

NATIONAL JUDICIAL ACADEMY



ORIENTATION COURSE FOR NEWLY ELEVATED HIGH COURT JUSTICES

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Programme Coordinators:

Dr. Amit Mehrotra and Mr. Prasadh Raj Singh

Faculty National Judicial Academy

The National Judicial Academy (NJA) has organized a two-day online orientation course for Newly Elevated High Court Justices on 30th April & 01th May, 2022. The orientation course provided a forum for participant justices to deliberate upon contemporary themes, recent trends and development in law & practice. The programme included areas such as Independent and Impartial Judiciary: A Prerequisite to Constitutional Democracy and Rule of Law; Judiciary and Media: Need for Balance; Inherent Powers, Suo Moto Powers and Powers of Judicial Review. One of the objective of the programme was to discuss the functions and powers of the constitutional courts pertaining to substantial question of law. The course involved an intensive discussion on the magnitude and ramifications of various facets of free and impartial administration of justice.

Session 1

Independent and Impartial Judiciary: A Prerequisite to Constitutional Democracy and Rule of Law

Resource Persons: Justice Akil Kureshi and Mr. C.S. Vaidyanathan

The session threw light on the emergence of independent judiciary while considering the approach adopted by judges starting from deference to striking down the Constitutional amendments. Emphasis was drawn to the case *I.C. Golaknath v. State of Punjab* 1967 AIR 1643 wherein the Apex Court categorically set the trajectory and overruled its decision in *Shankari Prasad* and *Sajjan Singh* case and held that Parliament had no power to amend part III of the Constitution so as to abridge or take away any of the fundamental right. It was asserted that judiciary has over the past 75 years earned the utmost confidence and public trust amongst the three coordinated organs. The institution has commanded trust, respect, and confidence and has been able to maintain high level of believability manned by judges. It was emphasized

that Constitutional office holder should own allegiance neither to any political parties nor any particular individual but to the constitution alone.

It was highlighted that while drafting the Constitution, members of the constituent assembly were essentially circumambient with three notions i.e. freedom struggle, aftermath of World War II and partition followed by the trail of obliterations. The framing of the Constitution therefore predominated the idea of protecting rights of the citizen. It was accentuated that members of the constituent assembly were in favor of incorporating a distinctive chapter for fundamental right fused with a steadfast machinery to protect it in the Indian Constitution. A reference was made to Article 12 outlining that its scope not only covers the Centre and State government but extend its jurisdiction to include state agencies and instrumentalities as well. Subsequently, Article 13 was emphasized with a note that state shall not make any law which takes away or abridges the right conferred by the Constitution under part III.

Reference was made to the book titled *The Indian Constitution: Cornerstone of a Nation* by *Granville Austin* wherein it is mentioned that “*the subjects loomed largest in the minds of Assembly members when framing the Judicial provisions were the independence of the courts and two closely related issues, the powers of the Supreme Court and judicial review*”. During the course of discussion it was emphasized that the Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. Therefore, if beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence. The Constitutional safeguard and duties of Constitutional court to keep the executive and legislative within its legal and constitutional bound were discussed along with the doctrines of legislative competence and manifest arbitrariness.

A reference was made to a series of judgments starting from *Shankari Prasad v. Union of India*, AIR 1951 SC 458, *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 followed by *I.C. Golak Nath v. State of Punjab*, AIR 1967, SC 1643 wherein the concept of prospective overruling was introduced. Subsequently, attention was drawn to the case *Kesavanand Bharti v. State of Kerala*, AIR 1973 SC 1461 wherein the Apex Court introduced the concept of *Basic Structure Doctrine*. It was underlined that the judgment in *kesavanand Bharti* is exceedingly imperative because it puts the Constitution of India beyond majoritarianism.

