NATIONAL JUDICIAL ACADEMY

ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES [P-1285]

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PROGRAMME REPORT

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Session 1: Precedents: Navigating through Precedential Conflict

Speakers: *Mr. M.S. Ganesh and Mr. Sujit Ghosh*

The session dwelt upon the doctrine of precedent and what it signifies at length. Concepts of stare decisis, ratio decidendi, obiter dicta and per incuriam were explained. It was stated that staredecisis means to stand by decisions and not to deviate from what is settled, to maintain consistency and avoid uncertainty [*Shanker Raju v. Union of India*, (2011) 2 S.C.R. 1]. Ratio decidendi refers to principle of a case on which court's decision is founded, the ratio of a case; Obiter dicta meaning by the way i.e.a statement or opinion of belief considered authoritative because of the dignity of the person making it; and Per incuriam meaning where a case is wrongly decided when a relevant case has already been decided and not considered by a judge. The session thereafter threw light upon where the Supreme Court and High Courts stand at present with regard to the doctrine of precedent. Art. 141 and Art. 144 of the Constitution of India were highlighted stating that they are an adaptation of Section 212 and Section 210 respectively of the Government India Act 1935 with certain alterations. It was pointed that there is no constitution in the common law jurisdictions which has similar provisions as Art. 141 and Art. 144 of the Indian Constitution. Art 141 of the Indian Constitution and Art. 3 Sec 1 of the United States Constitution were comparatively analysed. The problems arising in the Indian Supreme Court pertaining to conflict of opinions and plurality of decisions were contrasted with the challenges faced by the US Supreme Court.Following judgements were referred *Mahadeolal Kanodia v. The Administrator-General*, 1960 AIR 936;*Official liquidator v. Dayanand &Ors*, (2008) 10 SCC 1;*Shanti Fragrances v. Union of India*, (2018) 11 SCC 305 wherein Supreme Court has explained the whole issue of the doctrine of precedent vis-à-vis the Supreme Court itself for constitution of an appropriate larger bench.

It was emphasized that in case of application of doctrine of precedent in High Courts, intra court application is not a problem, however, as between High Courts since each High Court possesses autonomy constitutionally which militates against stare decisis, ratio decidendi and obiter dicta as being binding. The decision of another High Court on the same point is only of persuasive value and not binding. On this issue, a reference was made to the case *Valiamma Champaka Pillai v. Sivathanu Pillai &Ors* (1979) 4 SCC 429. It was suggested that every bench of every High Court must seek to ensure judicial discipline and comity consistent with established notions of the doctrine of precedent.

It was opined that the concepts of stare decisis, ratio decidendi and obiter dicta are guiding principles. It was highlighted that precedent is a concept of common law and the primary objective of precedent is to have the consistency of law so that justice could be dispensed in equal measure in a similar state of facts. It was pointed that due to the hierarchy in the judicial system conflicts tend to arise. The session included deliberation on how to manage conflict within conflict and when the conflicting decision by co-equal strength of a superior judicial forum becomes a problematic issue [*Central Board of Dawood Bohra v. State of Maharashtra*, (2005) 2 SCC 673]. It was mentioned that there are divergent opinions of courts on this point of conflicting decisions by co-equal strength [refer *Vasant Tatoba Hargude and others v. Dikkayya Mattaya Pujari*, AIR 1980 Bom 341; *M.M.*

Yaragatti v. Vasant, AIR 1987 Kar 186; *Raman Gopi&Anr. v. Kunju Raman Uthaman*, 2011 SCC OnLine Ker 4028; Miles v. Jarvis 1883 LR Ch Div. 833 etc.]. On the concept of obiter dicta following judgements of the Apex Court were referred *Municipal Committee,Amritsar v. Hazara Singh*, (1975) 1 SCC 794; *Oriental Insurance co. ltd. v. Meena Variyal& Ors*. (2007) 5 SCC 428; and *Arun Kumar Aggarwal v. State of MP*, (2014) 13 SCC 707. On the doctrine of per incuriam the judgement in the case *Philip Jeyasingh v. The Joint Registrar*, (1992) 2 MLJ 309 was discussed. The session further involved deliberation on the doctrine of sub-silentio, wherein it was pointed out that the Supreme Court has stated in a case judgement passed sub-silentio is of no moment [*A-One Granite v. State of U.P. &Ors*,(2001) 3 SCC 537]. Participant judges raised a question that if the court cannot assume jurisdiction without formulating a substantial question of law in case of a second appeal, how an order under Order 41 Rule 11 of the CPC could be treated as a binding precedent. The session also threw light on the exceptions to binding precedents like in contempt cases. Lastly, the principle of precedent was explained in light of ratio decidendi and obiter dicta wherein following key points were mentioned:

- Unless there is a factual symmetry there is no judicial precedent where a ratio can be blindly applied;
- A judgment is an authority of what it decides and not the conclusion that comes out of it;
- Do not extract a sentence from a decision and build on it a precedent;
- Scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation.

