Workshop for Additional District Judges [P-1047]

15th to 17th September, 2017

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The National Judicial Academy organized a "Workshop for Additional District Judges" [P-1047] during 15th to 17th September, 2017. The participants were Additional District Judges nominated by respective High Courts. The Workshop discussed critical areas concerning adjudication at the District level. The sessions involved discussions on issues related to challenges in implementation of the ADR system, Sentencing, Role of Judges in Court and Case Management, Electronic Evidence, Cybercrime and Fair Sessions Trial. The Workshop also focused on appellate and revision jurisdiction of District Judges under civil justice administration.

Major Highlights and Suggestions from the Workshop

Session 1: Challenges in implementation of ADR system in Subordinate Courts

- The jurisdiction of courts concerning Alternative Dispute Resolution system [ADR system] is supposed to be limited but in practical terms it is huge. The ADR system has been evolved to avoid courts by disposing the matter outside the court system so that disputes can be resolved in a faster, economical and structural manner.

- In Alternative Dispute Resolution system the parties have the luxury of having a judge exclusively hearing their case whereas in court a judges has to deal with a large number of cases. It is being statutorily recognized that two persons having dispute can entrust a person of trust to resolve the dispute. An arbitrator is a person who enjoys the trust of the parties. No judicial authority can look into the facts of the matter or change the decision arbitrator has made.

- Section 89 of the Code of Civil Procedure [C.P.C.] is one area where every civil judges will be dealing with ADR system and other matter comes u/s 8 of the Arbitration and Conciliation Act [Act]. The district judges also hear petition under section 9, 27, 29, 34, 36 and 37 of the Act. Section 89 was brought with a specific purpose of blending the judicial and non-judicial system in the sense that whenever a civil matter is brought to the court, the court should see whether a settlement option is available in the matter. The matter can be referred under the four category provided under section 89 i.e. conciliation, mediation, arbitration and judicial settlement including lok adalat.

- According to Afcons judgment it is mandatory for courts to have a hearing under section 89 but actual reference to ADR is not mandatory. After the pleadings are completed a hearing is mandatory before next stage of trial. There are some excluded category of matters which cannot be referred to ADR. The judges have to give reasons for not referring the matter to ADR mechanism. If the matter is referred to Arbitration then it has to be by joint memo of the parties. This joint memo is called arbitration agreement and then the matter can be referred.

- Once judges mentions that parties are agreeing for arbitration and matter has to be referred to arbitration then entire matter goes outside of the purview of court. The arbitrator conducts the proceedings according to the Arbitration and Conciliation Act. It can come back to the court under section 34 or 36 of the Act. The conciliation also have to follow the process of joint memo. If both parties are not agreeing for the arbitration then it is for the court to decide that whether the matter can be referred for the mediation.

- Judges should not sent original file when it is referring to ADR forum and only the copy should forwarded and in most of the cases parties are asked to file additional copy under section 89

- If the matter is referred to judicial settlement the Afcons judgement says that judge who referred the matter should not handle that matter because if parties doesn't settle it and if it comes back to the court then there should not be any notion of bias on the judge.

- Section 8 of the Act and section 89, C.P.C. mandate the court to refer the matter to ADR system. Section 8 is an exact contrast of section 89 because under section 8 there is no arbitration agreement. The parties comes to the court and court gives them an option but in section 89 one of the parties waive or neglect the arbitration clause and comes to the court when the subject matter is governed by arbitration agreement.

- When a matter is brought before a court which is a subject matter of arbitration agreement and one party says that the subject matter is covered by arbitration clause then the court has to refer the matter to arbitration.

- Certain procedural errors are being committed by court when application u/s 8 of the Act is filed. When a matter is brought and a written statement has to be filed within a time period then certain courts judges would ask the parties to file written statement along with objection. It is not possible because application u/s 8 of the Act has to be filed before any statement on the subject matter of dispute is filed. So if the parties are compelled to file a written statement or any statement on defence they are precluded from bringing in the option of Section 8 of the Act and taking it out of the court system. So it is mandatory that parties are given freedom to file application u/s 8 of the Act before the statement on defense is filed. It is up to the parties to do it. The Supreme Court clearly laid down that when the parties has chosen arbitration then they cannot deny it.