On independence of judiciary vis-à-vis appointment and transfer of judges following cases were deliberated upon; *S.P. Gupta v. President of India* AIR 1982 SC 149, *Supreme Court Advocates-on-Record Association (SCARA) v. Union of India* (1993) 4 SCC 441, *Supreme Court of India (In Re: Appointment & Transfer of Judges)* AIR 1999 SC 1 and *Supreme Court Advocates-on-record Association & Anr. v. Union of India* 2016 5 SCC 1

It was emphasized that power of judicial review is immeasurable and forms part of the basic feature of the Constitution. To stress upon the powers of judicial review following judgements including *S.R. Bommai vs Union of India* 1994 SCC (3) 1 and *L. Chandra Kumar v. Union of India* AIR 1997 SC 1125 were deliberated upon. It was accentuated that institutional transparency is indispensable and one must act in accordance with the requirement of the Constitution and not in arbitrary or whimsical fashion but purely to advance the object enumerated in the preamble of the Constitution.

Proclamation of emergency and exercise of power under Article 356, summoning of parliament, and power of pardon were other areas discussed in light of judicial review coupled with judiciary manageable standards for reviewing such powers. The importance of checks and balances was also acknowledged with the contemporary mode of governance in connection with judicial scrutiny. Attention was drawn to the doctrine of separation of power which is

firmly engrafted in the Constitution and ensures the importance of Constitutional supremacy. It was opined that the dichotomy between duties *versus* inclination is where a balance needs to be attained in order to achieve the goal of doctrine of separation of power. Lastly, it was highlighted that the independence of an individual judge as against the collectivity of the institution was a thought perhaps not present in the mind of the Constitutional makers while drafting the constitution. A reference was made to the case *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1 with regard to the decisional independence and it was suggested that a contrivance is required to handle such circumstances

Session 2

Judiciary and Media: Need for Balance

Resource Persons: Justice Gita Mittal and Justice G. Raghuram

The session threw light upon the prodigious growth of technology that has led to a sharp increase in the reach of media both print and electronic followed by uncontrolled intrusions. It was emphasized that media trial leads to inadequate views which often prejudice the process of justice delivery system. These views often influence the objectivity of stake holders, affects the purity of the evidence, influence police officers, and impact judges, & witnesses.

A reference was made to the case of *R. v. Metropolitan Police Commissioner ex p. Blackburn* (1968) 2 AER 319, wherein it was opined by Lord Denning that in order to be deserving of freedom, the press must show itself worthy of it. Further Lord Denning emphasized that “...Exposed as we are to the winds of critic, nothing which is said by this person or that nothing which is written by this pen or that, will deter us from doing what we believe is right...”

It was accentuated that the phenomenon of breaking news coupled with selective reporting i.e. court observations have been isolated without reference to the context of the case has become

a routine mode of reporting. It was highlighted that even a slightly erroneous reporting can seriously affect the fairness of court proceedings and disproportionately influence the opinion of public. The right of free press *versus* the right of fair trial was deliberated upon at length. The session threw light upon various remedies available against media viz. Contempt of Court Act, defamation suit, incitement to offence, postponement orders, GAG orders, privacy injunctions, and transfer of court proceedings. It was stressed that media should report fairly, accurately and in a responsible manner since judicial proceedings are important state function where fair reporting leads to accountability. A reference was made to Article 121 of the Constitution which clearly provides that no discussion shall take place in the Parliament with respect to conduct of any judge in discharging their duties.

During the course of discussion the case of *Zahira Habibullah Sheikh v. State of Gujarat* (2006) 3 SCC 374 was referred wherein some basics of a free and fair trial were listed viz. impartial judge, fair prosecutor, atmosphere of judicial calm, no bias against the accused, and lastly, witnesses should not be coerced, bribed, threatened or otherwise influenced in any way. It was opined that unfair media trial abandon all these above mentioned basic elements, thereby capsizing the process. The 200th law commission report was reflected upon wherein it is recommended that media personnel must be trained in certain aspects of law, such as the width of the right under Article 19(1)(a) and 19(2) of the Constitution along with knowledge of human rights and the law on contempt to understand the nuances and challenges attached with media reporting.

