# NATIONAL JUDICIAL ACADEMY

**ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES**

**[P-1265]** ***(Online Mode)***

**(30th & 31st October, 2021)**

## PROGRAMME REPORT


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## Objective of the Course

National Judicial Academy organized an orientation course for Newly Elevated High Court Justices with the objective of familiarizing judges with themes which might form a major part of their roster and to provide requisite knowledge and skills to that would be relevant for exercise of jurisdiction in the respective fields. The course explored emerging issues relating to the law and jurisprudence of bails including default bails. Further, the rule of *locus standi* and its application in criminal jurisprudence was discussed. The course facilitated deliberations on the contours of and emerging challenges in the high court's exercise of jurisdiction. The course also included discussion on interim orders; necessity, duration and ramifications to emphasize judicious application of discretion.

**Day-1**
Session 1 - Jurisdictional Challenges and Limitations
Session 2 - Concept of locus standi in Criminal Jurisprudence
**Day-2**
Session 3 - Exercise of Judicious Discretion in Grant of Interim Orders
Session 4 - Criminal Law: Bail Jurisprudence

### DAY I

### 30th October, 2021

**Session 1**

**Theme: Jurisdictional Challenges and Limitations**

On the theme of ***Jurisdictional Challenges and Limitations***, the deliberations commenced traversing the history and evolution of writ jurisdiction in England. It was stated that the initial reference to writs came from the King's Court; ordinarily, it was the Barons Court which decided *lis* between the parties, however, the King's Courts began to issue written orders (crude writs) to do justice. Consequently, it did not go down well with the Barons courts as the revenue generated from their courts started to decline since people preferred King's court for settling their disputes. Ultimately, there was an understanding reached between the two courts and it was decided that for the time the writs that had been issued by the King's Court operate they would limit itself to those writs. Subsequently, the writs found its way to India with the first Supreme Court being established at Calcutta followed by Madras and Bombay. These Supreme Courts had the same power to issue writs as the King's Court in England. However, with the Charter Act of 1861, three High Courts in Calcutta, Madras and Bombay replaced the respective Supreme Courts. Interestingly, these High Courts did not inherit the same jurisdiction of writ that the predecessor Supreme Court had. The Charter Courts could only issue the writs of *Prohibition* and *Certiorari*. The other writs were not

made available in order to preclude the Chartered High Courts from issuing direction to the government under the writ of *Mandamus*. Subsequently, in the initial years after independence writ jurisdiction exercised by the courts was respondent specific and confined to the territory where respondent lived.

Thereafter, on the issue of judicial review *Marbury v. Madison 5 U.S. 137 (1803)* was deliberated to highlight that judicial review answers the age old question of "who guard the guards?". It was emphasized that in contemporary times judicial restraint is understood vis-à-vis judicial activism, judicial excessisivm, judicial adventurism, judicial overreach, judicial populism and judicial diplomacy. It was stated that judicial activism is a philosophical theory based on objective reality and the existence of a proactive court trying to implement the law within the precincts of the constitution; judicial overreach was described as when courts usurp the functions of other constitutional functionaries.

It was highlighted that there are two types of adjudication, viz., *ex post and ex ante; ex post adjudication* is limited to the event and its consequences whereas *ex ante adjudication* is aimed to have an impact on the society. It was remarked that a Court of record having precedential value not only contemplates about the case and immediate relief but also its impact. It was stressed that writ jurisdiction shall be exercised by the High Court bearing in mind the impact of adjudication on the society.

Further, it was asserted that the power to issue writs by the High Court under Article 226 is wider than that of the Supreme Court under Article 32. It was emphasized that under Article 226 the High Court exercises enough power to leave no stone unturned to ensure justice. Further, the case of *Dwarka Nath v. Income Tax Officer 1966 AIR SC 81* was discussed wherein while referring to Article 226 it was held that "this article is couched in comprehensive phraseology and it *ex facie* confers a wide power on the high court to reach injustice wherever it is found. The constitution designedly used a wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with the those in England, but only draws in analogy from them." Further, *Sangram Singh vs Election Tribunal 1955 AIR 425, L. Chandra Kumar vs Union of India 1997 AIR SC 1125 and M.V. Elisabeth vs Harwan Investment And Trading Company 1993 AIR 1014* were discussed to highlight that power under Article 226 of the Constitution apart from being wide are paramount in its own sphere. In *Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation (2018) 16 SCC 299,* the court held that *prima facie* no matter can be deemed to be beyond the jurisdiction of a superior court and equally no matter can be said to be within the jurisdiction of an inferior court unless it is so provided.

