makhan Chand, AIR 2004 SC 3061.

1(A-2).Section 50 only applies in case of personal search and not extended to

search of vehicle, container, bag or premises : Where bags containing poppy husk were seized from truck in his the accused were sitting, it has been held by the Supreme Court that it was not a case of personal search of the accused and Section 50 of the NDPS Act, 1985 was not attracted as Section 50 only applies in case of personal search of person and not applicable to search of vehicle, container, bag or premises. See : **Kulwinder Singh & Another Vs. State of Punjab, (2015) 6 SCC 674.**

1(B) Effect of no statement regarding breach of Sec. 50 u/s 313 CrPC---Where

the officer making the search had asked the accused persons by way of notices whether they wanted to be searched by him or by any officer named in Sec.50 i.e.gazetted officer or magistrate and the accused had not stated u/s 313 CrPC that he was unaware of his rights u/s 50 of the NDPS Act or that

he was misled on that account in any manner, it has been held that though observance of Sec.50 is a procedural safeguard yet non statement u/s 313 CrPC is of some relevance in appreciating the grievance of the accused regarding non compliance of Sec. 50. See--- **Prabha Shankar Dubey Vs. State of MP, (2004) 2 SCC 56**

1(C). Observance of safeguards provided by Section 50 of NDPS Act, 1985 when not required : Observance of safeguards provided by Section 50 of the NDPS Act, 1985 is not required when the seizure was made from bags and not from the person of the accuse. See : **2013 CrLJ 2997 (SC)**.

1(D). Observance of safeguards provided by Section 50 of NDPS Act, 1985 when not required : Where seizure in question was made from scooter and not from the person of the accused, section 50 of the NDPS Act was not applicable. See : **2013 CrLJ 3036 (SC)**.

1(BB) Consent statement by accused to be searched in presence of police officer & its effect Where narcotic/opium was recovered from a bag carried by the accused and not from his person and option was given by the inspector of police to the accused as to whether he wanted to be searched in presence of gazetted officer or magistrate and the accused had infact signed consent statement expressing his confidence to be searched in presence of the inspector, it can not be said that there was violation of Sec.50 of the NDPS Act, 1985. See.... **Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)**

(BBB) Consent statement by accused to be searched in presence of police party alone not to amount to confession u/s 25, Evidence Act Where narcotic/opium was recovered from a bag carried by the accused and not from his person and option was given by the inspector of police to the accused as to whether he wanted to be searched in presence of gazetted

officer or magistrate and the accused had in fact signed consent statement expressing his confidence to be searched in presence of the inspector, it can not be said that the consent statement signed by the accused to be searched for narcotic by police officer does not amount to commission of offense and is not hit by Sec.25 of the Evidence Act. Such consent statement of the accused is admissible in evidence. See.... **Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)**

(C) No Specific mode or manner prescribed to inform accused of his right of search u/s 50---No Specific mode or manner has been prescribed to inform accused of his right of search u/s 50 by the Gazetted Officer or magistrate. Accused should be informed in a way so that he becomes aware that the choice is his and not of the officer concerned. See---

1. **Prabha Shankar Dubey Vs. State of MP, (2004) 2 SCC 56**

2. **2011 CrLJ 680 (SC)**

2(A). Recovery of Narcotic Drugs by police when not supported by public witnesses--- Where the accused, on seeing the police party, made an attempt to turn back and escape but was over powered by the police party and on his arrest and search "Charas" was recovered from his possession for which he had no license and after prosecution he was convicted for the offence u/s 20 of the NDPS Act 1985, it has been held by the Supreme Court that the obligation to take public witnesses(independent witness) is not absolute. If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating

their evidence. See--

1 A - Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)

1-Ajmer Singh Vs. State of Haryana, (2010) 3 SCC 746

2-State of Punjab Vs. Makhan Chand, AIR 2004 SC 306

3- Dharam Pal Singh Vs. State of Punjab, 2010(71) ACC 548 (SC).