Various guidelines for media such as Press Council of India's Norms on Journalistic Conduct, NBSA Code of Ethics and Broadcasting Standard, Guidelines on Reportage of Cases of Sexual Assault, Guidelines for Accreditation by Delhi High Court, Guidelines for Registration of Legal Correspondents for Reporting the Proceedings, Norms for Accreditation of Legal Correspondents in the High Court of Kerala, and Norms for Accreditation of Legal

Correspondents in the High Court of Himachal Pradesh were discussed and emphasized. Attention was drawn to some international instruments and conventions on freedom of media like Mass Media Declaration, UNGA resolution 59(I), and Madrid Principles.

During the course of discussion the case of *Indu Jain v. Forbes Incorporated* (2007) ILR 8 Delhi 9 was referred, wherein the principles identified by the Delhi High Court on media's freedom of publication *versus* an individual's right to privacy has been emphasized. Subsequently, attention was drawn to the case of *Shashi Tharoor v. Arnab Goswami* CS(OS), 253 of 2017, wherein the Delhi High Court strike a balance between the right to free speech against the right to fair trial. It was pointed out that the Court held that "the defendants have the right to air their stories and the same cannot be curbed, but it has to be tempered and balanced.

A reference was also made to the International Military Tribune at Nuremberg, which was set up to hear cases of war crimes against the Nazi government officials and conducted the first international trial on media-related incitement against two individuals namely, Hans Fritzche & Julius Streicher, for their role in disseminating material that fuelled the Holocaust in World War II.

The session included deliberations on legal provisions as provided in different legislations such as; Sec. 228A of IPC 1860, Sec. 23 & 23(2) of POCSO Act, Sec. 44(3) of UAPA 1967, Order XXXII Rule 2 of CPC 1908, Sec.22, Hindu Marriage Act, Sec. 43, Parsi Marriage and Divorce Act 1936, Sec. 33 Special Marriage Act and Sec. 11 of the Family Court Act 1984. It was highlighted that these above mentioned provisions provides for; restriction to disclose the identity of victim, complete and authentic information, proceedings pending shall not be published in any manner, and in-camera proceedings were some of the areas discussed upon.

It was opined that unlike other organs and private individuals, the judiciary cannot respond to erroneous reporting. Therefore, it is essential that the media reports the court proceedings, in a fair, accurate and responsible manner. It was elucidated that a responsible media is the handmaiden of effective judicial administration. Free and robust reporting, criticism and debate should be there since it contributes to public understanding of rule of law and a better comprehension of the entire justice system.

The session then focused upon the paradigm shift in value choices that judges make. It was stressed that the possibilities of critique of judicial behavior would be on rare occasions and when media does indulge in unfairly critiquing that behavior then, the media itself would be subject to contrary criticism. It was pointed out that it is the nature of the modern judicial review enterprise which invites a criticism of judicial branch as much as media criticism extends to the legislative and executive spheres. Reference was made to the following judgments including *Unni Krishnan, J.P. and Ors. Etc. v. State of Andhra Pradesh and Ors* 1993 AIR 2178, *TMA Pai Foundation V. State Of Karnataka* (1994) 2 SCC 734 and, *P.A. Inamdar & Ors vs State of Maharashtra* (2005) 6 SCC 537. Lastly it was underlined that the Contempt of Courts Act itself point out the exceptions like fair criticism which will not amount to contempt, that oral observations should be restrained and how to meet the challenges posed by media is a matter to be dealt with through experience.

SESSION 3

INHERENT POWER, SUO MOTO POWERS AND POWERS OF JUDICIAL REVIEW

Resource Persons: Dr. Justice B.S. Chauhan and Mr. Shekhar Naphade

The theme for the session 3 was on *Inherent Power, Suo Moto Powers and Powers of Judicial Review*. It was stated that Justice means justice between both the parties. Justice is the virtue, by which the Court gives to a man what is his due. It was opined that Justice is an illusion as

the meaning and definition of 'justice' varies from person to person and party to party. A Party feels having got justice only and only if it succeeds before the Court, though it may not have a justifiable claim. It was highlighted that section 482 of Criminal Procedure Code, 1973 (CrPC) confers inherent power upon the High Court to pass an order as may be necessary to secure the ends of justice.

