SE-22: Training Programme for SEBI Officers

1st – 3rd February, 2023

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The National Judicial Academy organized a "Training Programme for Securities and Exchange Board of India (SEBI) Officers" from 1st to 3rd February 2023. The participants were Adjudicating Officers (AOs) and their team members from SEBI. The programme focused on discussing skills in adjudication, appreciation of evidence including electronic evidence, disputes relating to securities transactions, and use of ICT in dispute resolution. The core thematic areas were the applicability of principles of natural justice in enquiries and adjudication; art, craft, and science of drafting judgments; law of precedents and Stare Decisis; imposition of penalties: exercise of discretion by adjudicating officers; E-Filing, digitization and maintenance of records; and court & case management.

The first session on the theme ***Applicability of Principles of Natural Justice in Enquiries and Adjudication commenced*** with the essentials and importance of principles of natural justice. It was emphasized that means are equally important as the end and thus, principles of natural justice are a very important tool in the adjudicatory process. It was emphasized that whatever is legal is supposed to be just. Article 141 of the constitution of India was discussed and it was emphasized that the law declared by the higher courts is binding on lower courts. Article 144 of the constitution of India which states *all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court* was also discussed. It was stated that the judiciary is a conscious keeper of democracy. Elements and different aspects of the inquisitorial and adversarial forms of the system were discussed. It was highlighted that the issuance of a show cause notice is an ingredient of natural justice. In the light of the judgment *Indian Commodity Exchange Ltd. v. Neptune Overseas Ltd*., (2020) 20 SCC 106, it was delineated that show-cause notice should be comprehensive with full supporting documents and the documents asked by the respondents should be supplied. If is not done then it is a failure of the principle of natural justice.

The importance of the speaking orders was emphasized. It was stressed that writing judgments is an art, though it involves skillful application of law and logic. It was suggested that the reasoning in the judgment should be intelligible and logical. Clarity and precision should be

the goal. All conclusions should be supported by reasons duly recorded and the findings and directions should be precise and specific. In this light, the participants were advised to read the judgment *State Bank of India and Another v. Ajay Kumar Sood*, 2022 SCC OnLine SC 1067. The judgment of *P.D. Agrawal v. State Bank of India,* (2006) 8 SCC 776 was also discussed and it was pointed out that the order will not be a nullity even if it suffers from technical/other minor violations unless real prejudice is caused to the complainant. It was observed that the court should apply the principles of natural justice regarding the situation obtained in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula.

The stage of entertaining the counterclaim Petition was also discussed in the light of *Ashok Kumar Kalra v. Surendra Agnihotri*, (2020) 2 SCC 394. It was enumerated that allowing counterclaims after the framing of issues would prolong the trial and also prejudice the rights that may get vested with the plaintiff over time. In exceptional circumstances, the court may entertain a counterclaim even after the framing of issues so long as the court has not started recording the evidence. It was opined that procedural rules should not be interpreted so as to defeat justice, rather than furthering it. It was stated justice is not what exterminates, it is giving everybody what is due to it. It was highlighted that proportionality of hearing is a part of natural justice. It was opined that Tribunal is a larger word and courts also come within the ambit of the tribunal. Tribunals came to be known as more subject-specific forums where the adjudicatory process is done similar to what happens in the courts. It was suggested that adherence to the rule of evidence is very important while adjudicating a matter. It was also emphasized that the actions that are taken by the authorities established by a law must always bear in mind the objectives to be achieved by that law. It was delineated that in the case of SEBI, the objectives are the promotion and regulation of the securities market and protecting the investor's interest. The procedural fairness in holding inquiry was discussed during the discourse.