2(B). Recovery of Narcotic Drugs by police when not supported by public

witnesses : Mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. In the instant case at the time of recovery of poppy husk from possession of accused some villagers had gathered there. The Investigating Officer in his cross examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. Section 114 of the Act, 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim *omnia praesumuntur rite et dowe probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. See : **Gian Chand & Others Vs State of Haryana, AIR 2013 SC 3395** (*paras 28 & 29*)

3(A). Presumption of commission of offense by the accused Sec 54 of the NDPS Act creates a legal fiction & presumes the person in possession of illicit article when possession is once established, that the accused had culpable mental state & had committed the offense. See... **Dharam Pal Singh Vs. State of Punjab, 2010 (71) ACC**

548(SC)

3(B). Section 106, Evidence Act to attract when recovery of contraband material is recovered from the possession or conscious possession of the accused :

From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. Accordingly to Section 35 of the Act, the Court shall presume the existence of mental state from the commission of an offence and it is for the accused to prove otherwise. It is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872. See : **Gian Chand & Others Vs State of Haryana, AIR 2013 SC 3395** (paras 14 & 15)

4(A). Sec. 42(2) of the NDPS Act & effect of it's non-compliance If no information was taken down in writing by police officer or conveyed to immediate police officer then any oral evidence of police officer will not be in compliance with the provisions of Sec 42(2) of the NDPS Act, 1985. See...

1. State of Karnataka v. Dondusa Namasa Baddi, 2011(72) ACC 666 (SC).

2. Karnail Singh v. State of Haryana, 2009 (8) SCC 539 (Five judge Bench).... held that substantial compliance with Sec 42(2) is sufficient.

Note - There were conflicting decisions by Three- Judge Benches of the Supreme Court rendered in the cases of (i) Abdul Rashid Abraham Mansoori v. State of Gujarat, (2000) 2 SCC 513 and (ii) Sajan Abraham v. State of Kerala, (2001) 6 SCC 692. on the point of consequences of non-compliance or only substantial compliance of Sec 42(2) of the NDPS Act and then the matter was referred to the constitution bench which, in the case of Karnail Singh, laid down the law which has been relied upon in the case of Dondusa.

4(B). Effect of search & seizure u/s 42 of the NDPS Act by Sub Inspector and not SHO :

Where authority u/s 42 of the NDPS Act, 1985 to search, seize and arrest without warrant

was given to Sub-Inspector of Police posted as SHO, and such search and seizure was made by the Sub-Inspector who was given temporary charge of SHO, it has been held by the Supreme Court that such search and seizure made by Sub-Inspector cannot be said to be vitiated. The word "posted" cannot be given undue importance. Acquittal of the accused on the ground that the search and seizure was not done by authorized person, held, improper. See : **State of Rajasthan Vs. Bheru Lal, 2013 CrLJ 3223 (SC)**.

5. **NDPS Act & Bail Of Juvenile...** In the event of recovery of commercial quantity of Charas from accused, it has been held that bail application of the accused would be considered u/s 12 of the JJ Act, 2000 & not u/s 37 of the NDPS Act, 1985. See...**2011 CrLJ 200 (All)**.
6. **Disposal of Narcotic Drugs u/s NDPS Act---** (A) For the Narcotic Drugs for its identification, procedure u/s 451 Cr PC should be followed for recording evidence and disposal. Its identity can be on the basis of evidence recorded by the magistrate. Samples also should be sent immediately to the chemical analyzer so that subsequently acontention may not be raised that the article which was seized was not the same. See---
 1. **Sunder Bhai Ambalal Desai Vs. State of Gujrat, 2003(46) ACC 223 (SC)**
 2. **Smt. Basavva Kom Dyamangouda Patil Vs. State of Mysore, 1977(14) ACC 220(SC)**
 (B) **Delay in sending sample of narcotic to chemical examiner when not fatal** Where there was clear evidence of chemical examiner that seals were intact when sample of narcotic/ opium was received by him and the same tallied with the sample impression of seal, it has been held by the Supreme Court that the delay in sending the sample for chemical examination would not be fatal to the case of the prosecution. See...
 1. **Jarnail Singh vs. State of Punjab, 2011 CRLJ 1738(SC)**
 2. **Hardip Singh Vs. State of Punjab, AIR 2009 SC 432**
25. **NDPS Act, 1985 & Pardon under Article 161 of the Constitution:** Questioning the validity of a Three-Judge Bench decision of the Supreme Court in Dadu alias Tulsidas Vs. State of Maharashtra, AIR 2000 SC 3203, on Section 32-A of the NDPS Act, 1985, a Two-Judge Bench of the Supreme Court has referred the matter to be decided first by Three-Judge Bench or by a Five-Judge Bench. See : **Krishnan & Others Vs. State of Haryana & Others, AIR 2013 SC 2139**.

