National Judicial Academy, Bhopal

REPORT

Workshop for Additional District Judges [P-1165]

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September 06th to 08th, 2017

PROGRAMME REPORT

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A three day Workshop for the Additional District Judges was organized on September 06th to 08th, 2019, attended by 42 participants nominated by 22 High Courts. The workshop providing them with a unique platform to share experiences and assimilate 'Best Practices'.

The objective of the workshop was to explore challenges in implementation of ADR system; to study sentencing practices and advantages of integrating court and case management systems in Subordinate Courts. The sessions covered topics including issues and practices pertaining to collection, preservation and appreciation of electronic evidence; advances and issues in laws regulating cybercrimes. The workshop also facilitated deliberations on the importance of fair sessions trails, and the best practices evolved by the common law in India to disseminate justice. The vital areas of appellate and revision jurisdiction of a district court, both in its functioning as a civil as well as criminal justice administration was discussed to cull out the best practices and examine the commonly faced issues. The workshop emphasised on enabling deliberations through clinical analysis of statutory provisions, case law analysis and critical consideration of relevant precedents, thereby minimizing a monologue.

Justice Roshan Dalvi, Justice Ravi Tripathi, Justice Ram Mohan Reddy, Adv. (Dr.) Debasis Nayak, Justice Ved Prakash Sharma, Justice S. Talapatra, and Justice Indira Banerjee guided the sessions as "Resource Persons".

Session-wise Programme Schedule

Day-1

Session 1- Challenges in implementation of the ADR system in Subordinate Courts.

Session 2- Court and Case Management: Role of Judges.

Session 3- Fair Session Trials.

Day-2

Session 4- Laws relating to Cybercrimes: Advances and Problem Areas.

Session 5-Electronic Evidence: Collection, Preservation and Appreciation.

Session 6- Sentencing: Issues and Challenges.

Day-3

Session 7- Criminal Justice Administration: Appellate and Revision Jurisdiction of District Judges.

Session 8- Civil Justice Administration: Appellate and Revision jurisdiction of District Judges.

Session-1

Theme - Challenges in Implementation of the ADR System in Subordinate Courts.

Speakers: Justice Roshan Dalvi and Justice Ravi Tripathi

The first session initiated by emphasizing the benefits of ADR in the backdrop of the huge pendency and inadequacy of justice in terms of quality and timeliness to its consumer. Premising upon the fact that dispute resolution is often cardinally dependent on principles of management, it was candidly emphasized that mediation is the best form of ADR system and a mediation strategically is all about "POS" an acronym that stands for identifying **P**roblems, generating **O**ptions, and reaching out for **S**olutions. The scarcity of properly trained mediators and mediation facility was discussed. Differentiation between the various processes under ADR (i.e. Arbitration, Mediation, and Conciliation) and their functional applications were explained. The appropriate time for referring a case for mediation was discussed and it was concluded that any time could be a good time for referring a matter for mediation. However, while categorising the issues into "pending matters" and "new matters" the following occasions were identified to be good time to refer for mediation:

<u>Pending Matters</u>

- ✓ At the time of hearing of interim application
- ✓ After Issues are framed and before evidence is recorded
- ✓ Even after part trial

<u>New Matters</u>

- ✓ At the time of the filing itself (in case of all referable matters)
- ✓ After the first hearing (as deemed fit by the Judge)

The discourse identified those maters which may not be fit to be referred for mediation. This list included:

- ✓ Matters involving point of law
- ✓ Matters interpretation of documents
- ✓ Matters involving alleged fraud, forgery
- ✓ Matters involving relief in *rem*, representative suit
- ✓ In the acts against society / human rights

A brief account of the major challenges faced in mediation was discussed including infrastructure, human resource, management and procedural issues such as inadequate case management, excessive interlocutory orders etc. Reasons behind failures of mediation processes was delved.

Session-2

Theme - Court and case Management: Role of Judges.

