Workshop for Additional District Judges

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The National Judicial Academy organized a "Workshop for Additional District Judges" during 21-23 February, 2020. The participants were Additional District Judges nominated by respective High Courts. The workshop was conceived to identify and address areas of adjudication which critically impact justice delivery at the District level; to provide a platform to participating District judges to share views and garner best practices in the areas including appellate and revision jurisdictions. The impact and issues relating to implementation of alternative dispute resolution system (ADR) at District level; and administrative issues relating court and case management were discussed. Topics *viz.* issues and practices pertaining to collection, preservation and appreciation of electronic evidence; advances and bottlenecks in laws regulating cybercrimes; nuances and conventions in sentencing practices and jurisprudence on fair trial process *inter alia* were explored in the workshop.

Major issues discussed in the workshop:

SESSION 1: FAIR SESSIONS TRIALS

The session started with an introductory address wherein the participants were welcomed and objective of the workshop was explained to them. The speakers stated that in a democratic society even the rights of the accused are sacrosanct and all rights for ensuring fair trial have to be followed in the judicial system. The speakers referred to various judgements of the Supreme Court of India where elaborate guidelines for just, fair and impartial trial are provided. The speakers emphasized that it is the duty of the court to see that accused is not denied rights related to fair trial. The speakers discussed transfer of trial of cases from one state to another when it is reasonably anticipated that the accused will not get a fair trial or the court process may be interfered. The speaker posed a question that why this question of fair trial arose in the first place and discussed basic elements of fair trial. There may be two reasons for a trial to be unfair i.e. personal prejudices and ignorance of law. The speaker then discussed various lapses that can occur at different stages of the Trial.

The first stage is the framing of charges and speakers opined that that charges should not be mechanically copied from FIR and charges should be framed according to the act done and evidence presented before the court. The prosecution should be asked to open the case and there are many things in favor of the accused as well including presumption of Innocence until proven guilty, free legal aid and a right to appoint a lawyer of his choice when he is appointing the lawyer himself and questions by accused to witnesses.

The speakers then focused on the Constitutional values embedded in the idea of fair trial and discussed relevance of Article 21 of the Constitution with regard to fair trial. The interpretation of

the Article 21 before and after *Maneka Gandhi case* was discussed. It was emphasized that participation of judges is necessary for the regulation of the trial and some important questions in quest of justice may be asked. It was opined that judges may put questions to the witness but it should not be in favour of any party. The speakers also focused on Article 20(2) of the Constitution which prohibits double jeopardy and referred judgments of the Supreme Court in this regard. The speaker then discussed the issues related to admissibility of evidences and suggested some judgements of the Supreme Court. The speakers concluded by stating that the concept of fair trial is the heart of criminal jurisprudence and hence the actions and behavior of judges on the bench should be impartial.

SESSION-2: **CRIMINAL JUSTICE ADMINISTRATION: APPELLATE AND REVISIONAL JURISDICTION**

The speakers started discussion with explaining the difference between the appellate and revisional jurisdiction of the district judges. Appeal is a statutory right of the appellant as it is provided for in the Cr.P.C. and hence, if the matter is appealable then the judge has to take up the appeal mandatorily. On the other hand revision is not a statutory right. Discussing the difference between revision and appeal, it was stated that if a matter has been taken up as an appeal it has to be decided on merits and has to be heard, whereas in cases of revision hearing, it is the court's discretion whether to hear the matter or not as revision is not a statutory right, though generally it is heard on the basis of the principle of natural justice. In the revision application, there is no stage of admission. The speakers explained that the appeal and revision are two very different powers, though exercised by the same court. In cases where there is revision from section 138, it can be heard only if there is an apparent error of law. Also, revision cannot be done in all the matters where provision for appeal is not provided, though in cases where there is apparent error the court can *suo motto* call the matter for revision and examine it.