26. **Restriction on power of remission imposed by Sec 32-A of NDPS Act, 1985 not discriminatory and not violative of Articles 14 & 21 of the Constitution** : Restriction on power of remission imposed by Sec 32-A of NDPS Act, 1985 is not discriminatory and not violative of Articles 14 & 21 of the Constitution. See : **Budh Singh Vs. State of Haryana, 2013 CrLJ 3061 (SC)**

27(A). **Necessary conditions for grant of bail u/s 37 of the NDPS Act must be fulfilled** : The following twin conditions prescribed u/s 37(1)(b)(ii) of the NDPS Act, 1985 must be fulfilled before grant of bail to an accused of offences under the said Act :

(i) That there are reasonable grounds for believing that the accused is not guilty.

(ii) That the accused is not likely to commit any offence while on bail. See :

(i) **Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798**

(ii) **Superintendent, Narcotics Central Bureau, Chennai Vs. R. Paulsamy, 2001 CrLJ 117 (SC)**

27(B). **Bail by ASJ under NDPS Act, 1985** : When the Special Judge exercises power to grant bail, he is bound by Section 37 of the NDPS Act, 1985. He has to take into account the conditions laid down in Clauses (i) and (ii) of Clause (b) of Section 37(1) of the NDPS Act and if he satisfied that those conditions have been fulfilled, he can release a person on bail under this Section. The other conditions laid down in Section 37 will also apply to him when he intends to grant bail in such a case. See....**Union of India Vs. Rattan Mallik, (2009) SCC 624.**

27(C). **Offences under NDPS Act to be cognizable & non-bailable (Sec. 37, NDPS Act)** : According to Sec. 37 of the NDPS Act, 1985 offences under the Act are cognizable and non-bailable.

(i) **Sec. 32-A, NDPS Act, 1985** : Sec. 32-A of the NDPS Act, 1985 reads as under--
- “.....”

(ii) **Sec. 32-A of the NDPS Act, 1985 partly declared unconstitutional** : In relation to Sec. 32-A of the NDPS Act, 1985, the Supreme Court has declared following law---

(i) Sec. 32-A of the NDPS Act, 1985 does not in any way affect the powers of the authorities to grant parole.

(ii) Sec. 32-A is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(iii) A sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Sec. 37 of the Act. See--- **Dadu Vs. State of Maharashtra, 2000 Cr.L.J. 4619 (SC----Three Judge Bench)**

27(D). Bail u/s 389 CrPafter conviction under NDPS Act : Sec. 389 of NDPS Act, 1985 empowers appellate Court to suspend sentence pending appeal and release accused on bail. Sec. 32-A of NDPS Act in so far as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act does not stand the test of constitutionality. Not providing at least one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statutes and when conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits at least in many High Courts. The suspension of the sentence by the appellate Court has, however, to be within the parameters of the law prescribed by the Legislature or spelt out by the courts by judicial pronouncements. The exercise of judicial discretion on well recognized principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislatu cated was also ruled out, it has been held that the accused was not entitled to be released on bail for the offences under the NDPS Act, 1985. See--- **Safi Vs. State of U.P., 2006 (6) ALJ (NOC) 1358 (All).**

