

Small Quantity Offences under the NDPS Act-Whether Bailable or Not?

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The recent arrest and subsequent detention of Aryan Khan, the son of Bollywood superstar, Shah Rukh Khan, following a raid on a luxury yacht by the Narcotics Control Bureau has again rekindled the discussion in the legal fraternity as to whether offences relating to small quantity drugs or psychotropic substances are bailable or not. This paper is a quest in search of an answer in this regard.

But to answer this, we need to first understand the nuances of jurisdiction of Criminal Courts trying offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter called the NDPS Act).

According to Section 36A(1)(a) of the NDPS Act (as amended up to date), all offences under the 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. In areas where Special Courts have not been constituted, as per Section 36D(1), any offence which is triable by a Special Court shall, until a Special Court is constituted, be tried by a Court of Session.

Section 36A, in its current form, came out of the 2001 amendment to the NDPS Act. Section 36A, however, was initially inserted into the NDPS Act by the NDPS (Amendment) Act, 1988 (2 of 1989) (w.e.f. 29.5.1989). At that point of time, all offences under the NDPS Act were triable by the Special Court constituted by the Government under Section 36. The 2001 (Amendment) Act (9 of 2001) substituted Section 36A with its current avatar under which only those offences which are punishable with imprisonment for a term of more than three years are triable by the Special Court.

Interestingly, however, the NDPS Act does not specify who shall try the offences which carry a punishment of imprisonment for a term which may extend to three years or which may be less than three years.

In this regard, one, thus, has to fall back to the Code of Criminal Procedure, 1973 (2 of 1974) (hereinafter called CrPC). One can trace the mandate of the CrPC in this regard to Section 4 thereof which reads as follows:

“(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired 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, inquiring into, trying or otherwise dealing with such offences.”

Section 4(2), CrPC makes it apparent that the investigation, inquiry and trial under any special law shall also be in accordance with the provisions of the CrPC unless the special law regulates the manner of the investigation, inquiry or trial. The general provisions of the CrPC will, thus, apply to all proceedings under any special law unless the special law provides special procedure in that regard.

I hasten to highlight Section 5 of CrPC here which reads as follows:

“Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

Thus, CrPC, as per Section 5, in the absence of a contrary provision, will not affect any special law or any special jurisdiction or power conferred by any special law.

Now, Part II of the First Schedule of the CrPC mandates that under laws other than the Indian Penal Code (45 of 1860) only those offences which are punishable with death or imprisonment for life or imprisonment for more than seven years will be triable by a Court of Session. Because of Section 5, CrPC, this usual rigour becomes ineffective under the scheme of the NDPS Act insomuch as the NDPS Act makes offences punishable with more than three years' imprisonment triable by the Special Court (which is deemed to be a Court of Session as per Section 36C).

But for offences punishable with imprisonment of less than or upto three years, the NDPS Act does not confer any special jurisdiction or power on the Special Court. So, Section 4(2) read with Section 5, CrPC mandates that it is the CrPC which will govern

the principles pertaining to trial of such offences. In fact, the majority view in **Tofan Singh v. State of Tamil Nadu, 2020 SCC OnLine SC 882** is that *“Read with sections 4(2) and 5 of the CrPC, the scheme of the NDPS Act seems to be that the CrPC is generally followed, except where expressly excluded, or applied with modifications.”*

So, in the absence of any exclusion or modification of procedure or conferment of jurisdiction for trial of offences punishable with imprisonment of less than or upto three years on Special Courts, one must turn to Part II of the First Schedule of CrPC which suggests that offences which are punishable with imprisonment of less than three years shall be triable by any Magistrate and for offences which are punishable with imprisonment upto three years, a Magistrate of First Class can try such offences.

In the existing set up of Criminal Courts, it is but evident that offences which are not punishable with imprisonment for a term of more than three years shall have to be tried by a Judicial Magistrate First Class which also includes a Chief Judicial Magistrate, by virtue of Section 12(1), CrPC. These offences ideally ought to be tried summarily [Section 36A(5)].

After going through the quantum of punishments prescribed by the NDPS Act, it seems that a Magistrate of First Class may try the following offences:

Sl. No.	Section(s)	Nature of Offence(s)
1.	15(a)	Contravention in relation to small quantity of poppy straw
2.	17(a)	Contravention in relation to small quantity of prepared opium
3.	18(a)	Contravention in relation to small quantity of opium poppy and opium
4.	20(b)(ii)(A)	Contravention in relation to small quantity of cannabis
5.	21(a)	Contravention in relation to small quantity of manufactured drugs and preparations
6.	22(a)	Contravention in relation to small quantity of psychotropic substances
7.	23(a)	Illegal import into India, export from India or transshipment of small quantity of narcotic drugs and psychotropic substances
8.	25	Allowing premises, etc., to be used for commission of an offence (involving small quantity of narcotic drugs and

		psychotropic substances)
9.	26	Certain acts by licensee or his servants such as omitting to maintain accounts, keeping false accounts, failing to produce licence before authority and wilful breach of the licence, permit or authorization
10.	27	Consumption of narcotic drug or psychotropic substance such as cocaine, morphine, diacetyl- morphine or any other narcotic drug or any psychotropic substance as may be specified in this behalf by the Central Government by notification in the Official Gazette
11.	28	Attempt to commit any of the aforesaid offences
12.	29	Abetment of or conspiracy to commit any of the aforesaid offences
13.	32	Offence for which no punishment is provided in the Act