The second session on ***Admissibility and Appreciation of Evidence.*** It was underscored that evidence is based on facts but every fact is not an evidence. It was stated that evidence is defined under section 3 of the Indian evidence Act and affidavit is not evidence within section 3. Admissibility and appreciation of Evidence and evaluation of probative value of the evidence presented before the adjudicating officer was discussed. It was enunciated that evidence is a voyage for the discovery of truth and is the reconstruction of past events. It was stated that

evidence is yet another observing the code of principles of natural justice. The standard of proof in civil matters and in criminal cases was deliberated upon. It was stated that in criminal cases criteria for proving that the accused is guilty the criteria is proof beyond reasonable doubt whereas in civil disputes it is the preponderance of probability. It was stated that there are direct and indirect evidence and direct evidence is said to be the best evidence. It was further stated that oral evidence should be direct and corroboration is a rule of prudence. Deaf and dumb witnesses were explained to the participants. It was stated that such a witness may scribe his statement on a piece of paper in court, but it will be tantamount to oral evidence. Other evidence that includes documentary and circumstantial evidence was discussed. It was emphasized that in circumstantial evidence to prove a fact every link in the chain should be completed and suspicion, however grave cannot take the place of proof. It was emphasized that documents can be read in evidence only when they are exhibited. It was underscored that the evidence may also be classified as primary and secondary evidence. It was stated that primary evidence means the document itself produced for the inspection of the Court.

The principle of last-seen evidence was also discussed. It was highlighted that Evidence Act does not apply to arbitrators. Different types of witnesses which include eye-witness, child witnesses, injured witnesses, and interested witnesses were discussed. It was opined that generally, child witnesses require corroboration. It was stated that a witness can be reliable, unreliable, partly reliable, wholly reliable, and wholly unreliable.

It was emphasized that the court may recall and examine witnesses. The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit. Various aspects of S.137 that include examination in chief, cross-examination, and re-examination were discussed. The concept of refreshing memory (S.159) was explained. The concept of may presume, shall presume and conclusive proof were deliberated upon. In light of *Balram Garg v. Securities and Exchange Board of India*, 2022 SCC OnLine SC 472, it was pointed out that the presumption is raised only when the prosecution establishes some foundational facts.

The third session on **Electronic Evidence: New Horizons, Collection, Preservation, and Appreciation commenced** with discussion on elements and nuances of Cyber Crime, its emerging challenges, threats, and possible solutions to overcome such threat. It was highlighted that electronic evidence is information that constitutes evidence generated by mechanical and

electronic processes which are often relevant in proving or disproving a fact or fact at issue. Electronic evidence is also known as digital evidence. Chapter 3 of the Information Technology Act which speaks about electronic governance was discussed.

It was opined that there should be a separate lab for extracting the data and in this light section 79 A of the Information Technology Act was discussed. It was highlighted that no one owns the internet and it is a public network and through this public network thousands of machines and servers are connected with each other. The relevancy, authenticity, and admissibility of electronic records were discussed. Digital forensics; search and seizure of electronic records were emphasized. Contours of Section 65-B in light of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1 were discussed.

An overview and concept of rooting were explained to the participants. It was underscored that rooting is a process of unlocking android smartphones and tablet devices to attain higher administrative privileged controls. It was emphasized that a rooted device can be used to install unapproved apps, update OS, delete unwanted apps, underclock or overclock the processor, replace the firmware, and customize anything else. It was stressed that rooting can void your device warranty and if used incorrectly, rooting can cause stability issues with the software or hardware. It was highlighted that rooted devices shall not be admissible as evidence in a court of law. It was advised that information preserved by internet service providers and other firms can be obtained by legal request.

It was underscored that digital evidence is very volatile in nature and could be available in a number of devices, locations, and formats. It was advised that shreds of evidence like the number of computer systems, type of connection (Wi-Fi, Ethernet), personal appliances, and computer peripherals should be noted and photographed. Precaution to be taken while collecting digital pieces of evidence was deliberated upon. It was enunciated that minor mishandling may corrupt or vanish the evidence and without proper documentation evidence may not be admissible in the court of law. It was highlighted that special skills are required for leveling and preserving digital evidence. It was suggested that the chain of custody should be prepared to identify who handled the evidence. Proper documentation like the digital evidence form should be done separately for every device. It was also advised that the serial numbers of devices should be properly documented**.** For collecting digital evidence through

cellphone/mobile it was advised that if the device is switched off one should not turn it on and if it is on one should put it on flight mode.