27(E).Where huge quantity of contraband was recovered from the physical possession of the accused on due search and possibility of the accused being falsely imply

27(F).Where the accused was charged with the offence u/s 20 of the NDPS Act, 1985 for the recovery of 1 Kg. of smack from his possession and the total quantity of the smack recovered from the possession of the accused and the other co-accused was 4 Kg. and 300 gms. and the same was sealed in matchboxes in the absence of public witnesses, the bail of the accused was rejected. See--- **Aman Vs. State of U.P., 2005 (53) ACC 893 (All)**

27(G). In compliance with the directions of Hon'ble Allahabad High Court (by Hon'ble Justice G.P. Srivastava) in the matter of Criminal Misc. Bail Application No. 5108 of 2006

Jagdish Vs. State of U.P., the Hon'ble Allahabad High Court has issued C.L. No. 36/2006/Admin 'G', dated 10.8.2006 which reads as under---

“It is hereby directed that all the recovered articles under NDPS Act as and when are recovered should be weighed either by the arresting officer or the S.H.O. of the Police Station concerned. In case both the authorities fail to discharge their duty, it is incumbent upon the Special Judge/Magistrate who grants first remand to the accused to get the recovered article weighed.”

27(H).Jurisdiction of Magistrates and Special Judges under NDPS Act, 1985 : As regards the jurisdiction of Magistrates and the Special Judges for conducting enquiries or trial or regarding other proceedings under the provisions of NDPS Act, 1985, the Hon'ble Allahabad High Court, in compliance with the directions of the Allahabad High Court (by Hon'ble Justice B.K. Rathi), in the matter of Criminal Misc. Application No. 1239 of 2002, Rajesh Singh Vs. State of U.P. vide C.L. No.31/2006, dated 7.8.2006 has issued following directions to the judicial officers in the State of U.P.---

“...the original provisions of the NDPS Act, 1985 has been substantially amended by the amending Act No. 9 of 2001, Section 36-A of the original Act provided for trial of offences under the Act by the Special Courts. This section has been amended and amended sub clause 1(a), which is relevant for the purpose of this petition is extracted below:

Section 36-A --- “Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government.” Sub-clause (5) of the said section is also relevant and is extracted below:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this act with imprisonment for a term of not more than three years may be tried summarily.”

4. From the perusal of the above provision alongwith Section 4 of the Cr.P.C., it is clear that in case the punishment provided for the offence under the NDPS Act is more than three

years, the offence is triable by Special Court and to that extent the provision of Section 36-A NDPS Act over rides the provisions of the CrPC. The trial for offences under the NDPS Act which are punishable for imprisonment of three years or less should be a summary trial by the Magistrate under Chapter XXI of the CrPC For the purpose to further clarify the position of law it is also necessary to refer to Section 4 CrPC which is as follows:-

Section 4 “Trial of offences under the Indian penal Code and other laws – (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, enquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

- (2) All offences under any other law shall be investigated, enquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences.
5. The above clause (2) therefore, show that all the offences should be tried according to the provisions of CrPC except where there is special provision in any other enactment regarding the trial of any offences. Section 36-A of NDPS Act only provide for trial by Special Courts for offences punishable under NDPS Act with imprisonment for a term of more than three years only. Therefore, if an offence is punishable with imprisonment for a term upto three years, it shall have to be tried by the Magistrate in accordance with the provision of Section 4(2) CrPC.
6. It will not be out of place to mention that after the enforcement of amending Act No. 9 of 2001 this procedure for trial has to be followed for all the offences irrespective of the date of commission of the offence. It is basic principle of law that amendment in procedural law will apply to the pending cases also. Not only this there is also specific provision regarding it in amending Act No. 9 of 2001. Section 41 of the Act provides as follows:-
Section 41: “Application of this Act to pending cases—(1) Notwithstanding anything contained in sub section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment before such

commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.”