Thereafter, the distinction between an appellate court and a writ court was deliberated in light of *Abdul Razak v. Mangesh Rajaram Wagle (2010) 2 SCC 432,* wherein it was held that the High

Court cannot exercise writ jurisdiction as appellate jurisdiction. Writ court cannot sit as an appellate court and reappreciate evidence. Further, territorial jurisdiction of High courts was discussed in light of *Kusum Ingots and Alloys Ltd. v. Union of India (2004) 6 SCC 254,* wherein it was held that writ petition questioning the validity of a Parliamentary Act shall not be maintainable in the High Court of Delhi merely because the seat of Union of India is in Delhi. In *Navinchandran N. Majithia v. State of Maharashtra (2000) 7 SCC 640,* a criminal complaint was filed in Shillong and the petition for quashment was filed in the Bombay High Court. The Bombay High Court on the face of it held that it cannot exercise jurisdiction of quashing a criminal complaint filed in Shillong. However, the Supreme Court held on the facts of the case that the Bombay High Court had the necessary jurisdiction to entertain the petition and erred in not doing the same. Lastly, on the aspect of self-imposed restriction, in *Committee of Management v. Vice-Chancellor (2009) 2 SCC 630*, it was held that availability of an alternative efficacious remedy is not an absolute bar to entertain writ petition.

**Session 2**

**Theme: Concept of *locus standi* in Criminal Jurisprudence**

On the theme of ***Concept of locus standi in Criminal Jurisprudence***, the discussion commenced by providing definition of *'locus standi'* as the right to bring in action or to be heard in a given forum or a right of appearance in a Court of justice. It was emphasised that 'complainant' is alien to criminal jurisprudence except when the statute specifically provides as held in *A.R. Antulay v. R. S. Nayak* (*1984) 2 SCC 5.* It was remarked that a crime is considered against the society as a whole, hence, any person can set the criminal law into motion except for offences like matrimonial disputes, defamation etc. for which the exceptions are provided under Sections 198 and 199 of the Cr.P.C. Further, it was pointed that Section 39, Cr.P.C goes a step beyond *Antulay* and casts a legal duty on every individual to set the criminal law in motion for the category of offences mentioned in the provision.

Thereafter, on the issue of a private complaint against public servants the decision in *Subramanian Swamy vs. Manmohan Singh (2012) 3 SCC 64* was discussed wherein it was held that there is no restriction on a private citizen filing a private complaint against a public servant and the Court is not barred from taking cognizance of offence by relying on incriminating material collected by private citizen. Therefore, a private complainant is also entitled to seek sanction for prosecution. Further, it was stressed that Section 154, Cr.P.C. does not prescribe any qualification for a person to get an FIR registered of a cognizable offence and under Section 190, Cr.P.C. a magistrate may take cognizance on a complaint of facts which constitute such offence, filed by any person in writing or upon an information of an offence received from any person other than a police officer or upon his own knowledge i.e. the Court may also take *suo motu* cognizance of the facts constituting an offence. Thus, Section 190, Cr.P.C. permits anyone to approach the Magistrate

with a complaint without prescribing any qualification of the complainant unless specifically contemplated by the provisions.

Further, elaborating on *locus standi of victim in criminal proceedings***,** emphasis was laid on the definition of victim as provided under Section 2(wa) of the Cr.P.C. Further, the term 'victim' used in the proviso to Section 372 Cr.P.C. was expounded in light of the interpretation provided by the High Court of Delhi in *Ram Phal v. State (2015) 221 DLT 1*, wherein it was held that the expression 'victim' includes his or her guardian or legal heir besides the direct sufferer of the physical harm. As the guardian or legal heir would be a direct sufferer of the emotional harm, the Court further held that what is sought to be included i.e. 'legal heirs' cannot result in excluding those relatives or loved ones of the victim simpliciter who actually falls within the ambit of victim. Further, in *Bhagwant Singh v. Commisioner of Police (1985) 2 SCC 537*, the court held that the informant who sets the machinery of investigation into motion by filing the First Information Report (FIR) must know the result of the investigation. The informant having taken the initiative in lodging the FIR with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer-in-charge of a police station on the FIR should be communicated to him and the report forwarded by such officer to the Magistrate under Section 173(2)(i) should also be supplied to him. It was stressed that after the amendment to the Cr.P.C. in 2008 whereby the definition of 'victim' was added in the code, some High Courts like Madras have enlarged the scope of the term victim to include informant victim within its meaning. Further, certain provisions of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was highlighted on the issue of victim's participation in trial; Section 15A(3) gives right to a victim not only to participate in trial but to be informed of every proceeding including bail proceeding under the Act

Further, it was pointed out since a crime is against the society, victim is generally a third party in a criminal trial and has a limited say in the prosecution of the offence. Thus, a victim cannot prosecute independently in a State case however, a complaint case filed by the victim before a Magistrate can be prosecuted by the victim. In a State case it is the duty of the State to prosecute, hence the prosecution/trial is conducted under Section 225, Cr.P.C. by public prosecutors appointed under Section 24, Cr.P.C. and the victim's role is fairly limited. In *Rekha Murarka v. State of West Bengal (2020) 2 SCC 474*, the apex court clarified the law in relation to the extent of assistance that can be rendered by the victim's counsel to the Public Prosecutor and the manner of providing assistance. It was held that though the same would depend on the facts and circumstances of the case, however a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. It was also observed that the balance inherent in the scheme of Cr.P.C. should not be tampered with and the prime role accorded to the Public Prosecutor should not be diluted. Even if there is a situation where the Public Prosecutor fails to highlight some issue(s) of importance despite the same been suggested by the victim's counsel, the latter may still not be given an unbridled mantle of making oral arguments

or examining witnesses. If the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the Court and if the judge finds merit in them, he may take action accordingly by invoking powers under Section 311, Cr.P.C. or Section 165, of the Evidence Act. In *Thakur Ram vs. State of Bihar 1966 AIR SC 911,* it was held that in a prosecution on a police report a private party has no *locus standi* except in few cases as provided under Sections 198/199, Cr.P.C.