Out of these abovementioned offences, the ones under Sections 15(a), 17(a), 18(a), 20(b)(ii)(A), 21(a), 22(a), 23(a) specifically deal with small quantities of narcotic drugs and psychotropic offences.

Now, let me return to the moot question of this paper, as to whether these small quantity offences, or for that matter all Magistrate triable offences (except one under Section 26) which carry imprisonment of less than three years are bailable or not.

It is pertinent to point out here that the heading of Section 37, NDPS Act is “**Offences to be cognizable and non-bailable**”. This perhaps gives an impression that all offences under the NDPS Act are non-bailable. However, in the body of the Section, the Legislature has only stated that every offence under the Act shall be cognizable. It is only Section 37(1)(b) that speaks of special limitations in grant of bail *vis a vis* certain offences under the NDPS Act. Offences under Sections 19 or 24 or 27A and also offences involving commercial quantity are governed by the special provisions stipulated in Section 37(1)(b) with regard to the grant of bail. Section 37(2), then, reiterates that the limitations in Clause (b) are in addition to the limitations under the CrPC or any other law in force. Section 37, in its body, nowhere mentions about the non-bailability of every offence under the NDPS Act.

Many see this as an omission on the part of the Legislature that has caused a considerable amount of confusion in the minds of Courts while dealing with remand and/or bail applications for the abovementioned offences. But is that really the case?

If we test the offences under the NDPS Act on the anvil of the CrPC, to find out whether the offences are bailable or not, we find that as per the third entry in Part II of the First Schedule thereof, the offences punishable with imprisonment of less than three years are classified as bailable.

If understood in that light, it would seem that, except the offence under Section 26, NDPS Act which carries a punishment of imprisonment upto three years, all other Magistrate triable offences under the NDPS Act and specifically the small quantity offences will be bailable.

In fact, multiple High Courts have ruled on this line.

The Bombay High Court in **Stefan Mueller v. State of Maharashtra, 2010 SCC OnLine Bom 1974** examined the ambit of Section 37, NDPS Act. The Bombay High Court succinctly pointed out that a limited role to play in the construction of statute may be assigned to the heading or title of a Section.

The Bombay High Court referred to **Frick India Ltd. v. Union of India and Ors., (1990) 1 SCC 400**, wherein the Supreme Court had observed as follows:

“It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.”

The Bombay High Court also cited **Raichurmatham Prabhakar and Anr. v. Rawatmal Dugar (2004) 4 SCC 766**, wherein the Supreme Court had observed as follows:

“In our opinion, it is permissible to assign the heading or title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with thereunder. The heading or title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title

would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.”

In the end, the Bombay High Court held that in the body of Section 37, the Legislature has only declared that all the offences under the Act shall be cognizable, but the Legislature has not declared that all the offences shall be non-bailable. After juxtaposing it with the Part II of the First Schedule of the CrPC, the Bombay High Court held that the offences under Sections 20(b)(ii)(A) and 27 are bailable.

The Calcutta High Court in **In re: Dhiman Dutta @ Chintu, 2001 SCC OnLine Cal 628**, also held that in view of Part II of the First Schedule of the CrPC the offences under Sections 21 (*for small quantity contraband*) and 27, NDPS Act are bailable.

The Tripura High Court in **Bapan Roy v. State of Tripura (B.A. No. 65 of 2018)** held that if there is no special declaration to make an offence non-bailable, then it will be guided by general law i.e., under the CrPC. The Tripura High Court also discounted the usage of the heading to give effect to the words in the Section. In the end, the High Court held that the offences under Sections 21(a), 22(a) and 29(1) of the NDPS Act, being for small quantity, which are punishable with imprisonment upto one year or with fine, will be bailable.

The Tripura High Court relied on **Frick India Ltd. (supra)** as well as Maxwell's **On the Interpretation of Statute**, where in Page 11 of the 12th edition of Maxwell's book, it is stated as follows:

“The (headings) cannot control the plain words of the statute, [(1923) 1 Ch.143], but they may explain ambiguous words, (1984) 9 App. Cas.365. But while the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning, R. v. Surrey (North-Eastern Area) Assessment Committee (1948) 1 K.B. 29, per Lord Goddard CJ. at pp. 32, 33.”