Speakers: Justice Roshan Dalvi and Justice Ram Mohan Reddy

The session was dedicated (a) to explore the general principles of management, (b) application of the general principles of management in judiciary i.e. in court management and in case management, (c) maximization of efficiency and innovativeness in a particular court room to deliver incrementally better output. Peter Drucker's principles of management were discussed and explained in the realm of Indian judicial system. The five cardinal elements of management i.e. planning, organizing, directing, co-coordinating and controlling were underscored. It was emphasised that for a court to optimize management the following important points *viz*: a) need to remove non- value added items, b) the "Pareto principle" (also known as the 80/20 rule, the law of the vital few, or the principle of factor sparsity) which states that, 80% of the work can be done by spending 20% time and effort. Hence, it is of paramount importance to identify the high value work in the court and prioritise them, c) Principle of paradigm (foundation) shift, which needs to apply in work, d) sharing of "best practice" to assist in proper management and e) use of judging resources in a good and optimum way, f) application of procedural simplification, g) decentralization, wherein, it was suggested to decentralize as much as possible to the competent person (stake holders *viz*. Court managers, clerks, commissioners etc.) and focus on the core judicial work *viz.* judging h) latest first principle etc. In discussing Case Management the 13 weeks' time line of UK was discussed. The approach of the courts in UK regarding case management and implications of non-compliance following the "Jackson/civil litigation reforms" and the decisions in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 and *Denton v White and other appeals* [2014] EWCA Civ 906 was highlighted. It was reiterated that although India does not have any such specific guidelines but it is generally about achieving the same end with less resources and time. Requisites for case management helps to improve efficiency in work, reducing delays and cutting the costs. In addition to above, detailed discussions on stages of case management by referring to the relevant provisions of Civil Procedure Code, 1908 (hereinafter CPC) i.e. Order XX Rule 18, Order XII, Rule 16, Order XV-A etc. were discussed.

Session-3

Theme – Fair Sessions Trial.

Speakers: Justice Ram Mohan Reddy and Justice Roshan Dalvi.

The session was an interactive one which was premised on the major principles of fair trial as laid down by the case law jurisprudence in India. The discourse included propositions to handle impediments in delivery of speedy justice; active promotion of ADR mechanisms; discouraging adjournments; optimal usage of Information and Communication Technology (ICT) in dispensation of justice etc. Witness protection as a part of victimology was emphasized wherein, *V.K. Sasikala v. State represented by the Superintendent of Police,* (2012) 9 SCC 771 was discussed. The assumption of innocence until proved guilty was reiterated by citing and discussing *Nagaraj v. State,* (2015) 4 SCC 739 and *Parshuram v. State of Bihar,* (2002) 8 SCC 16. The Supreme Court in *Mohd. Ajmal Amir Kasab v. State of Maharashtra,* (2012) 9 SCC 1 held that at any stage of a trial if the parties are not represented by an advocate, it will be a good ground to hold that the trial is in violation of 'fair trial'. Opportunity of being properly heard [*audi alteram partem*], objectivity and reasoned decision were stated as the three important and non-negotiable aspects for a fair trial. Examination of witness under Section 164 of CrPC and recording of the statement of accused under Section 313 must be done in a fair manner. The

question put to the accused under Section 313 of CrPC should be short and in a language comprehensible. It was also stressed that the accused must be necessarily furnished with all the relevant documents produced against him in order to facilitate him/her to defend himself/herself to ensure a fair trial. The sessions were participative engaging dialogue and arguments.

Session-4

Theme - Laws relating to Cybercrimes: Advances and Problem Areas.

Speakers: (Dr.) Debasis Nayak and Justice Ravi Tripathi

The session commenced with disseminating information on and explaining the meaning of certain basic terminologies and their implications. Cybercrime is a crime (mis)using or abusing the information either stored or in transit in electronic form, it is often committed using the internet (which is in essence a network of the network of computers). The wide and inclusive scope of the word "computer" and "computer resource" as defined under the Information and Technology Act, 2000 (hereinafter IT Act) under Section 2(1)(i), and 2(1)(k) respectively was discussed. A distinction between the terms "information", "data", "database", "hardware" and "software" of a computer system and their interactions were lucidly explained. The inception and purpose of the IT Act, specifically for regulating "e-commerce", and its evolution over years expanding its scope to regulate various criminal acts and omissions *viz*. fraud electronic signatures, voyeurism, cyber stalking, child pornography, cyber-bullying, cyber terrorism, cyber extortion, data privacy etc. was briefly discussed. Special emphasis was given to Chapter IX of the IT Act which deals with penalties, compensation and adjudication. The unauthorized acts which fixes liability under the IT Act for compensation *viz.* Access; downloading or copying; introducing malicious programs; causing damage; causing denial to access; causing disruption; assisting unauthorized access; charging services used to another's account; destroying, deleting or altering information residing in a computer resource; diminishing the value of information in a computer resource; web defacements, data diddling; piracy, divulging trade secrets; or any other act which may result in any injury to a computer resource; stealing, concealing, destroying, altering "computer source code" etc. The statutory mandate of "Reasonable Security Practices" for the entities dealing with "Sensitive Personal Data or Information" (SPDI) under Section 43A of the IT Act and the IT Rule, of April 2011 was discussed. What constitutes SPDI was discussed. Other important enquiries made included what constitutes data protection? Why is it important? to what extent it is (or can be) effectively protected? or the criticality and vulnerability of such personal data (which is under the actual control of a few private incorporations *viz. Facebook, Google, Amazon, Apple*) were delved into. The mechanism and nuances of data syphoning was discussed. The efficiency and scope of Section 43A, IT Act was contemplated *vis-à-vis* the issues *viz.* e-commerce platform