While referring to the judgments *State Bank of Patiala v. S.K. Sharma*, AIR 1996 SC 1669; *Mahadev Govind Gharge v. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka*, AIR 2011 SC 2439, it was observed that The "ends of justice" does not mean vogue and indeterminate notions of justice, but justice according to the law of the land.

With regard to the court's interference with investigation, it was emphasized that Article 21 encompasses investigation, enquiry, trial, appeal, revision and re-trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them. The judgements *Vinubhai Haribhai Malaviya v. State of Gujarat*, (2019) 17 SCC 1, *State of Bihar v. P.P. Sharma.*, AIR 1991 SC 1260; *A.R. Antulay v. R.S. Nayk.*, (1992) 1 SCC 225; *Kalyani Baskar v. M.S. Sampooram.*, (2007) 2 SCC 258; *Hema v. State.*, (2010) 1 SCC 192; *Lokesh Kumar Jain v. State of Rajasthan.*, (2013) 11 SCC 130; and *Dharam Pal v. State of Haryana.*, AIR 2016 SC 618 were discussed in reference to the fair and proper investigation. It was iterated that where the investigation has not been conducted in a proper and objective manner it may be necessary for the High Court/Supreme Court to order for fresh investigation with the help of an independent agency for the ends of justice so that real truth may be revealed. It was stated that a Court cannot be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. Criminal trials should not be reduced to be mock trials

or fixed trials. It was suggested that the powers of investigation fall within the exclusive domain of the police, and at this stage courts cannot intervene unless the police acts wholly without jurisdiction by seeking to investigate a non-cognizable offence without the permission of a magistrate, or where there may be some other statutory restriction on investigation or where the investigation is not conducted strictly in consonance with the provision of Chapter XII of Code of Criminal Procedure, 1973 (CrPC). However, in the light of the Judgement *Babubhai v. State of Gujarat.*, (2010) 12 SCC 254 it was stated that fair trial and fair investigation are parts of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere.

Distinction between an Appeal from an order granting bail and an order of cancellation of bail was discussed. The grounds for cancellation of bail was deliberated upon. The power of High courts to quash the FIR/Charge sheets while exercising its power under Article 226 of the Constitution of India and section 482 Cr.PC was discussed.

With reference civil and criminal proceedings to run simultaneously the Supreme court judgement *Lalmuni Devi (Smt.) v. State of Bihar & Ors.*, (2001) 2 SCC 17, was referred where it was held that peculiar facts of a case may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable, it does not mean that the criminal complaint cannot be maintained, therefore, it was observed that no law of universal application can be laid down in such matters. The facts and circumstances of each case have to be examined, appreciating the terms and conditions incorporated in the agreement.

The legal framework of the passing of the interim orders was discussed. It was stated that awarding an interim order is an incidental and ancillary power of the Court/Tribunal even if not specifically provided under the Statute. The judgments *Gheesa Lal v. State of Rajasthan*, AIR 1981 Raj 65; *Krishan Kumar Agarwala v. Reserve Bank of India*, AIR 1991 Cal 272; *Ram Ashish Ram v. Security Officer*, (1991) 18 ALR 24; and *Committee of Management Sri Maheshwari Inter College v. State of Uttar Pradesh*, (1994) 1 UPLBEC 63 were referred and it was emphasised that the clause (3) of Article 226 of the Constitution of India is mandatory which provides that if an interim order has been passed without giving an opportunity of being heard to the other side and the said party makes an application to the Court to vacate the interim order, the Court should dispose of such application within two weeks from the date of its filing and if such application is not disposed of in the said stipulated period, the interim order shall stand vacated automatically on expiry of the stipulated period.