- In post 2014 judgments the Supreme Court has taken a very clear stand for pro arbitration. In Enron judgement it was held that arbitration agreement is valid so far the intention of the parties to resort to arbitration is clear.

- The basic idea behind the Arbitration and Conciliation Act, 1996 is to enhance the autonomy of parties regarding choice of dispute resolution and least interference of the court. Section 5 of the Act clearly says that no court shall interfere with the matter which is not provided under part one. But still after this Act the court interferes with the arbitration process.

- Under section 9 of the Act the court can interfere any time before the execution of arbitration process. The application u/s 9 of the Act can be filed before a district court. But after amendment of the Act, if a matter is brought before court u/s 9 before the commencement of the arbitration, then the party which has sought the order has to commence arbitration within 90 days after the order is made.
- Post amendment the arbitrator order u/s 17 of the Act is treated like the order of the court. So any interim order passed by the arbitrator under section 17 is equivalent to court order and if order is violated and the matter is brought before the court and the court has to execute the order of the arbitrator. As section 17 and section 9 is concurrent jurisdiction it sometime creates a difficult situation. If there is interim order passed by the court before commencement of the arbitration and the court doesn't dispose of the matter and the arbitral tribunal takes charge then the court should not normally entertain the matter. Only in such circumstance where the order is not efficacious the court should entertain.

- According to a recent order of the Supreme Court, if an order u/s 17 of the Act by the arbitrator is not complied by the parties then the court can take contempt against the parties under Section 27 of the Act.

- Section 29 A in the amended Act prescribes the time frame for completion of arbitration process. So once the arbitral tribunal is constituted then within 12 months the arbitration should be completed. Only 6 months extension is given and when even after this the arbitration is not over then the arbitral tribunal is suspended.

Session 2: Court & Case Management: Role of Judges

- The schedule of cases should be prepared for hearing cases. Judges should only put those cases for hearing which can be heard on scheduled date. Such practice can considerably reduce burden of the court. This strategy should be framed during the first week of each month and schedule for the entire month should be prepared. There is strong role of judges in ensuring proper progress of cases from the initial time. The time schedule should be prepared in consultation with parties and once fixed it should be adhered to strongly.

- Priority should be given for disposal of older cases. Judges should not be too much concerned for disposal points and focus should be on disposal of more cases. The CMIS system where dates are given in automatic manner should be used according to the needs of each court.

- The judge should take control of court proceedings and not the advocate or any other stakeholder. In most places advocates determines the progress of cases and causes unnecessary delay which suits their interests. An effective case management system displaces the advocate's control from court process and court ensures that trial progresses according to fixed time schedules. The elements of successful case management include early court intervention and continuous court control of case progress.

- The court manager system has failed because of lack of acceptability. Because of lesser remuneration of court managers, the other regular staff have not given any importance to

court managers. But judges cannot do everything by themselves. In West neither the Chief Justice decide roster formally nor the judges decide what they have to hear. There the specialization of judges is taken into consideration before allocating cases to judges.

- The appellate court should not give regularly interfere with findings of facts done by lower courts. A different opinion can be taken. Regular interference with findings of facts by appellate courts creates uncertainty. The lower court judges also loses intellectual confidence when there is regular interference of their findings of facts.

- There is lot of jurisprudential incoherence in India as each judge tries to find his own legal truth. The single judge differs with division bench without assigning any substantial reason. There is traffic jam on the jurisprudential highway. This has resulted in the situation where now no principle is settled.

- There is resistance among court staff in adopting to changes brought by e-court project. Proper training to court staff should be provided regarding court and case management. The coordination of competent retired court staff should be taken for providing training to new staff. It is increasingly getting difficult to find good stenographer. The software should be used for transcription purposes and it can greatly reduce the time of judges.

- There are many stakeholders in the quick disposal of the judgement and judges alone should not be blamed for delay and pendency. All stakeholders have to understand the value of case management system then only the system can work effectively. The judges have important role in case management system as it is under their supervision that entire process takes place. The coordination of court managers and court clerks is very essential for successful case management system.