aggregators (*OTAs, OYO, Zomato, Swiggy, Amazon, Flipkart, Ola, Uber*) and it was argued that a need for a comprehensive legislation for safeguarding data is the need of the hour. The hierarchy of forums for seeking relief in form of compensation for less than or more than 5 Crore compensations was discussed. Offences and punishments under Section(s) 65 (source code) and 66 (computer related offences) wherein the scope and meaning of the various acts done "dishonestly or fraudulently" and their implications were discussed. The various tools used to commit cyber and their *modus operandi viz*. "logic bomb" and the example of "*Ziegler Case*" the bank fraud case. The law relating to the "intermediary liability" under the IT Act, IT (Intermediaries guidelines) Rules, 2011 and *Shreya Singhal v. UoI*, AIR 2015 SC 1523 was discussed. Other provisions relating to offences under the IT Act *viz.* Section(s) 66A (repealed) through 66F, 67, 67A, 67B etc. were discussed.

Session-5

Theme - Electronic Evidence: Collection, Preservation and Appreciation.

Speakers: (Dr.) Debasis Nayak and Justice Ravi Tripathi

The session commenced with the clarification on the nature of computer crimes and the relevance and importance of collection, preservation and appreciation of digital evidence, in the wake of the fact that e-evidence can be relevant for both a "physical crime" or "computer crime". It was explained that in computer crimes a computer is either used as a tool or is the target or both. It was cautioned that any investigative action must be commenced with utmost diligence ensuring no compromise with the evidence(s) therein. An investigating officer (*hereinafter* IO) having competence and capability must indulge in dealing with evidence of any original media. It is a best practice to document and preserve the standard operating procedures (*hereinafter* SoP) in a manner verifiable by an independent third party. In order to do the same it was discussed that the computer forensic process must follow:

- ✓ Aquire (the evidence or the device carrying the evidence).
- ✓ Authenticate (the evidence or the device carrying the evidence).
- ✓ Analyze (the evidence)
- ✓ Document (the SoP and the findings)

The original source of evidence (the device or computer or computer resource) must be cloned in the first instance without doing any other operation on it. After acquiring the source of evidence the authentication "hash functions" must be used to authenticate the originality (i.e. If acquisition hash equals verification hash, image is authentic). The importance of documentation was emphasized. It was insisted that a forensic examination report must:

- ✓ list software used & their versions
- ✓ be in simple language
- ✓ list the hash results
- ✓ list all storage media numbers, model, make etc.

The purport and importance of "chain of custody" was further underscored. It was explained that a mandatory log must be maintained as SoP to ensure the sanctity of the evidence as it traces the stake holders and reposes accountability for handling of the secured e-evidence from the source to the court room as a single unbroken chain of custody. Acronym of 5 "W" (of chain-of-custody log) were shared as;

- ✓ Who – took possession of the evidence
- ✓ What – description of evidence
- ✓ Where – did they take it to
- ✓ When – time and date
- ✓ Why – purpose for taking evidence