Thereafter, the interplay between Section 372 and 377 of Cr.P.C. was deliberated. It was stated that proviso to Section 372, Cr.P.C. provides for a right of appeal in the event of acquittal of the accused, conviction of the accused for a lesser offence or for imposing inadequate compensation. However, the victim has no right to appeal against inadequacy of the sentence under Section, 377 Cr.P.C. Further, though in case of acquittal of an accused, the State is required to seek a leave to appeal under Section 378 (i), Cr.P.C. however, a victim has a statutory right to appeal without seeking leave under the proviso to Section 372 Cr.P.C. in case of acquittal or for conviction for a lesser offence or inadequate compensation as was held in *Mallikarjun Kodagali v. State of Karnataka 2019 (2) SCC 752.* It was further held that proviso to Section 372 Cr.P.C. must be given a meaning that is realistic, liberal, progressive and beneficial to the victim of an offence.

Subsequently, *locus standi of interested parties* was discussed through various judgments. In *Arunachalam v. P.S.R. Sadhanantham (1979) 2 SCC 297*, the Supreme Court considered the competence of a private party to invoke jurisdiction under Article 136 of the Constitution of India against the judgment of acquittal by a High Court. It was held that the power under Article 133 is a plenary power and there are no words in Article 136 which qualify that power. Such power under Article 136 cannot be construed with an ordinary appellate power exercised by Appellate Courts. The exercise of power by the Supreme Court not being circumscribed by any limitation as to who may invoke the same, the Court entertained the leave to appeal against the judgment of acquittal by private party. Thereafter, P.S.R. Sadhanantham filed a writ petition before the Supreme Court [*P.S.R. Sadhanantham v. Arunachalam (1980) 3 SCC 141]* taking the plea that the Supreme Court had no power to grant special leave to appeal to the brother of the deceased against the judgment of acquittal. The Constitution Bench held that Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. This power has to be exercised by the Judges of the highest court of the land with scrupulous adherence to judicial principles well-established by precedents. Article 136 has a composite structure of power-cum-procedure inasmuch as there is an inbuilt prescription of exercise of judicial discretion and mode of hearing. It was thus held that in such a situation the Supreme Court can grant leave to one who is not a party on the record. In *Ratanlal v. Prahlad Jat & Ors. (2017) 9 SCC 340,* Supreme Court following the decision in *P.S.R. Sadhanantham* entertained the special leave to appeal filed by the brother of the deceased victim of the crime. In the said case the two witnesses were examined and cross-examined at length. After a passage of 14 months they filed an application under Section 311, Cr.P.C. before the Trial Court for their re-examination on the ground that statements made by them earlier were under duress. The Trial Court rejected the said

application under Section 311, Cr.P.C. Challenging the order of the learned Session Judge the two accused filed a petition before the High Court. The order of the trial Court was set aside by the High Court and the application filed by the two witnesses was allowed. Challenging the order of the High Court, the brother of the deceased victim filed special leave petition which was granted. The respondent/accused therein challenged the *locus standi* of the brother of the victim under Article 136 against the order of the High Court. The Supreme Court held that Article 136 does not confer a right to appeal and confers only a right to apply for special leave to appeal and in suitable cases the Supreme Court may exercise its discretionary power under Article 136, which is not circumscribed by any limitations as to who may invoke it. In *National Commission for Women (NCW) vs. State of Delhi (2010) 12 SCC 599,* the Supreme Court declined to entertain a special leave to appeal petition under Article 136 by NCW seeking enhancement of the sentence of an accused. It was held that appeal against a judgment of conviction for sentence as also against acquittal or enhancement of sentence or inadequacy of sentence and compensation in the statutory remedy provided under proviso to Section 372 Cr.P.C. and 377 Cr.P.C. and an appeal by a private individual can be entertained in a case where an existing remedy has been shut for a victim due to *malafide* on the part of State functionaries or due to inability of the victim to approach Court. However, to permit any person or an organization to file an appeal would cause utter confusion in criminal justice system. Neither the State nor the heirs of the deceased victim having chosen to file a petition in High Court, the Apex Court refused to entertain the petition filed by NCW.