Session 3: Civil Justice Administration: Appellate and Revision Jurisdiction of District Judges

- The role of the appellate court is not just supervisory and it is an opportunity to reexamine the decree in all its aspect. The only limitation is that the appellate court do not have the opportunity to look at the witness and his demeanor by which it can determine the intensity of truth and falsehood. But despite the witness not being there, on the basis of material on record, the appellate court can independently arrive at a different conclusion. However the appellate court should give due credence to the findings of facts.

- Appeal is a creation of a statute and only if the statute provide right to appeal the litigant can file an appeal. For civil appeals the right to file an appeal by the litigant has been conferred by the Code of Civil Procedure [C.P.C.]. The defendant also has a right to appeal against findings regarding issue framed by the trial court. Section 96 of the C.P.C. and procedural rules under order 41 deals with appeals against original decrees. All appeals against original decrees are first appeals. Section 96, C.P.C. lays down the grounds on which appeals can be filed and four grounds are mentioned. It specifically says that if consent decree is passed then an appeal cannot be filed. However if the consent is based on fraud then it can vitiate all proceedings.

- The appellate authority can reexamine evidence, examine all aspects and lay down the points for determination and decide the appeal. Order 41, Rule 1 to 35 provide procedure for dealing with appeals. If party remain absent from proceedings then Order 41, Rule 17 provides the power to appellate court to dismiss the appeal. The explanation says that dismissal will be dismissal for defaults and not on merits.

- Under Order 41 there are four Rules which are important. These Rules mentions when the decree of the lower court has to be stayed, under what circumstances decree can be stayed, whether a money decree can be stayed and if it is to be stayed then what are the circumstances under which it can be done. Money decree normally should not be stayed and only if the appellant deposit the entire amount or gives security to the satisfaction of the court or gives a bank guarantee then only in such cases money decree can be stayed.

- Order 41, Rule 22 deals with cross objection which are to be filed by the respondent who has succeeded in the lower court. Under Order 41, Rule 33 which lays down the final ambit of power which is to be exercised by the appellate judge. Rule 22 said that the respondent even though he has succeeded and decree is passed in his favour but if he is not satisfied with the reasoning on a particular finding on an issue which have been framed by the trial court, then he can file his objection and that objection has to be in the form of memorandum. This memorandum has to be filed within one month of the date on which the admission of appeal is served. This cross objection has to be decided by the court. Whether the court allows the appeal or dismisses the appeal, it still has to decide the cross objection.

- Sometimes confusion is created between Rule 22 and Rule 33. Rule 22 says that within one month cross objection has to be filed but Rule 33 says that even if no cross objection is filed, the appellate court in order to do complete justice can pass an order in favour of the defendant. These two position operate in different fields and do not overlap. Rule 22 on the one hand give a right to successful respondent to challenge some of the findings of lower court whereas under Rule 33 care is taken to do complete justice. The power of the court is not curtailed and if court finds that there is apparent kind of error on record, the court can correct that in its judgement.

Session 4: Electronic Evidence: Collection, Preservation and Appreciation

- The initiative of the UN Commission on International Trade Law in 1996 made a Model Law and based on that India has framed legislative framework regarding electronic evidence. The Supreme Court of India has recognized the validity of electronic evidence since 1960s and has enunciated guidelines for ensuring authenticity and admissibility of such evidence.

- The crime scene evidence must be captured through electronic medium such as video recording. Judges must check authenticity, relevancy and reliability of every electronic evidence before rejecting its admissibility. The court should see that such evidence has not been tampered with and all norms and guidelines should be followed to ensure authenticity.

- The courts are not getting adequate assistance from prosecution concerning electronic evidence as most of the time the prosecution lacks expertise to understand the complexity of electronic evidence and how to ensure its authenticity. There is need for comprehensive training of investigation and prosecution for proper presentation of electronic evidence. To completely switch over to different kind of methodology requires an attitudinal and ideological change. The resistance against change must be overcome. The experts should be called in courts to explain electronic records and its complexity. However the expert should not become an extension of the prosecution and should give neutral and independent opinion.