Session 2: Bench and the Bar: Operative Norms for Optimising Justice Delivery

Speakers:*Justice N. Seshasayee and Mr. AK Sriram*

The session included a pragmatic and practical exposition onmanaging the bar to optimise justice delivery. Judges were suggested to realise the shift from the bar to the bench in order to understand the modesty of a profession. It was pointed that once an advocate becomes a judge s/he is bound to follow the ethical code of the profession and becomes a loner that is where judges have to shift theirmindset to restrain themselves and their attitude. It was emphasized that pendency is an issue of discussion whereinonly judges are held accountable and not the bar. Therefore, a judge is required to do his best in their work while at the bench. It was opined that the bar and the bench are two sides of the same coin. The purpose of bar and bench are differentand it was asserted that judges must perform according to the purpose for which respective profession is meant. On the constitution of bar, it was set forth that bar is a bandwagon of different characteristics, personalities and accordingly, judges are required to suit and adjust themselves to different personalities at the bar. It was suggested that a judge should take absolute control over his court and case. It was stressed that if a judge is comfortable with his purpose then the lawyer appearing before him will also be comfortable.

The session included a discussion on managing lawyers efficiently to enhance judges' comfort at the bench. It was stated that the bottom line is how to win the bar and influence their attitude. The

performance of a judge must speak for him/her and nothing else, b00e simple decent human being, not to function beyond boundaries. It was suggested that judges must neither allow all cases nor put a stay on all cases but rather decide as per the requirements of a case.The session threw light upon some Dos and Don'ts that a judge may work upon including:Avoid prejudice towards any stakeholder involved; take note of the language - modulate oneself to convey the purpose; Stay calm and relaxed; take care of health. All thesefactors will reflect on the bench. It was highlighted that judges have wide powers which give them the freedom to go beyond boundaries but s/he must use the power with restraint. It was also mentioned that consistency is an important aspect. Some suggestions on how to perform the best and manage the bar with practical examples, real experiences formed part of the discussion. The session was broadly categorisedinto 3 aspects:

1. Relationship between the bench and the bar as partners in the administration of justice
2. Responsibility of bench and bar towards the community at large.
3. Administration of justice delivery

It was stated that for the benefit of the justice system and to ensure the rule of law both bar and bench must work in coordination. The relationship between the bench and the bar is one of the most crucial, delicate yet important aspects. A few attributes of a professionalrelationship between bench and bar were enumerated such as legal assistance, diplomacy, fearlessness, coordination, and ensuring justice is done. It was emphasized that the judiciary is being followed,watched and stalked continuously and therefore, the bar has an important role of being a protector of the judiciary.Communication skills are important for both bar and bench. It was pointed that due to the virtual mode of court proceedings the relationship between the bench and bar have become slightly different due to a lack of interaction. The session also threw light upon what is expected and what is not expected from judges from a lawyer's perspective. It was underscored that attributes expected from a judge include friendly, accommodative, liberal, etc., whereas what is not expected from judges include heckling juniors, threat of imposition of cost, and losing temper. Lastly, the importance of use of humour to lighten a situationin the court was stressed but at the same time judges were cautioned to maintain a certain degree of pleasantness, that is where the relationship between bar and bench will improve.

Session 3: Art of Judgment Writing: Judicial Modesty & Moderation

Speakers: *Justice Sunil Ambwani & Mr. Ramakrishnan Viraraghavan*

The session commenced by highlighting the importance of judicial modesty and moderation in writing judgments. It was emphasized that a modest and moderate judgment is difficult to challenge in appeal and the absence of modesty and moderation makes a judgment easy to challenge. Immodest and extreme judgments are more susceptible to be challenged in the appeal courts. A single paragraph is enough to get an admission and a stay. The discussion further highlighted that to arrive at a modest and moderated judgment judges ought to have modest and moderate thinking. Such thinking is possible only when a judge imbibes qualities like- reasonableness and unassertiveness. The true nature of a judge is reflected in his judgments therefore, judges should be ought most cautious and meticulous while writing judgments. It was highlighted that moderate living has its own benefits like- good health and long age etc. The discourse thereafter, discussed

the significance of honesty, hard work, humility and good health for High Court judges. Judges should aim to deliver judgment of high quality on a consistent basis since each and every judgment and order of a judge is equally important. No matter how big or small the judgment is, it is important that the quality of judgment of highest standard. It is the duty of judges towards the society and the justice delivery system. It was emphasized that judgment writing should be learned through experience and training. The judges must overcome the psychological impediments such as doubts, lack of self-confidence and procrastination in writing judgments.