The *Tim Lloyd/Omega Case* wherein the malicious software code destroyed the programs and sabotaged the computer was discussed in context to "logic bomb" related computer crime. It was further discussed for an e-evidence to establish the guilt beyond reasonable doubt to help in leading to conviction, correct procedure needs to be followed by IO, an adjuvant expert opinion needs to substantiate, and to establish that the act could only have been installed by the suspect for the consequence has to be established. The speaker discussed various internet based crimes *viz.* DNS spoofing; Web defacement; FTP attacks; Bogus Websites; Web spoofing; Website based launch of malicious code, cheating and fraud etc. The admissibility of e-evidence under Section 65B of the IT Act was discussed, wherein Section 65B(2)(a) through (d); 65B(4) (i.e. who will give the certificate) were discussed. The evolution of the case law jurisprudence including *State v. Navjot Sandhu,* (2005) 11 SCC 600; *Anvar P.V. v. P.K. Basheer,* 2014(10) SCALE 660 ; *Avadut Waman Kushe v. The State of Maharashtra,* 2016 SCC Online Bom 3256; *Kundan Singh v. State,* MANU/DE/3674/2015, Delhi HC (Division Bench); *Shafi Mohammed v. State of Rajasthan*, SLP (CRL.)No.2302 of 2017, SC; *Sonu v. State of Haryana*, (2017) 8 SCC 570; *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, CIVIL APPEAL NO(s). 20825-20826 OF 2017 SC-2019 were discussed.

Session-6

Theme - Sentencing: Issues and Challenges.

Speakers: Justice Ved Prakash Sharma and Justice S. Talapatra

The session initiated on the premise that unlike the western countries India awaits a policy on sentencing. *Jagmohan Singh v. State of U.P.,* AIR 1973 SC 947 was cited to corroborate the fact that a very wide discretion in the matter affixing the degree of punishment and that this discretion in the matter of sentence is liable to be corrected by superior courts. Hence, there exists a discretion of certain degree available to the judge to arrive at a correct sentence in a case. While dealing with the issues and challenges in "Sentencing Policy" it was discussed that following broad points may be adhered:

a) personal views should not be reflected in an order,
b) a level of consistency must be observed,
c) a standardized format is often helpful,
d) reasoning and justification for quantum is an integral part and must form a part of sentencing. Wherein Section 354(3) of the Code of Criminal Procedure, 1973 (*hereinafter,* CrPC) was referred to.

Both aggravating and mitigating factors must be considered before sentencing. Mandatory pre-sentencing hearing under Section 235(2) of the CrPC was deliberated upon. The meaning and scope of sentencing was discussed. While discussing the objective of sentencing it was advised that the following interrogatory statements must be considered by a judge:

a) What ought to be punishment and why?
b) Who should be punished and how?
c) What factors should decide the correlation between what, why, who and how?

*Rajbala v. State of Haryana***,** (2016) 1 SCC 463 was quoted to explain the imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed.

The speakers dwelt upon the cardinal factors of "uniformity" and "proportionality" in sentencing practices in order to abandon arbitrariness and rope in the rigor of certainty in punishment which is considered to be a more effective deterrent than the bare quantum of a sentence. *Shyam Nrain v. State (NCT of Delhi)*, (2013) 7 SCC 77 was quoted for establishing that the purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. It was reiterated that the courts must have a post-sentence planning to monitor the execution of the sentencing in terms of mandatory legal suffering and/or rehabilitation.

Session-7

Theme - Criminal Justice Administration: Appellate and Revision Jurisdiction of District Judges.

Speakers: Justice Ved Prakash Sharma and Justice S. Talapatra

Chair: Justice Indira Banerjee

The session was premised on the procedural law and jurisprudence evolved by the case law in India, with regard to appellate and revision jurisdiction of district judges. Elaborating upon Section(s) 399, 401 of the CrPC, being supervisory jurisdictions for the High Court and the Sessions Court, the speaker explained the wide scope of the provisions enabling the revisional Courts to test the correctness, legality or propriety of any finding, sentence or order. It was clarified that a Court under its revisional powers may interfere to examine the regularity of any proceedings. The concurrent and co-extensive revisional jurisdiction of the High Court and the Sessions judge over subordinate Criminal Courts within their respective jurisdiction was explained. The implications of Section(s) 397(3) and 399(3) of CrPC to oust the jurisdiction of other to entertain a parallel revision petition on the same subject matter when the other is already moved was discussed. Describing the meats and bound of the revision jurisdiction it was explained that as per Section 397(2) of CrPC the revisional power cannot be exercised against any interlocutory order passed in any appeal, inquiry or trial. Explaining further that under Section 397(3) a person is allowed to file only one application for revision to any one of the two courts i.e. Sessions Court or High Court having jurisdiction at a time in a given issue. Citing *Amit Kapoor v. Ramesh Chander* (2012) 9 SCC 460, the scope of revision was explained meticulously that a revisional jurisdiction may normally be exercised on a question of law, but in instances of defective procedure and appreciation of facts which leads to perverse finding a