The speakers referred to Section 370 of the Cr.P.C. which provides for appeal in the specific cases on fulfillment of the three conditions mentioned and discussed how to deal with the appeal from an order of acquittal and from an order of conviction. The speakers stated that appellate court has the power to revisit the case and can come to an altogether different conclusion from the trial court. A query was asked that what is to be done when the trial court judge has given reasons, but the conviction is based on 'cryptic reasoning'. To this the speakers opined that in such a case the appellate judge can re-appreciate evidences and come to a different conclusion. Interlocutory orders were then explained with example in the judgement in case *Madhu Limaye vs The State of Maharashtra (*1977*).* The speakers then discussed the revisionary power of the court which applies when the decision of the trial court is grossly erroneous. The judgment in case *K. Chinnaswamy Reddy v. State of Andhra Pradesh (1974)* was also discussed as the case specifies as to when the power of revision can be used in cases of acquittal. The speakers emphasized that the decision of the lower court should be interfered with only in rare circumstances.

Discussing the manner in which judgement in a matter of appeal to be written, the speakers stated that the judge can take an independent view regarding evidences and he should deal with the lower court's judgement para-wise and not wholesomely. He may re-appreciate or contradict the findings point by point. The power of High Court are different from that of the sessions court in cases of revision. The High Court has the power to convert a revision petition into a criminal application or a writ petition but the Sessions court does not have such power. At the end of the session,

answering a query by a participant, the speakers explained that revision can be converted into appeal, but appeal cannot be converted inti revision because appeal is a statutory right of the appellant and hence converting appeal into a revision would violate the appellant's right.

SESSION 3: SENTENCING- ISSUES AND CHALLENGES

The speakers started the discussion with emphasizing on the need to give discretion to the judges regarding the sentencing of the accused. The speakers said that the purpose of sentence need to be understood by the judges. In the ancient times when the society was not developed the mindset was an *eye for an eye* and hence there were very harsh punishments for many crimes. But as society evolves, need of the society change and thus sentences also change. It was highlighted that unlike the western countries, India awaits a policy on sentencing. The speakers opined that though society's need are to be considered, the judges should not be swayed by public outcry. Each case has a different set of facts and circumstances and thus penalty is also need to be modified accordingly. The participants agreed on key factors that need to be considered while deciding a sentence which included nature of offence, gravity of offence, criminal antecedents of the accused, scope of reformation, impact on the society and cruelty with which the crime was committed.

Discussing the types of theories of punishment, the speakers suggested that the retributive theory has become a thing of primitive times. Today, reformative theory and the theory of deterrence are the most used theories for determining the punishment. The speakers emphasized that sentencing should always be based on the "doctrine of proportionality", i.e. sentence should be proportional to the offence committed. In all cases where compensation is prescribed in the law, it needs to be seen that whether a victim be appropriately compensated by the accused. The speakers then discussed the factors to be taken into consideration while awarding compensation including means of the accused. To determine the means of the accused, a separate inquiry can be conducted if there are no sufficient evidences regarding earnings of the accused.

The speakers then discussed the factors that need to be considered while giving deterrent punishments including nature of crime, impact on the society, peculiar circumstances at the time of commission of the crime and nature of accused person (whether he is a habitual offender, menace to the society). The Speakers then discussed some practical aspects and the issues which the judges might face while sentencing. The last segment of the session was interactive and the speakers addressed the queries of the participants and the participants also gave their inputs on the subject. Section 4 and 6 of the Probation of the Offenders Act was discussed. A question regarding the Constitutionality of section 29 and section 30 of the POCSO Act providing for reverse burden of proof was raised. The concern of some participants was that these provisions affect the fundamental rights of the accused and according to principles of procedural fairness the burden of proof lies on the prosecution to prove the case against the accused beyond any reasonable doubt. In this regard the speakers said until a matter goes in this regard to the Supreme Court and the Supreme Court gives the verdict on the same, trial court should follow the law according to legislation.