Further, elaborating on *continuance of appeal by legal heirs,* it was emphasized that on the death of an accused, an appeal against acquittal and appeal for enhancement of sentence gets abated. However, as regards an appeal against conviction, it subsists in respect of the quantum of fine. Since the fine can be recovered from the estate of the deceased proviso to Section 394, Cr.P.C gives liberty to near relative of the deceased appellant to seek leave to continue with the appeal and in case such leave is granted, the appeal shall not abate. The 'Explanation' to Section 394(2), Cr.P.C. defines 'near relative' to mean a parent, spouse, lineal descendants, brother or sister. Further, Section 70, IPC provides that fine leviable within six years, or during imprisonment will not discharge the property from the liability on the death of the convict. It is provided that the fine, or any part thereof which remains unpaid may be levied at any time within six years after the passing of the sentence, and if, under the sentence the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period. The death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts. Thus, it is evident that the near relatives of the deceased convict including the legal heirs are at liberty to continue the appeal so as to seek exoneration of the property from which fine can be realized. The near relative of the convict may also pursue the appeal to seek an honorable acquittal to the convict. Lastly, in *Harnam Singh v. State of Himachal Pradesh (1975) 3 SCC 343,* the Supreme Court dealing with Section 431, of the Criminal Procedure Code, 1898 which was similar to Section 394 of the Criminal Procedure Code 1973 held that it is significant that the parenthetical clause of Section 431 does not contain the word "only". Thus, to limit the operation of the exception contained in that clause so as to take away

from its purview appeal directed both against imprisonment and fine is to read into the clause the word "only" which is not there and which by no technique of interpretation may be read there. This decision was followed in *Ramesan v. State of Kerala (2020) 3 SCC 45*, wherein it was held that an appeal arising from composite sentence of imprisonment as well as fine on death of an appellant-accused must be treated as an appeal against sentence of fine and therefore must not abate in respect of that sentence of fine as provided under Section 394(2), Cr.P.C.

## DAY II

## 31st October, 2021

### Session 3

### Theme: Exercise of Judicious Discretion in Grant of Interim Orders

In the session on ***Exercise of Judicious Discretion in Grant of Interim Orders,*** the discussion was commenced with a reference to the judgment of the Supreme Court in *Asian Resurfacing of Road Agency Pvt. Ltd. and Another v. Central Bureau of Investigation*, (2018) 16 SCC 299 to highlight the contours of judicial discretion in grant of interim orders. The nature of interim orders and the principles governing the grant of interim orders was discussed. The nature of interim orders was stated to be temporary; and is granted to maintain the status quo till the matter is decided. It ensures that the matter does not become infructuous and to avoid *fiat accompli*. It was emphasised that interim orders have to have a link to the final order/outcome of the case and the scope of the interim order cannot exceed the scope of the case and the possible orders that can be passed in the case. With regard to the discretion in grant interim order the case of *American Cyanamid v Ethicon Ltd* [1975] UKHL 1 was referred to which stated the considerations in determining necessity for interim order. The participants were advised to avoid an overzealous approach in grant of interim orders. The participants were also cautioned to ensure that the interim order does not result in unfair gains to any party in the matter.

The evolution and expansion of the scope and nature of interim orders was emphasized and it was stated that the right which was earlier *in personam* has now evolved to become a right *in rem.* The emergence of newer forms of interim orders including mareva injunctions, dynamic injunctions and continuing injunctions. Concerns were expressed over the practice of excessive extension of interim orders. With regard to life of interim orders, it was observed that despite the judgment of the Supreme Court in *Asian Resurfacing* case, the problem continues to persist as the Courts are now flooded with applications for extension of interim orders. The practice in the Madras High Court of having separate Civil Miscellaneous Petition Courts and Writ Miscellaneous Petition Courts was highlighted in dealing with interim orders and other miscellaneous petitions.

In this regard, Harvey Cox was quoted – "*Not to decide is to decide"* to highlight the impact of extension of interim orders. There are times on assessment of the case, the best course of action is no action i.e. it is not necessary to pass an interim order unless absolutely necessary. The element of judicial discretion in grant of interim orders was discussed. Judicial discretion was stated to be an act of making a choice in the absence of a rule with regard to what is fair and equitable. It involves situational consideration and ensures an equitable legal process by allowing the judge to consider situations and instances on which the law is silent. Such exercise of discretion can be just, and at the same time the discretion can be misused to cause gross injustice. In this regard, Lord Camden's view on judicial discretion was highlighted wherein he has stated that discretion in a judge's hand makes him a tyrant. The contrary view of John Marshall was quoted judicial power is never exercised to execute the will of a judge, rather it is exercised to give effect to the will of the legislature or of law.

The article by Thomas Zonay "Judicial Discretion: Ten Guidelines for Its Use" was discussed to emphasise on a judicious exercise of discretion in grant of interim orders. The principles emphasized were –

- Establish the record - Strive to ensure that the relevant and necessary facts are on record. The findings should be based on the relevant facts. The judge must address the matters of credibility which lend support to his conclusion. He must decide with proper reasoning
- Apply the correct law. This requires comprehensive knowledge of the law.
- Do not make a decision just because you can. This requires a judicious exercise of discretion.
- Consider the equities of the situation. Be fair to all parties in the matter.

