National Judicial Academy, Bhopal

REPORT

Refresher Course for Additional District & Sessions Judges

[P-1266]

30th & 31st October, 2022

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Refresher Course for Additional District & Sessions Judges (P-1266)
(30th & 31st October, 2021)

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The National Judicial Academy organized a two day online "Refresher Course for Additional District & Sessions Judges" on 30th & 31st October, 2021. The workshop aimed to discuss critical areas concerning adjudication at the District level. The sessions involved discussions on issues relating to effective handling of interlocutory applications; issues relating to sentencing; electronic evidence; and intricacies and nuances of law relating to bail.

46 judges participated from pan India representing 25 High Courts. The online refresher course provided participants a unique platform to share experiences and assimilate best practices. The emphasis was in enabling deliberations through clinical analysis of statutory provisions, and critical analysis of the relevant judgments.

Resource Persons

S.No.	Resource Person	Designation
1.	Justice Sunil Ambwani	Former Chief Justice Rajasthan High Court
2.	Dr. Justice Shalini P. Joshi	Former Judge, High Court of Bombay
3.	Justice Sanjeev Sachdeva	Judge, Delhi High Court
4.	Mr. Vakul Sharma	Advocate, Independent Counsel
5.	Justice R. Basant	Senior Advocate Supreme Court of India, former Judge Kerala High Court,
6.	Justice Subramonium Prasad	Judge, Delhi High Court
7.	Justice Ved Prakash Sharma	Chairperson, State Law Commission, Madhya Pradesh, Former Judge Madhya Pradesh High Court
8.	Justice Shashi Kant Agarwal	Former Judge, Allahabad High Court. Former Director, National Judicial Academy

DAY I
30thOctober 2021

Session 1
Theme: Effective Handling of Interlocutory Applications

The session initiated with the importance of interlocutory applications (*hereinafter "*IA") in the judicial system. The actual necessity and vitality of having the myriad species of the IA in the procedural law was traced, prior to delving into the functional difficulties posed by their (ab)use or (mis)uses.The proclivity of subjecting IAs by the advocates to systemic metastasis, rendering often a grinding halt of the proceedings or ensuring a procedural anorexia was diagnosed. The session attempted to visualize prognosis and suggest suitable operational resurrection(s) to deal with the all-pervasive systemic malady. Effective management of IAs demands attention because of its hydra headed uses and implications especially as a tool having disruptive and strangulating potentials. Contours of such (mis)use coordinates from delay tactics, to derail a court proceeding with a false navigation, to a systemic breakdown. Bad practices could be traced from using IA as a weapon as a subterfuge the initiation of a *lis*to be left to languish and pose systemic sepsis, to an interim order detaining or derailing the course of the court proceedings. The session also attempted to contemplate the innovative, pragmatic and feasible mitigating strategies to deal with the inordinate use of IAs to sabotage judicial proceedings. Managing adjournments in the wake of "docket explosion" was considered to be one of the major pathological causes. It was underscored that often the practice of many advocates thrives on filing and securing "interim injunctions". It extrapolates to the limits that in many cases, grant of injunction becomes the vanishing point of the adversarial parties, leading to choking of the justice delivery system on one hand and often setting a vantage point for coercive and involuntary negotiations on the other hand. It was however clarified that the purposes of injunctions must not operate as an end, but an aid to protect and preserve the sanctity and integrity of the subject matter (i.e. property etc.) until the final settlement or resolution of issues, or determination of the rights, or the interests of the parties therein. The session highlighted aspects of management of adjournments and epitomized the art of drafting an interim order. It was asserted that the single most aspect of controlling the malady of adjournment could converge to a foci of a judge being the master of his/her court. The deep and pervasive control may be attained by doing the simple daily things correctly and perpetually *viz.* ensuring effective service of summons or notices at every stage (which accounts for the fact that ~25% pending cases are awaiting service of summons at various stages). To catalyze this simple unitary process, use of indigenously developed (National Service and Tracking of Electronic Processes) NSTEP as a tool for quick service was suggested. It was suggested that "compensatory cost" (Section 35A of Civil Procedure Code, 1908 (CPC)), or "costs for causing delay" under Section 35 B, and "costs for expenditure or charges under Order 20A CPC, must be considered against the party seeking adjournment, alarming the seriousness and roping in procedural diligence and rigor. The general rule of allowing a maximum of three adjournments per party (Order 17 Rule 1 CPC) must be ratcheted up in principle. *M/s. Shiv Cotex v.Tirgun Auto Plast Pvt. Ltd*,(2011) 9 SCC 678was cited wherein the apex courtdirected courts to emulate and exercise discretionary jurisdiction in the following manner in the matter of granting adjournments:

> No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained.