Judgment writing should be done with minimum expectations and judges should start and finish the process with diligence. Judges should not wait for motivation rather, they should come in action themselves while writing judgments. Judges were suggested to follow five seconds and five minutes rule so that there is not much gap in thinking and writing judgment. Commencement of writing judgment takes time but subsequently, everything falls in place. The judges should focus on process and should not be concerned about the output. The three basic features of a good judgment i.e., brevity, simplicity and clarity were explained.

It was underscored that the primary audience of a judgment is the losing party. Therefore, the judgment should clear and coherent enough to communicate the reasons to the losing party. The secondary audience of the judgment may be the district judiciary and the society at large. The government can also be an audience. The judges were cautioned to remember that the newspaper and mediaare not the audience and judges should never write for them.

It was suggested that the judgment should be deal with the issues at hand and must not be used for displaying the knowledge of law and literature. At the same time judgments should not be written to impress fellow judges, Supreme Court or to get publicity. The protocols for writing a judgment were discussed with the participants. Difficult cases should be identified and the source of disquiet should also be recognized. The documents should be read before the hearing and issues should be identified. Judgment writing should commence early. Judges must write down their notes about the hearing, arguments and documents. After hearing there should be a schedule with times frames to write the judgment. Judges must set aside sufficient time on a daily basis to write judgments. While dictating judgments, there must be a framework, judges may keep at handbroad words for each paragraph and thereafter, start dictating their judgment using framework as a guide. The suggested framework may consist of technical aspects (name of the court, case number, parties, provision of law), introduction, body of the judgment (detailed reasoning and analysis) and operative portion (disposition and the final result). Thereafter, the rule of hard writing and easy reading was explained. The significance of time management and case management also formed part of the discourse.

It was opined that judgments are written for the society as well. This may include common man, academics, law schools, law students and media. It was stressed that a judgment signifies that fair hearing to parties has been ensured. It was suggested that while writing a judgment, a small part of the judgment should also highlight the process through which the case has passed and how fairnesswas ensured in that process. The different ways to decide a case and writing judgment were also discussed. It should never be forgotten that the ultimate objective is to arrive at the truth on the basis of settled principles of law and to decide the dispute between the parties. In complex cases involving several rounds of litigation, the judges can follow the method of asking lawyers to provide the list of dates of facts so that proper history of factual part of the case can be written. The opening statement should be able to signify the subsequent part of the judgment. The issues must be

framed after having discussion with the parties and should be mentioned immediately after the opening statement. In criminal cases judges must mention in the beginning of the judgment about the material which is brought before them, what kinds of documents were produced and who were the witnesses. In civil cases, the evidence which is going to be considered must be mentioned. A judge should be a good precis writer and precis of evidence and contentions should be written. Judges must learn the art of writing precis. Reasoning derived from arguments and evidence should be logical. All methods of reasoning are accepted provided it results in arriving at the truth. Various forms of reasoning processes including analogical process, inductive process, deductive process, inferential process and intuitive process were explained.

Thereafter, the impact of bias on judgments was discussed. Some biases are conventional like- bias in favor of poor person and deprived sections of society but subjective biases like- bias against color or height of a person will completely vitiate the judgment. While suggesting various methods to address biases judges were advised on sanitizing themselves. Firstly, one must understand and recognize the bias and subsequently, de-sanitize oneself while writing a judgment. The example of the American Bar Association's strategy to de-sanitize young judges where they are given psychological questionnaire listing biases against woman, abortion and blacks among others was referred. The latent biases are find out in this process and then recognized by judges. The rationality principle propounded by Max Weber was referred. Thereafter, writing of operating portion of the judgment was discussed. While discussing the concept of monkey's tale it was explained that there should not be any gap in the judgment which gives scope to lawyers to take advantage of that and the judgment should be self-sustaining and conclusive.