The Tripura High Court observed that *“what is described in the heading/caption is not necessarily the law; it is the enacted and substantive provision which has to be taken into account and applied by the Court. Therefore, the heading to Section 37 that all offences under the NDPS Act are non-bailable does not bind the Court in regard to the offences other than Sections 19, 24, 27(a) (sic) and offences involving*

commercial quantity.” To answer the issue of whether a small quantity offence is bailable or not, the Tripura High Court referred to Part II of the First Schedule of CrPC and answered that such an offence would be bailable.

To quote the Tripura High Court,

“To appreciate the second plank of controversy about the scopes of granting bail under Section 37 of the Act, this Court feels it apposite to re-iterate that, albeit, the title or heading of Section 37 of NDPS Act shows that offences shall be cognizable and non-bailable, but in the body of provision of Section 37(1) (a), the legislature has stated that "every offence punishable under this Act shall be cognizable". The legislature has not declared that all the offences under the Act shall be non-bailable, and with a definite object to achieve the legislature specifies the offences punishable under Sections 19, 24 and 27(a) (sic) and for offences involving commercial quantity as non-bailable. Clause (b) only speaks about the limitations on granting bail in addition to the limitations under the Cr.P.C. while granting bail. Therefore, the provisions of Cr.P.C. are necessary to be looked into to find out which of the offences under the NDPS Act are bailable and which are non-bailable.”

A Division Bench of the Delhi High Court in **Minnie Khadim Ali Kuhn v. State (NCT of Delhi), 2012 SCC OnLine Del 2657** observed that the description in the heading of a section is not necessarily the law; it is the enacted and substantive provision which has to be applied by the Court. The High Court, after referring to **Frick India Ltd. (supra)** and **Raichurmatham Prabhakar (supra)** as well as the applicable rules of statutory construction held that the heading to Section 37, NDPS Act that all offences under the NDPS Act are non-bailable does not bind the Court. After discussing Part II of the First Schedule of the CrPC, the High Court made it clear that in case of possession of small quantities of drug like under Sections 21 and 22, the accused is entitled to bail.

Let me quote the relevant portions of the judgment by the Delhi High Court.

“The First Schedule to the Criminal Procedure Code classifies offences. The offences listed are dealt with for the purpose of showing whether they are cognizable and bailable. Part I deals with offences under the Penal Code, 1860. Part II deals with offences under other laws. Item 3 in the list (in Part II of the First Schedule) provides that if the offence concerned (under the other law) is punishable with imprisonment for less than 3 years, it is bailable and non-cognizable. Now, the offence of possession of a small quantity (upto 100 gms) of charas, under Section 21 of the NDPS Act, if proved, can lead to a sentence up to six months, and fine. By virtue of Section 37(1) of the NDPS Act, it is cognizable. However, this class of offence is clearly bailable. In this

case, the FIR - a copy of which was produced-shows that two packets were allegedly seized, one weighing 40 gms and the other, 60 gms. The total amount allegedly seized was 100 gms, which is a small quantity. Therefore, the petitioner's son was entitled to be released, without his applying for bail in court, once he showed willingness to give bail, in terms of Section 436, Cr.PC. Since the suspect in this case has been released on bail, this Court does not deem it appropriate to pursue the matter further.

This court, in view of the above analysis, is therefore, of the opinion that except in respect of offences specifically enumerated under Section 37, i.e. offences punishable under Sections 19, 24 and 27 (sic), and those cases involving commercial quantities, the normal law, i.e. the Criminal Procedure Code is applicable whenever the question of bail arises. Thus, if the offences are punishable - like in the case of possession of small quantities of the concerned substance or drug, under Section 21 and 22-the suspect or accused is entitled to bail, and if she or he is prepared to give, has to be granted bail, in terms of Section 436 of the Criminal Procedure Code, without the necessity of his (or her) seeking it in the Court. This Court hereby directs the Police Commissioner to issue necessary guidelines and instructions to all police officials bringing to their notice the effect of this judgment, so that they are suitably instructed in future cases, wherever offences are bailable, to release the suspects wherever bail is offered in terms of Section 436, Cr. PC, read with Item 3 of Part II to the First Schedule of the Act, and any other class of offences deemed bailable by the Code.”

A Division Bench of the Kerala High Court in **Shaji v. Kerala State, 2004 (3) KLT 270**, made it clear that the offences under the NDPS Act, which are punishable with imprisonment for a term not exceeding three years, are bailable offences. Again in **Mathew @ Raju v. State of Kerala, Bail Appl. No. 836 of 2008**, the Kerala High Court, after relying on Maxwell's **On the Interpretation of Statute, Frick India Ltd. (supra)** and **Shaji (supra)**, reiterated that offences under the NDPS Act which carry imprisonment for a term not exceeding three years are bailable offences.