The court may insist on a written submission to box-in unnecessary adjournments. Moreover, a judge must make it a routine to record the reason and the number of adjournment sought to effectively fossilize adjournment culture. Dismissals in cases of default or deliberate absence of party, or to proceed *ex-parte* against the defaulting party was flagged as yet another guard against practices of frivolous adjournments. The interest of administration of justice and people's faith in judiciary being more important than the interest of justice for any party in a case. It was further iterated that there are myriad spies of IAs other than the above two prominent ones.

The doctrine of *Dominus Litus* also was discussed. It was underscored that court must be mindful of the fact that it is for the plaintiff to identify parties with whom he has grievance and wants to litigate. The distinction between "necessary" and "proper" party to a *lis*was drawn. A "necessary party" is one without whom no order can be made effectively, and a "proper party" is one whose presence is necessary for the complete and final decision on the issues involved in the proceedings (Order 1 Rule 10 (2) CPC). The judicial discretion to add or delete a party to a *lis* must therefore be based on fairness. It was explained that a subsequent purchaser may be a "necessary party" but a person claiming title adverse to plaintiff or defendant is not a "necessary" or "proper" party. While addressing an application on impleadment the position of *dominuslitus* becomes important. A couple of supporting case law *viz. Razia Begum v. Anwar Begum,*AIR 1958 SC 886 , *followed in Kasturi v.Iyyamperumal,*(2005) 6 SCC 733 were cited.

It was highlighted that an academic research had claim that out of all IAs only 20% need actual judicial interventions. It was suggested that judges may flag party-wise IAs in every case with a unique easy to contemplate number (e.g. IA-01 to IA-10), such a proactive classification would enable the judge to be aware of the total number of IAs filed in a particular case (which otherwise often might not even be known to the judge). Moreover, the same will enable the judge to consider all or as many of them together and decide upon them efficiently.*Ramrameshwari Devi v. Nirmala Devi*, (2011) 8 SCC 249 was discussed to further explain interim injunctions, and tagging cost with grant of adjournment.

Session 2
Theme:Appreciation of Electronic Evidence: Considerations, Care & Caution

The session rolled-out with examining the nature and scope of electronic evidence (e-evidence). The machine language being binary i.e. "zero" (on) and/or "one" (off) and operating in electrical impulses makes it difficult for a common and untrained man to decipher the code by him/herself

unlike a common language know to him/her. Thus, communication between a machine (holding the information as data in binary language) and human (who understands and constructs data in form of a standardized socially accepted language) stumbles bottlenecks in precise & correct interpretations. The issue compounds further with the constant change owing to evolution in the machine language (e.g. in form of version upgradations, system compatibility, interaction enablement *viz.* Internet of Things [IoT] etc.). A brief classification of the types of digital evidence was discussed including a) Volatile (RAM, Virtual Drives etc.). Those evidences which are short lived and are dependent upon, and thrive temporally on some external stimulus such as power supply,on certain application platforms; and b) Non-volatile (flash-drives, hard disks, etc.) which can be stored digitally for a much longer period of time. The volatility of digital evidence is one of the cardinal factors for evidentiary data integrity, preservation, and safer transportation of the same. On creation, location, and preliminary detection of veracity of digital evidence, clarity on topics *viz.* digital footprints and importance of meta-data was discussed as sub-sets in the domain of digital forensics. The categories of digital evidence as recognized by the apex court of India and the High Courts were enumerated. Such judicially evolved jurisprudence included: *K.K Velusamy v.N.Palanisamy* 2011 (11) SCC 575, wherein the court held that, "compact disc can be produced as a piece of evidence that includes a compact disc containing anelectronic record of a conversation." In *Shamsher Singh Verma v. State of Haryana*, 2015 SCC OnLine SC 1242 the Supreme Court held Compact Disk to be a document.*Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1 was referred wherein the apex court appreciated the electronic evidence, whether in the form of CCTV footage, mobile devices, memory cards, data storage devices, intercepted communications over VoIP, IP Addresses, etc. while delivering the judgment.While dealing with the importance and utility of International Mobile Equipment Identity (IMEI) numbers, which are 15 digit unique numbers for each digits, *Gajraj v. State (NCT of Delhi)*, (2011) 10 SCC 675; *Mohd. Arif v. State (NCT of Delhi)*, (2011) 13 SCC 621.In *Om Prakash Verma v State of West Bengal*2017 SCC OnLine Cal 13205, the High Court of Calcutta categorically directed a Standard Operating Procedure (SoP) prior to allowing interim custody of a stolen devicepending investigation, enquiry or trial, "the same should not be granted till the IMEI number or other unique identification number, … including its brand/product number and manufacturing details are ascertained and noted in the case records for identification of such device during trial." The doctrine of "silent witness theory" (of CCTV footage) formed part of discourse. It was argued citing *KishanTripathi* v. *State*, 2016 SCC OnLine Del 1136, "The CCTV footage, which was directly and immediately stored in the hard drive of the computer is the original media, that was self-generated and created without any human intervention. …is not secondary evidence and does not require certification under Section 65B of the Evidence Act. This issue is no longer *res integra* and is settled in the decision of the Supreme Court in *Anwar P.V. (S) v. P.K. Basir*, (2014) 10 SCC 473". It would be pertinent to quote the relevant part of the judgement in *Kishan Tripathi Case* which eludicated that:

> The CCTV footage is captured by the cameras and can be stored in the computer where files are created with serial numbers, date, time and identification marks. These

> identification marks/details are self generated and recorded, as a result of pre-existing software commands. The capture of visual images on the hard disc is automatic in the sense that the video images get stored and recorded *suo-moto* when the CCTV camera is on and is properly connected with the hard disc installed in the computer. It is apparent in the present case from the evidence led that no one was watching the CCTV footage when it was being stored and recorded. The recording was as a result of commands or instructions, which had already been given and programmed. The original hard disc, therefore, could be the primary and the direct evidence. Such primary or direct evidence would enjoy a unique position for anyone who watches the said evidence would be directly viewing the primary evidence. Section 60 of the Evidence Act states that oral evidence must be direct, i.e., with reference to the fact which can be seen, it must be the evidence of the witness, who had seen it, with reference to the fact, which could be heard, it must be evidence of the witness, who had heard it and if it relates to the fact, which could be perceived by any other sense or any other manner, then it must be the evidence of the witness, who says who had perceived it by that sense or by that manner. Read in this light, when we see the CCTV footage, we are in the same position as that of a witness, who had seen the occurrence, though crime had not occurred at that time when the recording was played, but earlier.

The two fold integrity test essential to admit CCTV footage was discussed w.r.t. *Kishan Tripathi Case* wherein the court held that:

> Per force, we must rule out any possibility of manipulation, fabrication or tampering. The hard-disk CCTV footage must pass the integrity test. It is a twofold test, system integrity and record integrity. It is with this over cautious and pensive approach, that we have proceeded and have bestowed our consideration. We would accept the genuineness and authenticity of the CCTV footage played before us, for good and sound reasons.

Three cardinal principles while dealing with digital evidence was enumerated as:

i. Standard of Proof
ii. Source and authenticity
iii. Best evidence rule

Regarding the standard of digital evidence the discourse went on to highlight *Tukaram S. Dighole v. Manikrao Shivaji Kokate*, (2010) 4 SCC 329, wherein the apex court held that "standard of proof" in the form of electronic evidence should be "more accurate and stringent" compared to other documentary evidence.

Moreover, in *Sanjay Singh Ramrao Chavan v. Dattatray Gulabrao Phalke*, (2015) 3 SCC 123, the court went on to extend yet another principle that, "source and authenticity are the two key factors for an electronic evidence".

Omychund v. Barker,14 Q.B.D. 667, at p. 708 was cited wherein according to Lord Hardwick, "the Judges and Sages of law have laid it down that there is but one general rule of evidence the best

that the nature of the case will admit." Accounting for the seriousness of proper investigation in case of dealing with electronic evidence, it was underscored that "non-production of CCTV footage, non-collection of call records (details) and SIM details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence." as held in *Tomaso Bruno v. State of UP*, (2015) 7 SCC 178.