SESSION 4: CHALLENGES IN IMPLEMENTATION OF ADR SYSTEM IN SUBORDINATE COURTS

The speakers started the session by interacting with the participants and asking them about how ADR is practiced in their States. The quota system for disposing a certain number of cases by ADR mechanism and issues related to this system was discussed. The speakers emphasized on sending the appropriate matter for ADR at the earliest stage. It was highlighted that the dominant party tries to drag the cases for a long time so that the other party succumbs and a judge should make sure that this does not happen. Discussing the situation in other countries, the speakers said that mediation and conciliation is institutionalized in many western countries, 97% of the cases are decided through mediation. The Judge should also try to persuade the parties to go for ADR where the matter is fit for the same and parties should be made aware of the potential benefits of the same.

The participants then started to discuss the challenges they face in referring the parties to ADR. One issue to which most of them agreed was that most of the parties are not willing to go for ADR. In such a situation the speakers suggested that judge should make them aware about the consequences of going for the proceedings and also how circumstances may have changed, and going for mediation would really help them resolve the dispute in an effective manner. Another very prominent issue was that advocates many time are not willing to let the parties go for ADR. The speakers explained a case under section 498A of IPC to highlight the importance of ADR system. The Speaker discussed section 9 of the Family Court's Act, which makes conciliation compulsory and also highlighted the importance of Section 89 of the Civil Procedure Code. Various provisions of the Legal Services Authority Act, 1987 related to ADR mechanism were discussed and it was emphasized that cases which the court thinks fit for ADR system should be positively be heard in Lok Adalats. Any case pending in regular court or any dispute which has not been brought before any court of law can be referred to Lok Adalat.

SESSION 5: COURT AND CASE MANAGEMENT: ROLE OF JUDGES

The speakers initiated the session by highlighting the role of administrative skills in the management of the cases. Various objectives of administration were discussed including time management, monitoring of caseloads and increasing accessibility of the court. For effective management, the important components are planning and directing according to the plan and then exercising effective control over the management. The speaker discussed the different aspects of management in court including judicial commitment and leadership, court supervision of case progress, listing for credible dates and strict control of adjournment by imposing costs. The speakers then discussed case management and various strategies such as classifying cases, proactive role of judge, making court litigant friendly and training the staff and bar for being sensitive to the wants of the society.

For enhancing the performance of the courts, the key areas were discussed including duration of pretrial custody, court file integrity, case backlog, proceedings to occur as per schedule, leadership, compliance of Court orders, achieve efficiency and effectiveness, transparency and accountability and affordable and accessible court service. The Speaker opined that courts should ensure that the processes and procedures of the court (including for filing, scheduling, access to information and

documents and grievance redressal) are fully compliant with the policies and standards established by the High Court for court management. The speakers emphasized the need for better case preparation and the judge should always be prepared beforehand when it is due to be heard.

SESSION 6 : CIVIL JUSTICE ADMINISTRATION: APPELLATE AND REVISION JURISDICTION OF DISTRICT JUDGES

The Speaker discussed various issues relating to the appellate civil jurisdiction of the District Courts. It was emphasized that a judge should always give reasons to agree or disagree with the lower court. Sometimes the only reason given is that the issues were not properly framed and that should also be stated. On the question of second appeal status, it was stated that it is not a matter of right and it is allowed only when there is a substantial question of law. It was clarified that first appeal is provided by 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. The Speakers then discussed "mixed question of law and fact". It was opined that it happens in very rare cases that the issues are so intermingled that may be called mixed question of fact and law. Therefore, in a civil suit the court should apply its mind to decide that whether it is a question of fact or law. In the appellate judgement also the points reflected in trial court judgement have to be again reflected. Since appeal is a substantive right, even if the judge is dismissing the appeal it should be done after reconsidering the matter afresh. First appeal is a valuable right of the parties and the judgment of the appellate court must reflect application of mind and record findings supported by reasons

One question regarding the scope of Order XLI Rule 27 was raised by the participant. The speakers responded that in the case of *Union of India v. Ibrahim Uddin 2012 (8) SCC 148* it has been held that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. The matter is entirely within the discretion of the court and is to be used sparingly. The speakers then discussed various other issues relating to revision. Section 115 of the Code of Civil Procedure was discussed in detail.