- Preservation of electronic evidence is a major issue and it is difficult to preserve electronic evidence *quay* its authenticity. Proper guidelines should be followed by courts in ensuring proper preservation of electronic evidence.

- The court must always consider certificate required under Section 65 (B) of the Indian Evidence Act, 1872 for admitting electronic evidence during trial. The Supreme Court has clarified that certificate is mandatory for admitting electronic evidence. The physical conditions of electronic evidence should also be considered and court should ensure that such evidence are preserved in hygienic and non-contaminated environment.

Session 5: Laws relating to Cybercrimes: Advances and bottlenecks

- There have been several cases in the past of WhatsApp spoofing and e-mail spoofing whereby messages were sent by a non-existent user masquerading as a known user to spread confusion and to steal data. This is done through VOIP-Voice Over Internet Protocol. The communication on VOIP happens not through towers but through internet cables.

- The WhatsApp spoofing can be detected by clicking on the forward link. Usually after click of forward link certain signs are shown in the header. In case of spoofed messages such signs are not shown. Similarly to catch spoofed email, the email headers should be checked. In email header the word message id should be looked. The reveled email address should be read down to top and not top to down. The domain name should be checked and if the domain name is not that of the internet service provider then it is a mail sent from spoofed server.

- The ownership of internet data is a big issues concerning internet security and regulating internet traffic. The internet at global level is controlled through root servers which are based in United States. The websites can be shut down with one instruction through such root servers. India do not have a root server and this create a disadvantage to India in term of internet control and regulation.

Session 6: Digital Evidence

- The digital footprints of a person can be tracked through call data records [CDR]. The call data records can tell the tower locations which can indicate the movement of suspected person. The tower location is shown by the call data record about the person's movement whose CDR has been called. For investigation now the google map is also probed and the accuracy of google map is 99.9%.

- As a convention the CDR of phone communication is kept for one year by the service providers. There is a circular from BSNL for the keeping of CDR for one year and other telecom companies have adopted that as a rule. In some instances service providers do provide details of communication beyond one year as well. This is because of rule of financial audit which obliges organizations to keep business record for seven years. The telecom companies therefore archives the CDR for seven years because of financial audit and income tax requirements.

- There is growing incidence of misusing of the IMEI number of mobile phones. The police investigation do not go into the details of checking IMEI number. The police makes mistake about properly identifying first cell id and last cell id in the analysis of call data records.

- There is unique profile Id of each account on Facebook. The first important thing is to get the profile ID. The profile ID can be known by placing the cursor on image on the Facebook profile page and the profile ID is shown at the lower end i.e. address bar of the page. The investigation officer should note this and should not make any mistake in noting numbers or characters. With this profile ID the investigation officer should go to facebook.com/records. The access to this webpage is only for law enforcement agencies. The e-mail of the senior officer should be used for accessing this webpage. The Facebook can provide information relating to the suspect and the IP address used for creation of the profile.

- Under the Forensic examination performed by the Investigating Agency there is a special need to properly look into the role played by proxy servers. There is need of proper training to police and prosecution in this regard. Awareness regarding the misuse of technology must be promoted.

Session 7: Fair Sessions Trials

- There are international human right conventions and declaration such as UDHR and ICCPR which prescribe certain minimum rights to be safeguarded. These rights include right of accusation told to the accused, right to consult lawyer of his own choice, expeditious trial, trial in presence of the accused, opportunity to lead evidence and cross examination, right to have an interpreter, right against self-incrimination, *autrofois acquit* and *autrofois convict*, right of compensation against wrongful arrest and no application of retrospective penal laws. These rights are inalienable process of justice.

- There should not be a process of back calculation where a judges decide first then seeks justifications for the decision. There may be cases where such process is resorted and it affects the fairness of trial process. The right to speedy trial is one of the facet of fair trial and other rights should not be sacrificed for the sake of speedy trial. Fair trial must be ensured to not only to accused, but to all stakeholders including society at large. The minimum basic elements of fair trial must be achieved irrespective of the gravity of offence. The right to open trial in terrorist cases has to be managed keeping in mind the protection of witnesses.