It was delineated that seizing digital evidence involves calculating the hash value of the suspect storage media, creating a digital fingerprint (image/clone) of the same, and calculating the hash value of the forensic image. With reference to forensics duplication, it was underscored that the copied data should be an exact copy of the original data so that the integrity of the data is maintained and to ensure integrity, the hash value of the copied data should be calculated. It was advised that a professional approach and guidelines should be followed by investigating officers to maintain the reliability, integrity, and legal relevance of the evidence. Legal procedure after the sizer of digital evidence was deliberated upon.

The fourth session on the **Law of Precedents and Stare Decisis** was commenced by highlighting the definition of precedent given by Salmond as… "*a judicial decision which contains in itself a legal authoritative element which is described as ratio decidendi"*. It was deliberated that *Stare decises is* a legal principle of determining points in litigation according to decided cases. It means '**to stand by the precedents'**. It is a doctrine that protects justice dispensation from disturbing settled views and legal positions. It is a fundamental principle of judicial decision-making. It was emphasized that the rule deductible from the application of law to the facts and circumstances of a case constitutes the ratio decidendi of the case. In the light of the judgement *Krishneya Kumar v. Union of India* (1990)4SCC 207, it was stressed that the *ratio decidendi* is the underlying principle, namely the general reasons or the general grounds upon which a decision is based, on the test or abstract from the specific particularities of the case which gives rise to the decision. In the absence of legal rules, it was iterated that the judges rationalized their decisions in terms of *ratio decidendi* of the past decisions decided by the superior courts. It was observed that the object of following binding precedents is to ensure broad consistency and uniformity in deciding questions of law. The principles laid down by prior decisions are also used by courts to justify and give credence to their decisions. A settled legal position ensures stability and efficiency in public life. The doctrine of *Stare decises* saves the justice dispensation from chaos and confusion.

The concept of obiter dicta was also discussed. It was stated that obiter dicta are passing observations and casual expressions on issues that do not arise in a case. Thus, observations

that do not consider any arguments, are not related to the case, and are not supported by reasons are known as obiter dicta. However, while referring to the judgment *Afcons Infra. Ltd. & Anr vs M/S Cherian Varkey Constn* (2010) 8 SCC 24, on Section 89 CPC it was remarked that where Supreme Court considers a specific collateral issue, in detail, though not relevant to the case and evolves a legal principle supported by reasons and expressly states in the judgment to be the binding precedent then in spite of being an obiter dictum it is binding under Art. 141 and will be considered as a law declared by Supreme Court. The judgments/orders which are not binding precedents include non-speaking orders, orders dismissing a petition in limine without giving any reasons and/or orders dismissing petitions or appeals as barred by limitation or for want of jurisdiction, judgments rendered on the basis of a compromise settlement, judgments based on withdrawal of petitions or dismissing with liberty to file review in the court from which the decision arises, decisions rendered 'off the cuff' or 'out of the blue', on issues which do not arise in the case, orders allowing SLP to be withdrawn with liberty to file a review petition before the High Court. It was suggested that the judgments should be read as a whole to ascertain the dictum and the decision should be read in the context in which it is rendered.

Decisions that are per incurium were explained to the participants. Per incurium means through inadvertence. It was stated that a decision rendered in ignorance of or forgetfulness of some statutory provision, or some authority which is binding on the court rendering such decision. Thus, a decision that fails to notice any statutory provision or binding precedent is termed as per incurium. However, a lower court or a court of smaller bench may not take the liberty to declare any precedent as per incurium. It may take a route under Section 113 of the Civil Procedure Court in making a reference to High Court. It was highlighted that when a particular point of law involved in a decision of a case is not presented before the court and /or the necessary premise for the decision by that court was neither perceived nor present in the mind of the court and the decision is rendered without adverting to that point of law or the premise, such decision is said to pass sub silentio. It was explained that decisions rendered/passing *sub silentio* of a point of law, not presented, argued, or discussed are not binding and need not be followed.