Session 4: Supervisory Power of High Courts: Role of Guardian Judge(s)

Speakers: *Justice B.S. Chauhan & Justice Roshan S. Dalvi*

The session commenced by referring to the constitutional framework for the supervisory power of High Courts. Article 229 empowers the Chief Justice to appoint and deal with the officers and staff of the High Court and Articles 233 to 237 deals with the subordinate judiciary. It was stressed that subordinate judiciary is the face of the Indian judiciary as it interacts with masses to deal with them every day. They are responsible to determine the persona of the Indian judiciary. Thereafter, the issue of All India Judicial Services was discussed. It was stressed that the High Court is chosen to be the custodian of the subordinate judiciary so as to provide independence to the judiciary and ensure separation of power which is recognized as the basic features of the Constitution of India. Another reason was to ensure that judicial officers are free from external pressures while deciding cases. To explain the total and absolute control of the High Court on subordinate judiciary Article 235 was discussed in detail. It was underscored that judicial officers, administrative department and ministerial staff comes under the supervisory control of the High Court according to Article 235. Posting, promotion, disciplinary proceedings, imposition of punishment and all administrative issues have to be dealt by the High Court. It was stressed that it is the duty of the High Court to protect honest judicial officers from false complaints. In this regard *Shamsher Singh &Anr vs State Of Punjab*, 1974 AIR 2192 was referred and the scope of Article 235 was discussed. The circumstances under which disciplinary proceedings can be commenced against a judicial officer were explained.

The issue of adverse remarks in judgment was highlighted by referring to various judgments of the Supreme Court. It was expounded that when the court wants to make an adverse remark against a

judicial officer they ought to follow guidelines of the Supreme Court before making such remarks. The court must ensure that whether the officer against whom the court is going to make a remark is before the court or in a position to lead defense, whether there is some evidence on record justifying such remark, does it reflect on the integrity of the judicial officer and whether such remarks are necessary to decide the case or are going to make an integral part of the judgment. After ensuring all these tests, if the High Court has to make the adverse remark then it should be done on the administrative side. The officer must be called and may be given an opportunity to explain. Accordingly, decision must be taken. The representation of the officer for his defense should be considered.

While discussing writing of the annual confidential reports (ACRs) it was highlighted that ACRs give opportunity to judicial officer to improve and inculcate discipline. The ACRs must be recorded objectively and impartially and the records of the concerned judicial officer must be checked. It was opined that remarks like 'outstanding' should be given only after ensuring that the judicial officer deserve that in totality. Reasons must be recorded in situation of downgrading of ACRs. The material and basis of such downgrading should be recorded. Adverse entries must be communicated to the concerned officer and if the officer is aggrieved, opportunity to represent him for correction should be given. Conversely, good entries should also be communicated to the officer as was emphasized in *Dev Dutt v. Union of India*, AIR 2008 SC 2513 and *Sukhdev Singh v. Union of India*, (2013) 9 SCC 566 by the Supreme Court.

Moreover, the meaning of word 'guardian' was discussed and the Guardians and Wards Act, 1890 was referred. Every guardian has wards and every guardian judge has many wards in the subordinate judiciary. He is the guardian and leader. Guardian has no rights and privileges and he/she has obligation, responsibility and duty. Guardian implies a position of trust, care and custody and not only control. It was highlighted that understanding of who is a boss and who is a leader is crucial to understand the role of public servant. Thereafter, different roles of a boss and a leader were discussed. It was opined that a boss is a good instructor but a leader is a good model. So, a guardian judges should inspire judicial officers to emulate him/her. A leader works as a team. Various aspects of control of judicial officers including appointments, confirmation, transfers, promotions and discipline of work were discussed. The process of confirmation after probation was discussed and the special needs of female candidates were highlighted with significant illustrations. Regarding the transfer of judges, it was opined that the objective test of "where you are known you cannot preside" is not satisfied equally between male judges and female judges and balancing of that position is required to be done. It is important that guardian judges think of gender perspective while discharging their duties. While focusing on the ambit of responsibility of a guardian judge it was opined that the disciplinary control of judges and staff includes vigilance on judicial misconduct. This includes dishonest deeds, attire, demeanor, favoritism, social interactions, punctuality and expedition. The issue of writing long judgment and judgment without reasoning by judicial officers was discussed and it was opined that guardian judges must interact with the concerned judicial officer to sort out issues in writing judgment. Regarding appraisal and confidential report it was opined that the objective of such exercise should be to inculcate discipline and not to demoralize the judicial officer. The dignity and independence of the judicial officer should be respected. The evaluation of judgments must include qualitative and quantitative parameters with reasons.