The Rajasthan High Court in **Hakim @ Pilla v. State of Rajasthan, S.B. Criminal Miscellaneous Bail Application No. 13195/2019** held that if the recovered contraband is of small quantity, the offence is a bailable offence

The Allahabad High Court in **Abdul Aziz v. State of U.P., 2002 CriLJ 2913** held that the provisions of the NDPS Act will prevail over the provisions of the CrPC only to the extent that the offences under the Act shall be cognizable and regarding consideration of bail for offences under Sections 19, 24 and 27A only. The Allahabad High Court observed:

“From the analysis of provisions of Section 37 of the N.D.P.S. Act and Sections 4 and 5 of the Cr.P.C. it is clear that except for offences under Sections 19, 24 and 27A of the Act, the provisions for bail as given in the Cr.P.C. will apply.”

After discussing the applicability of Part II of the First Schedule of the CrPC, the Allahabad High Court held that the offence under section 21(a), NDPS Act shall be bailable and can be tried by any Magistrate.

As far as our parent High Court is concerned, I have not managed to find any judgment of the Gauhati High Court that has conclusively discussed and decided this issue. There are a few notable mentions though.

In **Najimuddin Choudhary @ Md. Raja v. State of Assam, A.B. No. 1654/2020**, an application for pre-arrest bail under Section 438 of the CrPC was preferred by the petitioner who was apprehending arrest for an offence under Section 21(a), NDPS Act. The petitioner relied upon **Mathew @ Raju (supra)** and **Frick India Ltd. (supra)** to submit that the offence punishable with imprisonment of one year is a bailable offence. The Gauhati High Court did extend the benefit of pre-arrest bail to the accused petitioner but it did not lay down any law as to whether indeed such an offence was bailable or not.

In **Rauchana Begum v. State Of Assam, AB 2260/2020**, a pre-arrest bail prayer under Section 438, CrPC was preferred in connection with an offence under Section 22(a) of the NDPS Act. The cases of **Minnie Khadim Ali Kuhn (supra)** and **Bapan Roy (supra)** were cited to stress that the offence was bailable in nature. Even in this case, though the pre-arrest bail prayer was allowed but there was no conclusive finding on whether the offence was bailable or not.

In the absence of any discussion on this issue in either judgment, the mere fact that the accused were granted pre-arrest bail cannot lead to a conclusion that the Gauhati High Court has held such offences to be non-bailable.

A decision passed by a court in silence without consideration of the applicable law or any argument is a decision passed *sub silentio*. According to the **Black’s Law Dictionary**, an order passed *sub-silentio* is of little or no authority.

On the other hand, in **Rajkumar Chaudhury v. State of Assam, Crl. Pet. No. 814/2019**, the accused-petitioner filed a petition under Section 482 CrPC challenging the order whereby his bail prayer for an offence under Section 21(a) of the NDPS Act was rejected by the Chief Judicial Magistrate, Kamrup (M). It was contended that the order was not sustainable in the eyes of law as he was apprehended under Section 21(a) of the NDPS Act, for possessing 800 gms. of ganja, which is below the small quantity threshold and hence bailable. The case of **Stefan Mueller (supra)** was also cited there. The Gauhati High Court disposed of the petition at the motion stage noting that the provision of Section 482 CrPC is not meant for invoking its jurisdiction in any other situation, where alternative remedy is available to a party. It held that the Court below would be in a position to consider such a bail prayer under Section 436 CrPC and having regard to the provision of Section 37 of the NDPS Act. Here as well, the Gauhati High Court did not lay down any law as to whether indeed such an offence is bailable or not, rather it directed the petitioner to file a fresh bail petition before the Court below citing the relevant provisions of law and the decision of the Bombay High Court.

Interestingly, however, there is precedent on the other end of the spectrum. A single judge of the Bombay High Court in **Rhea Chakraborty v. Union of India, 2020 SCC OnLine Bom 990** differed from the earlier judgment of the Bombay High Court in **Stefan Mueller (supra)**. The Bombay High Court held therein that all offences under the NDPS Act are non-bailable.

The reasons provided by the Bombay High Court in **Rhea Chakraborty (supra)** are two-fold. However, neither of these reasons musters enough strength to outweigh the observations made in the preceding judgments. Let me explain.

(i) **Reliance on Baldev Singh v. State of Punjab, (1999) 6 SCC 172:** According to the Bombay High Court, the Constitution Bench of the Supreme Court in **Baldev Singh's case (supra)** decided with no uncertainty that "*Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail.*" As per the High Court "*this categorical statement shows that Section 37, firstly, makes all offences non-bailable; and, secondly, also lays down stringent conditions for grant of bail.*"

The Bombay High Court even suggested that this observation by the Supreme Court in **Baldev Singh (supra)** was *ratio decidendi*. Interestingly, however, the Bombay High Court itself stated that “*The Constitution Bench was deciding the ambit and scope of Section 50 of the NDPS Act. The Court was deciding various facets of Section 50 of the NDPS Act.*”

The subject matter before the Supreme Court in **Baldev Singh (supra)** was not Section 37. The Supreme Court had no opportunity there to delineate the law on the issue as to whether all offences under the NDPS Act are bailable or not. That issue had not been discussed or determined by the Supreme Court. This reliance by the Bombay High Court does not appear to be steadfast as the observations made in **Baldev Singh (supra)** in regard to Section 37 were nothing more than passing remarks despite the Bombay High Court’s reluctance to accept them as such. One must understand that the binding value of a decision of a Court is only extended when the judgment actually raises, discusses and considers a question directly.