SESSION 7: THEME- LAWS RELATING TO CYBER CRIMES: ADVANCE AND PROBLEM AREAS

The speaker started his address by illustrating the importance of tackling the procedural issues relating to cybercrimes. The speaker emphasized that while evidences are placed before the judge, their authenticity should be checked and then the evidence should be admitted or rejected. He explained certain evidences as to how technology can be manipulated to create fake evidences. During the session the speaker then explained simple tricks through which we can check whether such a mail or message is authentic or spoofed.

The speaker then explained internet space including *Surface Web Space* which consist of the sites that are easily accessible to everyone, like facebook, whatsapp etc, *Deep Web Space* means sites which are protected, that are built with stringent security and only authenticated persons can access them. (eg: GST, ADHAAR and Income Tax) and *Dark Web Space* means sites that google cannot recognize, it is the part of the Web not indexed by web search engines. They are mostly used by criminals to commit cybercrimes. The legal provisions that put compliance obligations on the internet service providers were discussed by referring to section 67C of the IT Act. The speaker said that intermediary should preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe. Since no specific time limit is provided till now therefore currently the service provider show that data is saved till last one year but they do save data for last 10 years.

The speaker further focused on evidence from mobile phone. In cases where a mobile is produced as an evidence and its admissibility should be checked. The first thing that needs to be seen is that whether the mobile was rooted or not. If the phone is rooted, the judge should ask the forensic lab that how any times it has been rooted and unrooted, because it may so happen that the culprits root it, modify it and then unroot it again. The speaker then discussed the Voice over Internet Protocol which is a system through which one can send spoofed e-mails. Hence, to check the authenticity of the e-mail court need to see that whether it has been sent from the authentic e-mail ID or from a VOIP server. The speaker explained various strategies for checking authenticity of emails.

The speaker then discussed that questions that should be asked to the investigating officer who collects the electronic evidences. The speaker then had a discussion on the various types of cybercrimes including stalking fraud, terrorism, pornography, theft, slandering, vandalism, trespassing and laundering. It was discussed that currently no international cyber law exists but there is a growing need for the same.

SESSION 8: ELECTRONIC EVIDENCE: COLLECTION, PRESERVATION AND APPRECIATION

The Speaker commenced the session by explaining electronic evidence which implies any probative information stored or transmitted in digital form that a party to a court case may use at trial. Before accepting digital evidence a court will determine whether the evidence is relevant and authentic. Sections 65A and 65B of the Indian Evidence Act was referred to in this regard. Section 65A thus provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B. The speaker illustrated the procedure to be followed for the collection of the digital evidence so that the evidence collected is authentic and can be appreciated in proper manner. These include pre investigation assessment, evaluation of scene of crime, collection of physical evidence, precaution for collecting digital evidence, collection of digital evidence, forensic duplication, seizure of digital evidence, packaging, labeling and transportation, legal Procedure after seizure and gathering information from various agencies.

For collection of digital evidences some precautions were highlighted by the speaker. Firstly the device should be disconnected from all the networks and then each component of the device should be separately packed and labeled and the users should be asked the passwords etc. The suspected

drive should be connected using wire block device only for investigation. The speaker emphasized that for reference purposes the accused should not be given the original data rather a copy of the data should be given. During forensic duplication data should be copied accurately and a mirror image should be created. For seizure of the digital evidences, after calculating the hash value, a digital fingerprint (image/clone) should be created and then the value of this clone should also be calculated. The speaker then focused upon the various agencies from whom information can be extracted and what information should be extracted from them. As far as possible the investigating officer should try to collect the primary device and the judge should also insist on presentation of the primary evidence in the court.