- The presumptions regarding guilt of accused in dowry deaths and domestic violence and reverse burden of proof in economic offenses and sexual offences against children creates advantages in favour of prosecution and trial of such offences can result in unfair trial if safeguards are not applied. The standard of proof beyond reasonable doubt is taken away in such offences but the prosecution has a duty to propose the facts which have to be rebutted by defense because the basic assumption is that negative cannot be proved.

- The recent amendments in Cr.P.C. has enhanced the place of victim in judicial process. The court must consider the perspective of victim as well. There has been a rise in the jurisprudence relating to compensation to victim. The court need to be cautious in compounding of serious offences where compensation is offered to victim by accused. The victim should not enter into settlement because of influence of power of accused. If there is possibility of accused influencing the settlement then court should bring the case to its logical conclusion.

- The stage of charge is very important and at this stage proper scrutiny must be done. The case where the accused get convicted by trial court but the evidence do not sustain at appellate stage suggest lapses on the part of trial court. The innocent should not be compelled to undergo the ordeal of trial and at the stage of charging courts must ensure fairness. It is the entirety of the matter which must succeed in the eyes of the society.

- In some jurisdictions the investigation is bound to disclose evidence favorable to defense. The investigation is not supposed to withhold or suppress such evidence. The investigation is not done for a person but it is a sovereign function and people want to know the truth. Judges are obliged to see documents provided by the prosecution but they can exercise the power u/s 91, Cr.P.C. or comparable sections for getting more documents. Judges can see the case diary at any time. Judges must take a proactive role and give proper course to trial in such instances. Judges have extensive discretion and they can utilize that to arrive at truth. The trial where evidence favorable to accused were suppressed by prosecution is a wastage of public money because the appellate courts have ordered production of suppressed documents in many cases. The prosecution should not be allowed to take technical victories and judges must use their discretion to do justice.

- At the stage of charge whatever prosecutor feels appropriate, he files u/s 173, Cr.P.C. and the accused can simply make oral submissions. The accused cannot put any material or evidence at this juncture. If the prosecution evidence are not enough to arrive at a proper

conclusion the judge can call additional evidence from prosecution under section 91 and comparable sections of Cr.P.C.

Session 8: Sentencing: Issues and Challenges

- Sentencing is the end result of trial. It is easy to convict but difficult to come to just and fair sentence. Section 235 (2), Cr.P.C. mandates court to hear the accused on sentencing after conviction. If court do not hear the accused after conviction then there is a statutory violation. Court must assess the circumstances and situation of convict. Motive is irrelevant for conviction if actus reus and mens rea is proved. But motive become very relevant during sentencing.

- Court must not sentence an accused in a way which will make him a more hardened criminal. Court must see that how much of sentence can help an offender to move out of criminality and move to a domain where he will become worthwhile to society. If an offence carry death sentence then court must adjourn proceeding to decide about death sentence. The trial court can suo moto adjourn the hearing to decide about sentence. Under Section 235 (2), Cr.P.C. the court must assess the mitigating and aggravating circumstances.

- In India the courts seems to have developed personalized sentencing rather than objective sentencing. This personalized sentencing has given rise to inconsistency and disparities in sentencing. Depending on the approach of the judge concerned cases having similar kind of facts can have widely varying sentencing. There is need of legislative parameters such as mentioned in the NDPS Act for guidance of court. The Supreme Court of India has suggested some guidelines for objective sentencing to fill the legislative void.

- Non-execution of death sentence is becoming a major problem and it has led to creation of mercy jurisprudence where due to non-execution of death sentence, the accused is approaching Supreme Court for relief due to unreasonable delay in disposing of mercy petition.

- In offences carrying few years of punishment to life imprisonment, the responsibility of judges increases and they should assess the facts and circumstances of cases and the gravity of offences. Such wide spectrum in punishment poses challenges before judges to reconcile the interest of society, victim and accused.

- In Vishal Yadav matter, the trial court had given life sentence and the High Court enhanced it to life imprisonment with minimum 25 years. If the High Court could sentence in this way in appeal then the trial court could also order such sentence.