The Bombay High Court, in fact, correctly mentioned that *ratio decidendi* is the underlying principle, namely, the general reason or the general ground upon which a decision is based. The reason for the decision or the *ratio decidendi* is not the final order containing the decision. In fact, in a judgment, though the *ratio decidendi* may point to a particular result, the decision may be different and not a natural consequence of the *ratio decidendi* of the judgment. It is the *ratio decidendi* of a judgment and not the final order in the judgment, which forms a precedent.

Yet the Bombay High Court failed to see that in **Baldev Singh (supra)**, the issue as to whether all offences under the NDPS Act was not even taken up for consideration. Section 37 did not form any underlying principle therein. All that the Supreme Court did in Paragraph 4 of the judgment was to introduce the objects and scope of the NDPS Act. The subject matter for consideration of the Supreme Court was the scope of Section 50 of the NDPS Act. The entire discussion was targeted towards that end.

In fact, there are catena of judgments such as **Union of India v. Ram Samujh and Anr., (1999) 9 SCC 429**, **State of Kerala v. Rajesh, 2020 SCC OnLine SC 81**, **State of M.P. v Kajad, (2001) 7 SCC 673** and even **Tofan Singh (supra)** among others, wherein the Supreme Court stated that Section 37 of the NDPS Act provides

that the offences under the NDPS Act are cognizable and non-bailable. However, it must be understood here that these observations were made while reproducing Section 37 in the judgments. The heading of Section 37 does say that, of course. But I have already pointed out that the body of Section 37 does not support the heading. And in any of the aforesaid judgments, no *ratio decidendi* as such was laid down to the effect that all the offences under the NDPS Act are non-bailable. In fact, none of these judgments was in connection with bail for offences which carry punishment of less than three years. In **Ram Samujh (supra)**, **Rajesh (supra)** and **Kajad (supra)**, the Supreme Court was considering bail prayers in connection with commercial quantity offences and the Supreme Court noted that the power to grant bail under Section 37 is circumscribed by the twin conditions mentioned in Clause (b). On the other hand, in **Tofan Singh (supra)**, the Supreme Court was considering the evidentiary value of a statement recorded under Section 67, NDPS Act.

In all these cases, the observation that offences under the NDPS Act are cognizable and non-bailable was made by the Supreme Court in passing while referencing Section 37 of the Act. The Supreme Court did not lay down a binding precedent to that effect. The observations of the Supreme Court cannot be considered out of context to cull out a non-existent *ratio decidendi*.

Thus situated, the reliance of the Bombay High Court on **Baldev Singh (supra)** to suggest that all NDPS Act offences are non-bailable was erroneous.

(ii) **Statutory History of the NDPS Act:** The Bombay High Court also went on a panoramic quest through the statutory history of the NDPS Act to conclude that all offences under the Act were non-bailable. The Bombay High Court pointed out that at the time of enactment

“...there was no mention in the Act itself as to whether the offences would be bailable or non-bailable. Therefore, obviously to consider this aspect, recourse needed to be taken to the provisions of Cr.P.C. i.e. Part II of its Schedule. It is important to note that the Act, as it stood then in 1985, Section 27 provided punishment for illegal possession in small quantity for personal consumption of a contraband and under that Section the maximum punishment was one year. Similarly Sections 26 and 31 provided lesser punishments. All the other offences, provided punishment of rigorous imprisonment for a term which was not less than ten years. Thus, there were bailable as well as non-

bailable offences mentioned under the NDPS Act in 1985, applying Part II of Schedule of Cr.P.C..

Subsequently, the Legislature felt that though the major offences were non-bailable by virtue of level of punishment, on technical grounds the drug offenders were being released on bail. Therefore, it was felt necessary to make the offences cognizable and non-bailable. This is mentioned in the Statement of Objects and Reasons dated 29.11.1988 for amendments carried out in the Act. The opening paragraph of Statement of Objects and Reasons reads thus:

“In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.”

Clause (vii) of second paragraph of Statement of Objects and Reasons reads thus:

“2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia, provide for the following:—

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(vii) to provide that the offences shall be cognizable and non-bailable.”

Accordingly, Section 37 was amended. The marginal note of the amendment reads “Offences to be cognizable and non-bailable”; and the Section 37 after 1988 amendment (w.e.f. 29.5.1989) itself reads thus:

“37. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail”.

Thus, for the first time there was reference to special provisions for bail for offences under NDPS Act. The rigours were introduced for offences punishable with imprisonment of five years or more. Sub-Section (2) mentioned that the limitations on granting bail were in addition to the limitations under Cr.P.C. or any other law for the time being in force.