revision may be allowed. Referring *to Eknath Shankarrao Mukkawar v. State of Maharashtra*, AIR 1977 SC 1177, it was explained that w.r.t Section 377 CrPC the High Court has the *suo motu* power to enhance an inadequate sentence if it deems fit under its revision jurisdiction. In cases of acquittals the conditions laid down in *Akalu Ahir v. Ramdeo Ram,* AIR 1973 SC 2145, for the High Courts power to revision was discussed. The scope and premise of "interlocutory orders" and the jurisprudence evolved by the Supreme Court of India with special reference to the power vested on the Constitutional Courts for revision was debated and explained.

Session-8

Theme - Civil Justice Administration: Appellate and Revision Jurisdiction of District Judges.

Speakers: Prof. S.P. Srivastava and Justice S. Talapatra

Chair: Justice Indira Banerjee

The Session initiated with the description that since the word "appeal" has not been defined under the Civil Procedure Code, 1908 (*hereinafter* CPC), it needs to constructed in its natural and ordinary meaning as a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum. Appeal may lie to confirm, reverse, modify the decision or remand the matter, by a competent higher forum on:

- ✓ Question(s) of fact, and/or
- ✓ Question(s) of law

It was clarified that an appeal is a creature of statute and is essentially a substantive right which can be exercised only against the decree, or appealable orders and not merely against an adverse finding. Unlike power of revision a *suo motu* appeal is not possible. It is a continuation of the suit wherein the entire proceedings are left open before the appellate authority. Case law jurisprudence cited included *Smt. Ganga Bai v. Vijaikumar,* AIR 1974 SC 1126. *Union of India v. K.V. Lakshman,* AIR 2016 SC 3139 was referred to suggest that the right to first appeal, under Section 96 of the CPC, against the decree is a legal right of the litigant, the jurisdiction of the first appellate Court is very wide like that of the Trial Court, and hence a litigant can challenge almost any of the findings of fact or law by the Court of first instance. It is the duty of the appellate Court to revisit and appreciate the entire evidence, even if the procedure renders a completely paradoxical inference. Hence, in a first appeal a case may undergo an exhaustive rehearing. *Madhukar v. Sangram*, AIR 2001 SC 2171 was cited to reiterate that the judgment of the Appellate Court must issue-wise record the findings supported by reasons. The same should be done for all the issues, along with the contentions put forth, and asserted by the parties. While reversing a finding of fact the Appellate Court must contemplate with clarity the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. Order 41 Rule 27 of CPC was discussed in detail on the point of "admission of additional evidence in Appellate Court" and the limitations laid down therein. The case *Mathad v. Rudrayya S. Mathad,* AIR 2008 SC 1108 decided by the Supreme Court of India mandating the necessity of recording the reason by the Appellate Court while admitting a fresh evidence was referred. The intent and scope of that Order 41, Rule 27 was clarified and explained referring to the Supreme Court *in ParsotimThakur v. Lal MoharThaku*, AIR 1931 PC 143, that

Order 41, Rule 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Section 115 CPC on revision was discussed in detail. The concept of power of revision in civil cases was dealt with and explained with the help of several case law including *Prem Bakshi v. Dharam Deo,* (2002) 2 SCC 2; *Shiv Shakti Coop. Housing v. Swaraj Developers,* (2003) 6 SCC 659. It was explained that the legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. Preferring an application under Section 115 of CPCe is not a substantive right. It is a source of power for the High Court to supervise the subordinate Courts. An Order interim in nature, cannot be the subject matter of revision under Section 115 CPC. It has been categorically held by the Supreme Court in a catena of cases (*viz. Durga Devi v. Vijay Kumar Poddar* (2010(2) PLJR 954)) that if the Order in favour of the party applying for revision provides finality to a suit or other proceedings, then a revision would be maintainable. The acid test that is to be applied in every case is to discern and find out whether the order though interim would dispose of the suit or other proceedings.