The case law jurisprudence on Section 65B of the Indian Evidence Act, (IEA) and its various implications was chronologically traced and analyzed. In *Sonu @ Amar v. State of Haryana*, the apex court dealt with retrospective application of Section 65B with reference to *Anwar v. Bashir Case*. The court held that:

> This Court did not apply the principle of prospective overruling in *Anvar's case*. The dilemma is whether we should. This Court in *K. Madhav Reddy v. State of Andhra Pradesh*, (2014) 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of *Anvar* is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice.

Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801, holding that "requirement of certificate under Section 65B(4) is not always mandatory… legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies." has been overruled by *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*,(2020) 7 SCC 1, wherein, the apex court held that, "It is clear that the major premise of *Shafhi Mohammad* that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under section 65b(4) in cases in which such person refuses to give it." The apex court *Arjun Panditrao* further went on to clarify that:

> We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In *Anvar P.V. Case*, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned.

In the wake of the extremely fast changing and ephemeral developments in the world of technology, and to keep pace with the evolving nature of the technology, whether the judges as vanguard need to scale up as a technocrat too?

DAY 2
31st October 2021
Session 3
Theme: Intricacies & Nuances of Law Relating to Bail

The sessional objective delved into the philosophical jurisprudence of bail and its ramifications therein. The constitutional underpinnings of the concept of bail and its evolution through case law jurisprudence including the exceptional dilatation of the popular doctrine "bail is the rule and jail is exception" (as expounded earlier by the Supreme Court of India in *State of Rajasthan v. Balchand*, (1977) 4 SCC 308), in the case of special laws was examined. The cardinal principles of (dis)allowing bail and the relevant considerations and nexus therein were examined. The session dissected and dilated on the sensitive contours of "conditional bail". The judicial proclivity to inadvertently transgress the power of judicial discretion leading to potentially unwarranted ramifications, sometimes abridging and truncating public trust on the institution was contemplated. Moreover, the dimensions of "risk assessment" of bail especially while dealing under special enactments was examined.

It was asserted that in *absentia* of a statutory definition of "bail" under Code of Criminal Procedure, 1973 (CrPC) reliance could be drawn from the elucidations expounded by higher courts in India on several occasions. In *The State of Maharashtra v. Viswas Sripati Patil,* 1978 Cri LJ 1403, the High Court of Bombay held, "The term 'bail' connotes security for prisoner's appearance and its effect is simply the temporary release of the person pending trial". The Allahabad high Court, in *Ram Newas v.Phaozdar,* 1987 All LJ 49, held that:

> As a matter of fact the term 'bail' when used as a noun according to grammar, means the security given for the due appearance of a prisoner to obtain his release from imprisonment. In other words, the 'bail' connotes the means or process of procuring the release of an accused charged with certain offence, by insuring his future attendance in court and compelling him to remain within the jurisdiction of the Court. To put it differently, even after having been released from jail, either on the basis of fake or fabricated bail order; or on the basis of a genuine and legal bail order; but still he is within the jurisdiction of the Court. It is better to quote the relevant discussion in *Corpus Juris Secundum*, Volume 8 (Eight), page 31, page 60 (Sixty) as follows:
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> > "One enlarged on bail is, however, also considered as being in the custody of the law and the bail does not divest the Court of its inherent power to deal with the person of the accused."

While the Madras high Court subsequently in *Natturasu v. State by S.I. of Police, Mannirpallam Police Station*, 1998 Cr LJ 1762, went on to hold that, "'bail' connotes the process of procuring the release of an accused charged with certain offence by ensuring his future attendance in the Court for trial and compelling him to remain within the jurisdiction of the Court.". The apex court in, *Vaman Narain Ghiya v. State of Rajasthan,* (2009) 2 SCC 281, further went on to assign "bail" as a right against State, as it held that "[c]onceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints."

Dealing with the importance of the "bail jurisprudence" (both for its statutory as well as constitutional underpinnings) the following case law would help demystification. *Nagendra v. King Emperor,* AIR. 1924 Calcutta 476, held that, "the object of the bail is to secure the attendance of the accused *at the time of the trial* and that the proper test to be applied for the solution of the question whether bail should be granted or not is whether it is probable that the party will appear *to take his trial"*. In *G. Narasimhulu* v. *Public Prosecutor,* (1978 Crl.L.J. 502), the Apex Court held that "the requirement for bail is *merely* to secure the attendance of the prisoner *for trial* and that it is the *duty of the Court* to admit the accused to bail, wherever practical, unless there are *strong grounds* for supposing that such persons would not appear *to take the trial*." Reasoning as to why it is imperative for a court to be immaculate in (dis)allowing bail may be traced in *Natturasu v. State,* 1998 Cr LJ 1762 wherein, the court held that, "the object of the bail is to secure the *attendance of the accused at the trial*. The accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself in the trial than if he is in custody.… [hence] a presumed innocent person must have his freedom in the form of bail to enable him to establish his innocence at the trial".