Section 37 was further amended in the year 2001. At that time, sentencing structure was introduced depending on the quantity of drugs in respect of certain penal Sections of NDPS Act. The first paragraph of the Statement of Objects and Reasons of 2001 amendment reads thus:

“The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.”

After this amendment in the year 2001, now Section 37 reads as mentioned hereinbefore.

Thus, it can be seen that in the year 1985, Cr.P.C. governed the provisions of bail for NDPS offences. By the amendment carried in the year 1989 (w.e.f.

29.5.1989), for the first time, the provisions of Cr.P.C. were excluded by specifically introducing a non obstante clause excluding application of Cr.P.C. for grant of bail. If there was inconsistency between the NDPS Act and Cr.P.C., the provisions of NDPS Act were to prevail.

In the year 2001, the Act was further amended. However, significantly the structure of Section 37 did not change. The only major difference was that the provisions for grant of bail were made less severe for offences involving quantities less than the commercial quantity of a contraband. In addition, of course, the rigours did apply to Sections 19, 24 and 27A. As observed by the learned Single Judge in **Stefan Mueller (supra)**, there was no specific sentence categorically stating that every offence punishable under the NDPS Act was non-bailable. The title was - "offences to be cognizable and non-bailable". The same position existed before 2001 between 1989 to 2001 as well.

In the 1985 Act, except Sections 26, 27 and 32, all other offences were non-bailable as per the schedule of Cr.P.C. and yet necessity was felt to make offences non-bailable as mentioned in the Statement of Objects and Reasons. The concept of small quantity was already there in the then existing Section 27. Therefore, the amendment to Section 37 in the year 1989 and then in the year 2001 will not be affected by concept of "small quantity" introduced in sentencing structure of other penal sections".

Having gone through the assertions made by the Bombay High Court to the above effect, I would respectfully disagree with this line of reasoning for the below mentioned reasons.

It is indeed true that at the time of enactment of the NDPS Act in 1985, the expression "non-bailable" did not exist in Section 37. The old Section 37 was as follows:

"Offences to be cognizable - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) every offence punishable under this Act shall be cognizable."

At that relevant point of time, it was Part II of the First Schedule of the CrPC that had to be resorted to for determining whether an offence was bailable or not.

The first major change to the scheme of the NDPS Act took place through the 1988 (Amendment) Act. As rightly pointed out by the Bombay High Court, the Statement of Object and Reasons of the (Amendment) Act does indeed mention the recommendation of the Cabinet Sub Committee that the offences shall be cognizable and non-bailable. The Bill (as the Act then was) also made it clear that it intended to

achieve that objective among others. However, one must understand that the offences were already cognizable even in 1985. So, the proposed change must have been, then, to make all the offences non-bailable. Or is it so? If that were indeed the case, then the quintessential question arises as to why the Legislature only provided a heading to Section 37 that says “**Offences to be cognizable and non-bailable**”. Why did the Legislature not mention so in the body of the Section?

To understand this better, let us see what Section 37 looked like after the 1988 amendment. Section 37, at that point of time, used to be as follows:

“Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

Prior to the 1988 (Amendment) Act, no conditions or qualifications on bail were imposed by Section 37. But following the amendment, the Legislature in addition to retaining the cognizable nature of every offence under the NDPS Act added twin conditions for release of a person on bail. These conditions were missing in the earlier avatar of Section 37.

The heading of the amended Section 37, thus, must be understood in light of the changed contents of the Section.

If we break up the heading into two parts, the first being “*Offences to be cognizable*”, the meaning thereof is conveyed by clause (a) of Sub-section (1) - *every offence shall*

be cognizable. The latter part of the heading “*and non-bailable*” cannot, of course, be attributed to every offence for the precise reason that no such assertion is available in clause (a) of Sub-section (1). If the Legislature wanted to make every offence non-bailable, it would have done so. Section 37(1) would have then stated that “*every offence shall be cognizable and non-bailable*.” But Section 37(1) does not say so.

It has to be presumed that the Legislature omitted to do so deliberately and it was not an inadvertent omission. The Legislature has carried out multiple amendments to the NDPS Act in the three decades following the 1988 (Amendment) Act and it had enough opportunities to rectify this omission if it were really an inadvertent omission as many want to believe. The very fact that it was not done so clearly suggests that the Legislature never intended every offence under the NDPS Act to be non-bailable.

The intention of the Legislature cannot be second-guessed, especially since a perfectly reasonable explanation to the heading exists. One must remember that the expression “*non-bailable*” and clause (b) of Sub-section (1) and Sub-section (2) were inserted into Section 37 together. Thus, the expression “*non-bailable*” present in the heading must be understood in light of clause (b) of Sub-section (1) and Sub-section (2).

The Bombay High Court did notice that the rigours in clause (b) had been introduced for offences punishable with imprisonment of five years or more. Sub-Section (2) mentioned that the limitations on granting bail were in addition to the limitations under CrPC or any other law for the time being in force.