It was stated that Precedents cease to be binding under the following conditions:

- When Supreme Court or larger Bench reverses such a decision.
- When a larger Bench declares that the decision was rendered erroneously, and is no longer binding and lays down a different view in variance with the earlier decision.

- When the legislature enacts a statute governing the subject covered by the decision and the statutory provisions are inconsistent with or are contrary to the ratio of the decision.
- When the decision is rendered per in curium.
- When the decision is a minority dissenting view.

It was remarked that a small difference in facts may lead to a different conclusion. It was suggested that precedents may not be relied on except on principles of law in technical offenses and questions of rendering justice to victims in deciding criminal cases. The participants were cautioned on too much reliance upon precedents in criminal cases, and adopting cut paste approach in similar cases may result in dangerous situations, which may result in failure of justice. However, it was opined that the Judges may not be left alone in the vastness of law to decide cases on principles of law which, may be complicated, without any assistance. The judgments of higher courts as precedents guide them and lead their path to discharge their duties of rendering just and fair decisions.

The fifth session on ***Art, Craft, and Science of Drafting Judgments*** was commenced by focusing on the structure and language used in writing judgments and orders. The importance of reasoning in judgements was highlighted and it was emphasized that judgment should be a work of art. The speakers explained difference between quasi-judicial orders, administrative orders and judicial orders. It was stated that a judgment is a statement given by a judge on grounds of a decree or order and it is the outcome of proceedings of the court. It was added that a judgment is distinct from a formal order as it gives reasons for arriving at a conclusion. It was stated that judges must give their reasoning honestly to the best of their ability without any fear, bias, prejudice or personal perceptions and any concern that the appellate court may reach to a different conclusion.

The judge must state the facts explicitly, precisely and consciously as they are found on record and give reasons with sufficient and honest reasoning without any bias, prejudices, or perceptions for the decision. The issue that whether judge made his conclusion when starting to write a judgment or he see the records before writing and then decide, or reflect upon the case and then write it was discussed. The speaker opined that the manner of writing judgments depends on case to case basis and complex case requires more reflection than routine cases. It was opined that judgment reflects the conscience of a judge, who writes it, and evidences his impartiality, integrity, and intellectual honesty. It was emphasized that a judgment must begin with clear recital of facts of the case, cause of action and the way the case has been brought to

the court. It was emphasized that the judgment must quote the issues/ or charges immediately after the narration of facts. It is always advisable to decide preliminary issues like limitation, valuation, or authority of the court before going into the merits of the case. The issues should not be drafted in the absence of counsels. It was opined that only cogent, relevant and admissible evidence must be narrated and that too very briefly giving the purpose for such evidence. The documents and exhibits admitted in evidence after they are proved on record must find their mention along with oral evidence by which they were proved. A judgment must briefly state the contentions of counsels on the points of determination. It was added that before deciding an issue or recording findings on a charge, the relevant evidence must be discussed. The findings recorded by the judge must be based on reasons and reasoning to support or to explain such findings. The logical process to arrive at the conclusion was discussed and various forms of logical processes including analogical process, inductive process, syllogistic or deductive process, inferential process and intuitive process were highlighted. It was opined that a judge must clearly write the operative portion of the judgment which pronounces his conclusion over the issues brought before him. Regarding language of the judgment it was opined that the plain and simple language has always been preferred and appreciated in writing judgments. Brevity, simplicity, and clarity are the hallmarks of a good judgment.

The sixth session on ***Imposition of Penalties: Exercise of Discretion by Adjudicating Officers*** commenced with issues related to the scope of discretionary powers and doctrine of proportionality. The issue that whether the exercise of discretionary power is just exercise of mental faculties or it should have ethical and moral content was discussed and it was opined that judicial discretion is controlled discretion which balances ends with the available means. It was further added that the proportion in which the discretion is to be exercised and the penalty is to be imposed is a combined effect of all these elements including the element of proportionality. It was emphasized that assessment of penalty should be a judicious estimation and liability has to be assessed in a constrained way and within those limits lies the discretion. It was emphasized that the process of penalty is a fine balancing exercise.