The use of discretion in grant of interim orders was stated to be an extra-ordinary remedy which was to be exercised to ensure preservation of subject matter and *status quo* in the case. Injunctive relief cannot be claimed as a matter of right and this necessitates the application of judicious discretion of the court. The nature of injunctive relief varies from case to case and the exercise of judicial discretion in this regard.

The cases of *Walker v. Jones* ((1865) L.R.I.P.C. 50), *Preston v. Luck* ((1884) 27 ChD 497 CA), *American Cynamid v. Ethicon, National Commercial Bank of Jamaica v. Olint Corporation* ([2009] UK PC 16), *F. Hoffmann-LA Roche Ltd. v. Cipla Limited* (2008) 148 DLT 598, *Colgate Palmolive v. Hindustan Lever* ((1999) 7 SCC 1), *S.M. Dyechem v. Cadbury (India) Ltd.* ((2000) 5 SCC 573) and *Hammad Ahmed v. Abdul Majeed and Others* (2019) 14 SCC 1 were discussed to trace the evolution of contours of judicial discretion and the principles governing the grant of interim orders.

In *Walker v. Jones* it was stated that the judge has to assess the difficulty of the questions involved which make it proper that an injunction should be granted until the court decides the case. In *Preston v. Luck*, the standard established was that injunction should be granted only in cases where a strong *prima facie* case and a possibility of one of the parties winning is established. Thereafter,

the standard in *American Cynamid* it was emphasized that the purpose of an injunctive remedy is to minimise the amount of damage till the case is decided. Necessity of interim order has be made on the basis of the seriousness of the issue and the balance of convenience. The standard established in *American Cynamid* has been extended to various categories of cases ranging from property disputes to intellectual property disputes. The standard in *American Cynamid* has been applied in the cases of *F. Hoffmann-LA Roche Ltd. v. Cipla Limited*, *Colgate Palmolive v. Hindustan Lever*, *S.M. Dyechem v. Cadbury (India) Ltd.* and *Hammad Ahmed v. Abdul Majeed and Others.* In *F. Hoffmann-LA Roche Ltd. v. Cipla Limited*, the court has stated that the principles in *American Cynamid* must be applied to patent infringement matters and must adopt a cautious approach while granting interim orders. However, in *National Commercial Bank of Jamaica v. Olint Corporation* it was held that at the interlocutory stage, the court must assess whether granting or withholding an injunction is more likely to produce a just result.

On the issue of the life of an interim order, it was stated that interim orders must have a limited life and should not be extended without a speaking order. The judgment in *Asian Resurfacing* case has served to keep judges on guard to ensure the case does not continue for extended periods. Emphasizing on discretion as the application of mind, a reference was made to an account of Justice Vivian Bose and Justice Syed Mahmood in the book "Laughing at the Gods: Great Judges and How They Made the Common Law" by Allan C. Hutchinson.

The adoption of the ruling in *American Cynamid* by the Supreme Court of India in *Gujarat Bottling Co. Ltd. v. The Coca Cola Co. (*1995 SCC (5) 545) was discussed. In this case the court stated that relief by way of interlocutory injunctions is granted to mitigate the risk of injustice to the plaintiff in the period before the resolution of the matter by the court. The objective is to protect the plaintiff from injury by violation of his right for which he could not be adequately compensated in damages recoverable in the case. However, the need of the plaintiff for such protection has to be weighted by the corresponding need of the defendant to be protected against injury resulting from being prevented from exercising his legal right. Hence the need for assessing the balance of convenience is necessitated. Balance of convenience requires the court to examine the competing interests of the parties and determine where the balance lies in order to protect the defendant while granting an interlocutory injunction in favour of the plaintiff. The court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty can be resolved at the time of the trial in the favour of the defendant. Emphasis was placed on ensuring that neither party in disadvantaged as a result of the interlocutory injunction. It was stated that interim order have the potential to cause irreparable harm if granted in undeserving cases. The considerations to be kept in mind while determining the necessity for grant of interim order *viz. prima facie* strength of the plaintiff's case, likelihood of irreparable harm and balance of convenience were discussed.

Mareva injunctions were discussed and it was stated that these injunctions operate as a freezing injunctions which is a form of ad personam interim relief sought in the pendency of the case. It is sought to prevent the other party from dispersing the assets other than in the ordinary course of

business. A similar relief is incorporated in Order 38 Rule 5, Civil Procedure Code, 1908. In this provision also the considerations for grant of such relief is similar i.e. strength of case. It is also important to assess on the basis of the following considerations – irreparable harm and balance of convenience. It is not the *prima facie* strength of the case alone but also the likelihood of harm and the balance of convenience which is necessary to be determined before granting interlocutory injunctions. Balance of convenience involves an exercise of discretion on part of the judge to determine the relative strengths and weakness of the parties' case. In assessing such considerations, the participants were advised to refrain from elaborate discussion of the case at the interim order stage and refrain from conducting a mini trial at this stage. Judges should take *prima facie* stock in a broad sense of the materials on record to assess where the balance of convenience lies.