The vital endeavor to balance the conflicting interests *viz.,* the tenets of upholding the "personal liberty of an individual" *versus* "ensuring that society as a whole remains protected", was reiterated. The apex court in *Vaman Narain Ghiya v. State of Rajasthan,* (2009) 2 SCC 281, 286 held that, "Bail may thus be regarded as a mechanism whereby the State devolutes (sic) upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice."

The blurred area under Section 436 CrPC, "judicial discretion and the principle of "hunch of the bench" was dealt with in light judgments including *Gudikanti Narsimhulu v. Public Prosecutor,* (1978) 1 SCC 240 and *State of Maharashtra v. Sitaram Popat Vetal,* (2004) 7 SCC 521.

The scope of power of Supreme Court to "release without surety" on one hand to the "propriety for ordering astronomical amount as surety" on the other hand was measured with the observations made by the apex court in *Moti Ram v. State of Madhya Pradesh,* (1978) 4 SCC 47. The principle of "parity" on grant of bail to co-accused or as a precedent was discussed with help of *Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana,* (2021) 6 SCC 230.

The essential ingredients of a bail was discussed. A well-reasoned bail order is a *sine qua non.* The validity of a bail order is justiciable. The afore said principles were explained to the participants in the light of case law jurisprudence including, *Sonu v. Sonu Yadav*, 2021 SCC OnLine SC 286; *Mahipal v. Rajesh Kumar*, (2020) 2 SCC 118; *Nandan Jaiswal v. Munna alias Munna Jaiswal*,(2009) 1 SCC 678; *Ram Govind Upadhyay v. Sudarshan Singh*,(2002) 3 SCC 598. The scope and distinctions between "default bail" and "anticipatory bail" w.r.t. Section(s) 167(2), 437 & 438 respectively was drawn with the aid of several landmark judgments including *Sarvanan v. State*, (2020) 9 SCC 101; *M Ravindran v. Intelligence Officer Directorate of Revenue Intelligence*, (2021) 2 SCC 485, *Nathu Singh v. State of U.P.*, (2021) 6 SCC 64; *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694; *Shri Gurbaksh Singh Sibbia v. State of Punjab*, (1980)2 SCC 565. Nature of conditions which may be imposed while granting anticipatory bail orders, its scope and interpretation of "interest of justice" as under Section 438(3) was explained with the help of *Kunal Kumar Tiwari v. State of Bihar*, (2018) 16 SCC 74.

Session 4

Sentencing Practices

It was discussed that the Supreme Court in the case of *Bachan Singh v Union of India* (1980) 2 SCC 684 and *Machhi Singh v Union of India* (1983) SCC 3 470 has provided certain broad guidelines which have to be followed the courts. It was stated that while sentencing the judge has to take into account both the mitigating and aggravating circumstances. A balance sheet has to be prepared to weigh both the crime (brutality, manner of crime etc.) and the criminal (age, chances of rehabilitation, prior criminal record etc.) It was highlighted that the Code of Criminal Procedure,1973 states that special reasons has to be provided whenever the death sentence is pronounced. It was emphasized that sentencing process is of very complex nature and the judge has to critically apply his mind to the fact situation. The judgment of *Rajbala v State of Haryana* (2016) 1 SCC 463 was highlighted wherein it was enunciated that the sentence should be appropriate, adequate, just and proportionate. It was stressed that absence of sentencing guidelines has come under major criticism and two committees i.e. Malimath Committee (2003) and Madhava Menon Committee (2008) has recommended the need for sentencing guidelines. It was opined that the sentencing system has become judge centric which affects the process due to arbitrariness, inconsistency and unpredictability. It also affects the public confidence in the justice system. The inconsistency in sentencing due to divergent opinions of judges was highlighted through the examples wherein different sentences were given on the same facts. It was stressed that the opportunity provided accused on the issue of sentencing should be real and substantive opportunity. It was further emphasized that the personal predilections of the judge should not affect the sentencing process.