Now the next question that arise for decision s as to what is the punishment provided for the present offence under amended NDPS Act. It appears that the punishment for recovery of Narcotic Drugs or Psychotropic Substance has been divided in 3 categories as mentioned in the table given at the end of the Act. In this table 2 columns No. 5 and 6 are material, the first is regarding the small quantity and the other is regarding commercial quantity. The third category will follow from this table where the quantity is above small quantify but is less than commercial quantity. The ganja has been given at live No. 55 of this table, 1000 gm of ganja has been categorized as small quantity and 20 kg. of ganja has been categorized as commercial quantity. Accordingly to the third category in respect of recovery of ganja is above 1 kg. and below 20 kg.”

28(A-1).Release of vehicle under NDPS Act : Where the narcotics was recovered from the truck when the accused, the brother of the owner of the truck, was sitting therein but the owner of the truck though a co-accused but was not arrested on the spot nor there was any evidence that carrying of the narcotics was in his knowledge, the High Court has held that in view of the law propounded by the Supreme Court in the case of **Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223 (SC)**, the truck should be released in favour of its registered owner u/s 451, 452 CrPC. See : **Samarjeet Vs. State of UP, 2014 (86) ACC 505 (All)**.

28(A-2).Vehicle seized u/s 18/20 NDPS Act to be released in favour of its owner : Relying on the decision of the Hon'ble Supreme Court in Sundarbhai Ambalal Desai Vs. State of Gujarat, 2003 (46) ACC 223(SC), it has been held by the Hon'ble Allahabad High Court that a vehicle seized u/s 18/20 NDPS Act should be released in favour of its owner. See : **Prakash Sahu Vs. State of UP, 2014 (86) ACC 214 (All)**.

29. POCSO Court to try both the cases where accused charged under SC/ST Act

also : A perusal of Section 20 of the SC/ST (Prevention of Atrocities) Act, 1989 and Section 42-A of the Protection of Children from Sexual Offences Act, 2012 reveals that there is a direct conflict between the two non obstante clauses contained in these two different enactments. If Section 20 of the SC/ST Act is to be invoked in a case involving offences under both the Acts, the same would be triable by a Special Court constituted under Section 14 of the SC/ST Act and if provisions of Section 42-A of the POCSO Act are to be applied, such a case shall be tried by a Special Court constituted under Section 28 of the POCSO Act. Dealing with an issue identical to the case on hand, the Apex Court in Sarwan Singh Vs. Kasturi Lal, AIR 1977 SC 265 held thus : "When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier. In KSL & Industries Limited Vs. Arihant Threads Limited & Others, AIR 2015 SC 498, the Apex Court held thus :In view of the non obstante clause contained in both the Acts, one of the important tests is the purpose of the two enactments. It is important to recognize and ensure that the purpose of both enactments is as far as possible fulfilled. A perusal of both the enactments would show that

POCSO Act is a self contained legislation which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure. The legislature introduced the non obstante clause in Section 42-A of the POCSO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POCSO Act though the legislature was aware about the existence of non obstante clause in Section 20 of the SC/ST Act. Applying the test of chronology, the POCSO Act, 2012 came into force with effect from 20.06.2012 whereas SC/ST Act was in force from 30.01.1990. The POCSO Act being beneficial to all and later in point of time, it is to be held that the provisions of POCSO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments." See : **State of A.P. Vs. Mangali Yadgiri, 2016 CrLJ 1415 (Hyderabad High Court)(AP) (paras 14, 15, 16, 17, 19 & 20).**

- 30. Provisions of NDPS Act, 1985 are not in derogation of the Drugs and Cosmetics Act, 1940:** Accused was found in bulk possession of the manufactured drugs without any valid authorization and was convicted under the NDPS Act, 1985. The High Court u/s 389 CrPC directed suspension of sentence and granted bail to the convict appellant by holding that the convict must have been tried under the Drugs and Cosmetics Act, 1940 instead of the NDPS Act, 1985. The Supreme Court set aside the order of the High Court by holding that the provisions of the NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940. **See: State of Punjab Vs. Rakesh Kumar, AIR 2019 SC 84 (Three-Judge Bench).**