Super injunctions were discussed and it was stated that the term was coined by a committee headed by Lord Neuberger denoting injunctions which provide anonymity for one or both parties in the case, prohibit reporting of substantive facts of the case and which prohibit access to court files. This injunction reduces court proceedings to a chamber proceedings where third parties are not aware of the details of the proceedings. These injunctions do have beneficial use to maintain confidentiality and protect the privacy of parties especially in cases of sexual assault or in cases involving minors. This injunction should be used in very small category of cases. Reference was also made to Council's Club injunctions which are prevalent in England which allows discovery of sensitive material which is part of the case file; and to Anti Suit Injunction which is discussed in *Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.* (2003) 4 SCC 341. Anti Suit Injunctions are relevant in cases where a jurisdictional issue is involved. The factors that the court must consider while determining the necessity of an anti suit injunction are –

- The defendant against whom the injunction is sought is amenable to the jurisdiction of the court.
- The ends of justice will be defeated if the injunction is declined.
- The principle of comity and respect for the courts in which the commencement or continuation is sought or to be restrained must be kept in mind.
- Convenience of parties and also convenience for resolution of the matter.

Discussions were also undertaken on varied types of injunctions – Anton Piller order, John Doe orders. John Doe orders are extra ordinary remedy which was juridically created to cater to the situation where the defendant is unknown and amounts to a blank warrant. John Doe orders have evolved over time to keep up with the peculiar complexities of cases. With regard to John Doe, the judgment in *Eros International v. BSNL* (CS(OS) No 2315/2016) was discussed. It was stated that Anton Piller orders can cause incalculable harm and hence, must be granted with great caution.

Emphasis was placed on the interim orders as a temporary remedy to be used to preserve the balance, prevent irreparable damage or loss, and to ensure equity in the matter till the final outcome of the case. It was also stressed that the following factors must always be considered while exercising discretion in grant of interim orders –

- Where it apparent that the grant of interim relief is contrary to the terms of a law or a contract, the interim order should not be granted.
- In disputes relating to public projects or public tender, the court should exercise circumspection, and consider two competing interests – injuring to the plaintiff if injunction is not granted and injury to the public if the injunction is granted. In such cases injunctions should not be routinely granted so as to stall the public procurement process.
- Where it appears that the plaintiff can be adequately compensated monetarily after the trial then injunction should not be granted. Conversely, where the damages cannot be adequately compensated and the plaintiff establishes a strong *prima facie* case and irreparable injury then the injunction should be granted
- Where the grant of injunction requires frequent supervision, then the injunction should not be granted.

Interim Mandatory Injunction was discussed with reference to *Dorab Cawasji Warden v. Coomi Sarob Warden* ((1990) 2 SCC 117). With reference to *Asian Resurfacing* case, it was stated that there is a need to be cautious while granting interim orders and courts need to be circumspect to ensure that the interim order does not serve to prolong the proceeding. There is a need to maintain records of the interim orders granted in cases so as to monitor the matter and to prevent unnecessary delay. Concerns were expressed regarding injunctions against a forum which prohibit the court from proceeding with the matter and it was state

With regard to discretion, reference was made to 'The Discretion of a Judge' by Lord Bingham. Further, the words of Lord Shaw were recalled –"To remit the maintenance of rights to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand" to emphasize of the exercise of discretion within the limits of the law.

With regard to masking of portions of judgment in commercial matters, it was stated that unless the claim for masking or anonymity is routed in some substantive basis or substantive law such order should not be given. With regard to grant on stay on exemption notification should be granted in extremely rare conditions and should be couched with conditions.

**Session 4**

**Theme: Criminal Law: Bail Jurisprudence**

On the theme ***Criminal Law: Bail Jurisprudence*** emphasis was placed on the socio-economic context of criminal justice and the judges were advised to be conversant with the socio-economic realities, including caste, economic and educational context of the region they exercise jurisdiction upon. This aids the judge to situate the case in the social context and in rendering socially relevant judgments. Understanding this socio-economic factors which lead to cases, including cases of statutory rape and POCSO offences, is necessary in adjudication of these cases. Consideration of these socio-economic realities is necessary in bail matters and efforts must be to balance the

interests of the accused and the society. Concerns were raised with regard to the deliberate attempts on part of the prosecution of procrastinating the trial. In such cases often the accused spends significant time in jail and therefore, the court must be vigilant to ensure that such delay on part of the prosecution does not result in denial of liberty to the accused and must be alert about this issue in bail hearings.

With regard to conditions imposed in the grant of bail, it was underscored that the condition imposed must have strong nexus with the objective of ensuring the presence of the accused. Conditions must only be to secure his attendance before the court. Participants were advised to refrain from indulging in legacy building in bail matters.