It was stated that the penalty should be imposed in a manner which maintains the deterrent value of the penal provisions and the legal provisions relating to the imposition of penalty were referred. Sections 4A, 11, 11(2) A and 15 A of the SEBI Act 1992 dealing with the powers and functions of the board were highlighted. Various amendments to the SEBI Act were discussed and it was opined that amendment of procedural laws cannot be applied retrospectively. The

judgment *Securities & Exchange Board of India vs. Ajay Agarwal* Civil Appeal No.1697 of 2005 was referred. It was stated that subsequent legislation made it clear that the power of levying penalty if exercised in prior period will also deem to have been regularly exercised. It was opined that the legislation provided a range of amount i.e. minimum 1 lakh per day subject to one crore which can be imposed as penalty and this range controls the discretion of the adjudication officer. The adjudicator has to first establish the default and then the penalty can be imposed. The order imposing penalty should be supported by reasoning and should demonstrate that there was default. The order should also reflect that arguments of the defence counsel have been considered. Then the controversy about Section 15 J on factors to be taken into account while adjudging penalty was discussed. The judgments *Siddharth Chaturvedi vs. Securities and Exchange Board of India* 2016 (12) SCC 119 and *Securities and Exchange Board of India vs. Roofit industries Ltd.* 2016 (12) SCC 125 were referred. It was opined that adjudicating officers should first establish default and should make a cogent finding on default while imposing penalty. The issue of considering correcting steps taken by the defaulter was highlighted. The imposition of penalty should be proportionate and balanced. It was emphasized that the interpretation of fiscal and penal statues should be done in a sui generis manner or strict manner because they invite some consequences. They should be construed in the terms as they have been framed and not liberally. It was emphasized that extremities have to be calibrated in order to suit the situation and adjudicating officer should follow principles of natural justice while serving summons and notices. Documents which have been relied upon by the adjudicating officer should be disclosed to the defence. It was stated that the standard of proof of preponderance of probability while adjudicating securities matter does not mean that decision will not be supported by adequate reasons. It was emphasized that adjudicating officers should exercise their discretion within the bounds of law. The judgments *T. Takano v. Securities and Exchange Board of India and Another*, 2022 SCC OnLine SC 210, *Securities and Exchange Board of India v. Bhavesh Pabari* (2019) 5 SCC 90 and *Chairman, SEBI v. Shriram Mutual Fund* (2006) 5 SCC 361 were referred.

The seventh session on ***E-Filing, Digitization and Maintenance of Records*** was commenced by highlighting the increasing global acceptability of the use of technology in court processes. It was opined that the technology is playing leading role in governance globally and it is helping to improve the efficiency of courts. The e-Courts project was discussed and its historical background was highlighted. Various challenges in establishment of the computer hardware and infrastructure in the courts of the country in Phase I of the e-Courts Project were

discussed. The policy decision of using Free Open Source Software [FOSS] in Phase II of the e-Courts project was discussed and elements of core and periphery aspects of FOSS were highlighted. It was stated that in Phase II the use of information for enhancing the efficiency of courts and reducing delay and arrears were focused upon. The information on trend of offences and delay causing issues helped the policy makers to optimize the use of technology in courts. The financial aspects relating to Phase I and Phase II of e-Courts project was discussed and the cooperation of department of justice was highlighted. The issue of unspent funds was also discussed. The establishment of the National Judicial Data Grid [NJDG] was highlighted and electronic availability of all cases at the all the levels of judiciary was demonstrated.