By the expression “*non-bailable*”, the Legislature has specified that the offences punishable under Sections 19, 24 and 27A and the offences involving commercial quantity are non-bailable. Clause (b) of Sub-section (1) speaks about the limitations on granting bail for such offences. Sub-section (2) then adds that these rigours shall be in addition to the limitations under the CrPC and any other law while granting bail. Part II of the First Schedule of the CrPC makes every offence punishable with imprisonment for a term of three years and more non-bailable. Offences under the NDPS Act which carry such punishments will, thus, be non-bailable. Additionally, the offences punishable under Sections 19, 24 and 27A and the offences involving commercial quantity are fettered by the imposition of the twin conditions mentioned in Clause (b). Through the usage of the expression “*non-bailable*” in the heading, the

Legislature has condensed this meaning for offences under the NDPS Act. The amendment to Section 37 (w.e.f. 29.5.1989) cannot be read in a way to suggest that all offences under the Act have been made non-bailable. As I have stated earlier, if that were the intention of the Legislature, it would have clearly mentioned as such.

Section 37 was further amended in the year 2001. At that time, the sentencing structure was introduced depending on the quantity of drugs in respect of certain penal Sections of the NDPS Act.

The Bombay High Court stressed on the fact that the structure of Section 37 did not change significantly and that the only major difference was in case of the provisions for grant of bail, wherein the twin conditions were made applicable for offences under Sections 19, 24 and 27A and offences involving commercial quantity.

That is, however, a simplistic reading of the issue. With the amendment in 2001, not only did the legislative intent undergo a significant change, in respect of the sentencing policy, the legislative change was also reflected in the bail regime. Instead of the previous classification of offences which were punishable with imprisonment of five years and more, the Legislature has now confined the twin conditions of bail only to offences under Sections 19 or 24 or 27 A and also for offences involving commercial quantity.

In fact, as per the Statement of Objects and Reasons for the Amending Act of 2001, the strict bail conditions (after the amendment of 1989) were adding to the misery of the drug addicts. The reformative approach towards the addicts was somehow taking a backseat because of this. Therefore, it was proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. It was also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

Now, what emerges from the Statement of Objects and Reasons of the Amending Act of 2001 is that the legislative intent behind the NDPS Act has all along been to inflict

severe punishments for drug traffickers, but at the same time, it envisaged a reformatory approach towards addicts and those who committed less serious offences.

Following the 1988 (Amendment) Act, this intent somehow got diluted as the stringencies of bail were imposed for those offences which were punishable with imprisonment of five years or more. The 2001 (Amendment) Act rationalised the sentence structure and restricted the application of twin conditions only to the more egregious of the offences.

There was, however, never anything in the original Act or in the 1988 (Amendment) Act that suggested that all the offences must be viewed through the same lens. The less serious offences and especially the ones pertaining to drug addicts were always intended to be viewed liberally and with a reformatory agenda in mind for the offenders. Thus, it cannot be said that the amendments brought about in 1989 and 2001 somehow were targeted to make every offence non-bailable. Doing so would negate the very reformatory approach that the Legislature has all along desired to undertake for the less serious offences.

But, where the Bombay High Court completely missed the point was in its assertion that while in the year 1985, CrPC governed the provisions of bail for NDPS Act offences, by the 1988 (Amendment) Act, the provisions of CrPC were excluded by specifically introducing a *non obstante clause* for grant of bail.

That is, however, factually incorrect. It is indeed true that whenever there is inconsistency between the NDPS Act and the CrPC, the provisions of the NDPS Act will prevail. That being said, the *non obstante clause* in Section 37 does not contain an absolute exclusion of CrPC for the grant of bail.

Section 37, as it currently is, reads as follows:

“Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

It is clear that the *non-obstante clause* in Section 37 overrides the provisions of the CrPC to the extent that the offences under the Act shall be cognizable and regarding consideration of bail for offences under Sections 19 or 24 or 27A and for offences involving commercial quantity only. The exclusion of the provisions of the CrPC is to this extent only. In other matters, the provisions of CrPC will apply to the offences under the NDPS Act.

A *non obstante clause* is a common legislative tool that is used in order to ensure that known, or even unidentified provisions, in the same or other enactment, which can potentially conflict with the enacted part, are overridden. A *non-obstante clause* does not always have to be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a *non obstante clause* cannot cut down the construction and restrict the scope of its operation. In such cases, the *non obstante clause* has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. [**Dominion of India v. Shrinbai A. Irani, AIR 1954 SC 596**]

The true meaning of the *non obstante clause* ingrained in Section 37 can be discerned from (i) what it seeks to override, and (ii) the legislative policy which underlies the enactment.

On the first point, the *non obstante clause* overrides the CrPC and makes all offences cognizable, regardless of their nature or gravity. The specific reference in Section

37(1)(b) is only directed at three provisions, i.e., Sections 19, 24 or 27A, and towards the offences dealing with commercial quantities. The *non obstante clause* clearly overrides the CrPC in respect of these offences and no other, being the subject matter of additional bail conditions.