In bail matters the necessity of balancing the scales between the accused and the victim was discussed. The emergence of victimology in criminal jurisprudence was discussed and it was stated that the victim is unheard and unrepresented in the criminal justice system. Further, in order to ensure fair trial, judges should scrutinise the case carefully from the side of the accused. Judges must consider how much passage of time in a case would amount to delay. There is no fixed scale for this as it may differ from one case to another. For example, in case of an 80 year old accused 2 years may be a long time while in case of a young accused 2 years may not be a long time.

Condition under Section 37 (b) (ii) Narcotics Drugs and Psychotropic Substances Act, 1985 was discussed which requires the court to verify at the time of grant of bail that the accused is not likely to commit any offence while on bail. It was stated that such condition imposes an onerous responsibility on the court is an impossibility. It was stated that the bail order will be scrutinised on the reasons given in the order. So irrespective of the stumbling blocks in the legislation, bail can be granted if the provision of law conflicts with Article 21 of the Constitution of India. But in such case, the order must be justified with adequate reasons which reflect the violation of the accused's constitutional rights. Further, in cases where the facts reveal that the proceedings have become oppressive against the accused, bail can be granted.

On anticipatory bail, it was stated that the allegations need to be taken in consideration. It was opined that transit bail does not exist in the law; it is an improvisation of Section 438, CrPC. It was required in earlier times when modes of travel were slower and time consuming. In the present day with faster modes of travel, e-filing and e-courts, transit bail is not required. Consistency in grant of bail was stated to be a chief point of criticism of judges, as it may be perceived that on similar facts and similar cases the outcome of bail hearings is varied. A need was expressed for determining standards and policy with regard to bail to ensure uniformity. It was stated that it is the better conscience and not the better argument which should determine the outcome of a bail hearing.

Article 21 was emphasized as the constitutional North Pole for the judicial conscience. Judges were advised to keep a cool head and avoid provocation while hearing bail matters; and decide the matter as per law. Discussions were undertaken on the judgments in *P. Chidambaram v. Directorate of Enforcement* ((2019) 9 SCC 24) wherein it was stated that bail should not be granted

in economic offence cases; and *Gurbaksh Singh Sibbia & Ors. v. State of Punjab* (AIR 1980 SC 1632). It was stated that in economic offences, anticipatory bail should not be rejected on the basis of *P. Chidambaram* case and should be decided on merits citing *Gurbaksh Singh Sibbia* case. It must be kept in mind that bail matters essentially deal with liberty of a person and hence, a cautious approach is required.

Discussion were also undertaken on the extension of bail order by virtue of the judgment of the Supreme Court in extending limitations in pandemic (*In Re: Cognizance For Extension Of Limitation,* Suo Motu Writ Petition (Civil) No.3 of 2020). In regard to default bail it was stated that Section 167 CrPC does not contain a rule of limitation and hence, the extension of limitation *vide* the order of the Supreme Court would not operate as a grounds to deny default bail. In this regard, the judgment of the Supreme Court in *S. Kasi v. State through the Inspector of Police* (2020 SCC OnLine SC 529) was discussed.

Participant judges were advised to adjudicate within the contours of law and not to impose extraneous conditions in the case. The cases of *Dharmesh @ Dharmendra @ Dhamo Jagdishbhai @ Jagabhai Bhagubhai Ratadia & Anr. v. State of Gujarat* (Criminal Appeal No. 432 of 2021), Aparna *Bhat and Others v. State of Madhya Pradesh and Another* (Criminal Appeal No. 329 of 2021) and *State Rep. by the Inspector of Police v. M. Murugesan* (Criminal Appeal No. 45 of 2020) were discussed. Judges were advised to have a road map and the judgments in *Nikesh Tarachand Shah v. Union of India* ((2018) 11 SCC 1), *Gurbaksh Singh Sibbia, Arnab Manoranjan Goswami v. State of Maharashtra (*(2021) 2 SCC 427), *Anil Kumar Yadav v. State (NCT of Delhi)* ((2018) 12 SCC 129), *Dr. Sameer Narayanrao Paltewar v. State of Maharashtra* (Criminal Application (APL) No. 393 of 2021), *Hariram Bhambhi v. Satyanarayan* (Criminal Appeal No. 1278 of 2021) and *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* ((2011) 1 SCC 694) were emphasized upon. With regard to reversal of bail orders by the Supreme Court, the standard principles of administrative law are applied in such cases and very often non-discussion of the gravity of the offence also is a reason for interfering with the bail order. Concerns were expressed over delay in bail matters and also on the increase in criminal litigation due to greater inclusion of penal provisions in civil legislations.