It was stated that due to the e-Courts project, lot of court processes have been digitalized and this has reduced the time judges had to spend on administrative issues. The technology has created efficiency and reduced hours of operation. One of the crucial role of e-Courts project was to identify needs of stakeholders in the justice delivery system and integrate their needs within the technological framework. The reengineering of the court processes was explained and it was stated that rules and procedures of the courts were changed and aligned with technology. The commencement of the e-filing process was highlighted and the electronic case management was discussed. It was stated that digitization of the courts' records has led to the availability of vast spaces in court complexes which was earlier occupied with physical records. It was stated that one of the major challenge was changing the mindset of stakeholders and motivating them for using technology and the training efforts in this regard were highlighted. Then the vision document of Phase III was referred and it was emphasized that technology should be used to enhance the access of litigants to justice system. The recent initiatives by the e-Committee of the Supreme Court were highlighted including launching of ESCR which is a database of judgments of the Supreme Court. It was suggested that SEBI should establish a system of digital database which can generate metadata to trap fraudsters easily.

The eighth session on ***Court and Case Management*** was commenced by highlighting the role of an individual in a collective mission effort. The organization of the work should be such that anyone can perform in the system seamlessly. The collective approach of management was emphasized to achieve uniformity in functioning and it was stated that organizations should function like moving machines instead of a place occupied by a single individual. The meaning and benefits of management were explained and it was opined that

management enhances efficiency in the organization. The five elements of management as propounded by the management guru Peter Drucker were explained. These elements included planning, organizing, directing, coordinating and controlling. Then 5 stages of scientific thinking mechanism were highlighted which included identifying problems through thinking, making plans for improvement through discussions, considering suggestions through broad themes, applying improvement techniques by eliminating and putting plans into practice through the Japanese way. It was emphasized that one should identify non value added items and core competency. The 80/20 rule of the time management was highlighted. The procedural simplification and decentralization were emphasized.

The meaning and scope of the case management was focused upon and it was opined that case management make practitioners and judges becoming better at what they do and they achieve the same end with less resources and in less time. Various aspects of case management in UK were highlighted which included fixing length of time for litigation, fast track and multi-track case management system, fixed time table, controlling inspection, exchanging witness statements, video recording of evidence and summary procedure for all suits below 10000. The areas of case management were discussed which included definite length of time for each step, deciding key issues in the case, listing cases according to priorities and pre-trial conference. The procedural simplicity for expedition and judges' control on case proceeding were emphasized. The issue of scrutiny of cases at the stage of admission was discussed and it was opined that if there is no sufficient material to proceed then cases should be dropped at the stage of admission. The issue of the imposition of cost by the tribunal in appropriate cases was discussed and the judgment *SEBI vs Vital Communication* Civil Appeal 1649 of 2022 was referred.

The ninth session on ***Challenges in Adjudication*** was commenced with the discussion on compensatory powers of courts and tribunals. It was stated that it should be seen that power of imposition of penalty and interest by the tribunal has been provided by the statute. The issue that if adjudication officer summons a person and the person do not respond then what adjudication officer can do in this regard was discussed. It was opined that adjudication officer has the power to impose the penalty and they can proceed accordingly. The power to compel the presence of the person can only be granted through legislation and implied powers to assume jurisdiction for a tribunal which is otherwise not provided by legislation is not the correct legal position. The adjudication officer should not abdicate his authority if the case of

defaulting summon is made out against the person. It was stated that the notice should be issued to the person who is not obliging the summons before proceeding against the person. It is up to the assesse to challenge the jurisdiction of the adjudication officer. It was opined that in situation where the witness is not ready to come for the cross-examination, his evidence or charges can be rejected. The role of adjudicator is to adjudicate and he should not assume the role of investigator. The issue that when the order is issued under digital signature then whether the certified copies are required to be provided to the parties was discussed. The concern was raised on the requirement of certified copies of order for the matter of appeal. It was opined that organization can make rules and regulation in this regard. The appellate authority can take a copy from the organization database rather than asking the certified copy of order from the parties. The issue concerning admission of an appeal and stay order was discussed and it was opined that admission of appeal does not amount to the grant of stay. It was suggested that adjudication officers should not be concerned about appeal against their orders. The difference between the role of an adjudicator and an investigator was highlighted and their limits were explained.