The latter point of underlying legislative policy gets cleared up from a purposive reading of the Statement of Objects and Reasons of the 1988 (Amendment) Act. In **Rhea Chakraborty (supra)**, the Bombay High Court stated that even in the 1985 Act except Sections 26, 27 and 32, all other offences were non-bailable as per the Schedule of CrPC and yet necessity was felt to make offences non-bailable as mentioned in the Statement of Objects and Reasons. However, if one reads the first paragraph of the Statement of Objects and Reasons, it is very categorically stated therein that “*though the major offences were non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail*”. While proposing the amendment to the NDPS Act to strengthen it, this issue was intended to be tackled with. With the imposition of the twin conditions, first in 1989 (w.e.f. 29.5.1989) and then in 2001 (w.e.f. 2.10.2001), the release on bail of the accused involved in illicit drug trade became harder. The *non obstante clause* managed to override the CrPC through the imposition of the twin restrictions in addition to the limitations which existed under the CrPC.

The proposal to make the offences non-bailable was effected through the imposition of these fetters on the bail of persons suspected or accused of offences specified in clause (b) of Sub-section (1) of Section 37. It was not the intention of the Legislature to make all of the offences non-bailable through either of the amendments. It was to ensure that the drug traffickers did not get released on bail on technical grounds. That was the actual object behind the amendment and it is there for all to see in the first paragraph of the Statement of Object and Reasons. Reading the second paragraph out of context and in isolation has perhaps contributed to the misreading of the provision.

The error of the Bombay High Court in reading the scheme of the NDPS Act, its statutory history as well as the legislative intent is manifest in the following assertion in Paragraph 45 of its judgment where after reproducing the earlier quoted statement of the Supreme Court made in **Baldev Singh (supra)**, the Bombay High Court observed “*This categorical statement shows that Section 37, firstly, makes all*

offences non-bailable; and, secondly, also lays down stringent conditions for grant of bail.” The stringent conditions for grant of bail are, however, only for offences under Sections 19, 24 and 27A and for offences involving commercial quantity. Just as these stringent conditions are not applicable for all offences under the NDPS Act, likewise, all offences under the NDPS Act are also not non-bailable. They cannot be so in the absence of a clear provision to that effect. Courts cannot conjure up restrictions which are not mandated by the Legislature.

In summation, what we find is that by virtue of the *non obstante clause* present in Section 37, the provisions of CrPC *vis a vis* bail have been excluded only in respect of offences under Sections 19 or 24 or 27A and for offences involving commercial quantity. For all other offences, CrPC will prevail. The judgment of the Bombay High Court in **Rhea Chakraborty (supra)** does not lay down the correct proposition of law.

In conclusion, I would like to point out that headings or marginal notes cannot be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous. The contents of Section 37 are intended to assert two things- (1) every offence is cognizable; (2) imposition of twin conditions for granting bail to persons accused or suspected of a certain category of offences, in addition to existing limitations on bail under the CrPC and any other law in force.

There is no room for any ambiguity there. As there is no reason for doubting the contents of the Section, statutory construction does not permit a Court to resort to the heading or marginal notes to cut down the application of the clear words used in the provision.

The heading in Section 37 has to be read as a condensation of the characteristics of the contents of the enacted and substantive provision. In fact, as pointed out earlier, a purposive reading of the heading is possible even without subtracting from or adding to the meaning of the contents of the Section.

The heading cannot be read to draw an inference that every offence under the NDPS Act is non-bailable. The small quantity offences remain bailable. In fact, all of the Magistrate triable offences under the NDPS Act are bailable (except the offence under

Section 26 which is non-bailable as it will be covered by the second entry to Part II of the First Schedule of the CrPC).

There is, of course, no doubt that the rigours of Section 37(1)(b), NDPS Act are mandatory but they are applicable only for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity. For other offences, these stringencies have no application. They cannot be cited to draw up a conclusion to the effect that all offences under the NDPS Act are non-bailable.

The offences under the NDPS Act which are punishable with imprisonment of less than three years are bailable and a Magistrate while taking up production of such cases under section 36A(1)(b) must keep that in mind. The Magistrate must release the suspects/accused persons, in all such cases, whenever bail is offered in terms of Section 436, CrPC.

The offence under Section 26, however, is non-bailable. The Magistrate may authorize a remand, if he deems it so desirable and his power to remand a person accused of or suspected of an offence under this provision shall go beyond the fifteen day period and he is not to forward the accused or suspect to the Special Court. Bail for such an offence will be discretionary for the Magistrate but he is not encumbered by the rigours of Section 37 in this regard.

For all other offences (triable by the Special Court), after the expiry of the fifteen day remand period, the Magistrate must ensure that the accused or suspect is forwarded to the Special Court having jurisdiction. If it seems to him that the detention of the person is unnecessary, even in that case, he shall forward the person to the Special Court having jurisdiction.