A view was expressed that bail is often not considered as a matter of right; it is not only of judicial decision making but also of judicious decision making. Emphasis was placed on Article 21 of the Constitution of India and it was stated that constriction in the grant of bail is playing havoc with the criminal justice system. Emphasis was placed on the need to adopt a liberty-oriented approach to bail. The often cited objective of the criminal justice system i.e. maintenance of social order was discussed. However, from the prism of criminality the challenges involved in distinguishing between an offender and a criminal was highlighted. The trend in legislation of constriction – the increased tendency of subjecting almost every aspect of human life to criminal sanctions and the resultant choking of the criminal justice system was underscored. This increased criminal sanctions in civil matters was highlighted as a concern. It is crucial for judges to be aware about the present day realities of the criminal justice system and the delays involved. Reference was made to the

judgments in *R. P. Kapur v. The State of Punjab*, (AIR 1960 SC 862), *State of Haryana v. Bhajan Lal* (AIR 1992 SC 604), *State Of Bihar v. P.P. Sharma* (AIR 1991 SC 1260), *Shiva Nath Prasad v. State of W.B.* ((2006) 2 SCC 757) and *All Cargo Movers (I) Pvt. Ltd. & Ors vs Dhanesh Badarmal Jain* ((2007) 14 SCC 776). Emphasis was placed on the need to examine whether delayed criminal action involves an element of abuse of the judicial process and if the matter should be sustained; and whether the court should adopt a liberal approach in such cases to grant bail. It was stated that the proliferation of criminal law has led to an extensive invocation of these laws and in such a situation the courts are the only institution that can protect the liberty of the individual. This calls for a judicious exercise of discretion by the judges. Enhancement of quashment of bail orders and cancellation of bail orders on most limited grounds will ensure that there are not enough decisions from the trial courts. This will lead to havoc and a consequence will be that the Supreme Court will be flooded with appeals from such quashments and cancellations. Concerns were expressed on the prosecutorial tendency to act as advocates for the State rather than the citizens; and emphasis was placed on the need to adopt a justice oriented approach in litigation. Concerns were expressed as to the practice of delaying release of person on bail subsequent to the order the court on the grounds of verification of bail bonds.

On anticipatory bail reference was made to 41$^{st}$ Law Commission Report. Anticipatory bail was introduced to address the problem of wrongful arrests and abuse of the criminal justice system. The judgments of *State Rep. By The C.B.I v. Anil Sharma* ((1997) 7 SCC 187), *Sanjay Chandra v. CBI* ((2012) 1 SCC 40), *P. Chidambaram v. Directorate of Enforcement, Gurbaksh Singh Sibbia, Siddharam Satlingappa Mhetre* and *Sushila Aggarwal v. State (NCT of Delhi)* ((2020) 5 SCC 1) were referred to with regard to bail in economic offences. The need for introspection with regard to the approach to anticipatory bails was stressed. The judgments in *Neeharika Infrastructure (P) Ltd. v. State of Maharashtra* ((2020) 10 SCC 118) and *A.P. Mahesh Cooperative Urban Bank Shareholders Welfare Association v. Ramesh Kumar Bung* (2021 SCC OnLine SC 475) were discussed to emphasize on the role of the Writ Courts to protect the individual. Two remedies available to the writ courts in cases of unjustified prosecution were highlighted i.e. Anticipatory Bail under Section 438 and quashment of proceedings. However in cases when the remedy of quashment is sought and the individual is directed to apply for anticipatory bail, it may lead to docket explosion. It was opined that in such cases where the court is convinced that the case is an abuse of process it should deal with the same and such orders must be passed with adequate reasons to justify the action taken by the court. On the twin conditions for bail and the operating reverse burden at the stage of bail, it was opined that it is difficult to prove innocence at the stage of investigation especially as the accused does not know the case against him. With regard to cases under Narcotics Drugs and Psychotropic Substances Act, 1985 where no contraband is seized from the person and still the person is put in custody, it was stated that a distinction needs to be drawn between such cases and cases involving commercial quantity. The court was emphasized as the last bulwark to ensure justice and protection to the people in the present trend of increased criminalization under legislation. Concerns were expressed regarding the kneejerk reaction of the

legislature in enacting laws in recent times and the need for legislative audit was stressed. Emphasis was placed on a liberty oriented judicious approach.

In matters of bail in NDPS cases involving commercial quantities and the considerations for grant of bail, it was stated that as per the judgment of the Supreme Court bail may be granted when half of the maximum sentence is undergone. Reference was made to the judgments in *Union of India v. K.A. Najeeb* (Criminal Appeal No. 98 of 2021, (2021) 3 SCC 713) and *Thwaha Fasal v. Union of India* (2021 SCC OnLine SC 1000). In such cases it was advised that if it is alleged that the trial has not commenced, the court can ask the counsel to file the record of proceedings from the stage of framing of charges till the last day of hearing as this will show where the adjournments have taken place and the reasons for delay. If the delay is caused by the accused then he is entitled to benefit from such delay. However, if the delay is on account of prosecutorial lapses then it impacts Article 21 and hence, the accused may be granted bail. Reservations were expressed on the ground of 'society's cry for justice' which is argued in cases especially sexual offences to justify the sentence. This ground which was accepted in *Mukesh v. State (NCT of Delhi),* ((2017) 6 SCC 1) is a populist consideration which may not merit examination or application in judicial matters in court. The theory of residual doubt considered in death sentence cases was also discussed.