With regard to the suo moto power of the High court section 397 of Cr.Pc which gives powers to the High Courts to call for the records and suo motu power under section 401 of Cr.Pc to exercise the revisional power to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court was discussed. It was emphasised that where the Court comes to the conclusion that certain orders have been passed illegally and in arbitrary manner, the Court can suo motu exercise the power of judicial review. It was iterated that judicial review is defined as 'the power of the court to determine whether the acts of legislature and executive are consistent with the Constitution or the Constitutional values and the concept of judicial review lies in the supremacy of the Constitution of the land. It was emphasised that the power of judicial review is one of the basic features of the Constitution. However, Power of judicial review does not provide for Appellate jurisdiction.

SESSION 4

CHALLENGES AND NUANCES OF SECOND APPEAL AND SUBSTANTIAL QUESTION OF LAW

Resource Persons: Justice P. K. Balasubramanyan and Mr. M.S. Krishnan

The theme for the session 4 was on *Challenges and Nuances of Second Appeal and Substantial Question of Law*. The recommendations of the 54th Law Commission for the amendment of section 100 was discussed. With reference to the substantial question of law the judgment of *State Bank of India & Ors. v. S.N. Goyal* (2008) 8 SCC 92 was referred where it was observed that even where there is an enunciation of law by the concerned High Court and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a strait-jacket definition as to when a substantial question of law arises in a case.

It was iterated that the Supreme Court has repeatedly held that perversity in the impugned judgments is a ground to set aside the judgments of the Court below and acts of perversity would fall within the purview of substantial question of law, in other words perversity is also a substantial question of law. The instances of perversity were deliberated upon that includes finding of fact arrived at by ignoring or excluding relevant materials, finding of fact arrived at by taking into consideration irrelevant materials, finding of fact so outrageously defines logic, finding is based on no evidence, finding is based on conjectures and surmises. However, it was suggested that unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

While regard to section 103 C.P.C it was stated that powers under Section 103 C.P.C. can be exercised by the High Court only if the core issue involved in the case is not decided by the trial court or the appellate court and the relevant material is available on record to adjudicate upon the said issue. It was iterated that section 103 C.P.C. is not an exception to Section 100 C.P.C. nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing section 103 C.P.C. in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity.

It was iterated that a full Bench of the Madras High Court in the case of *Rimmalapudi Subba Rao v. Noony Veeraju*, AIR 1951 Mad 969 observed the following general principles for a substantial question of law:

- 1) A question of law of general public importance, the decision of which is likely to affect a large section of the public, will be a substantial question of law.
- 2) A question of law on which there is great divergence of judicial opinion will be a substantial question of law.
- 3) A substantial question of law need not be a question of general importance. It is sufficient if it arises between the parties. This, however, does not mean that every question of law as between the parties is a substantial question of law.
- 4) When a question of law is fairly arguable, when there is room for difference of opinion on it, then such a question would be a substantial question of law.
- 5) When a particular set of facts can lead to alternative findings in law, then, a substantial question of law would be involved.
- 6) If the principle to be applied or the point of law arising in the case is not well established, then certainly that would be a substantial question of law.

The judgment of *Sir Chunilal V Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd.*, AIR 1962 SC 1314 was also deliberated upon where the A Constitutional Bench of the Supreme Court upheld the observations of the full Bench of the Madras High Court in AIR 1951 Mad 969 and laid down the proper test for determining whether a question of law raised in the case is substantial. This can be summarised as:

- (1) (A) Whether it is of general public importance or (B) Whether it directly and substantially affects the rights of the parties and
- (2) If so, (A) whether it is either an open question in the sense that it is not finally settled by the Court or (B) is not free from difficulty or (C) calls for discussion of alternative views.

The judgements *Damodar Lal v. Sohan Devi and Anr* 2016 SC LT 1485, *Ramathal v. Maruthathal* (2018) 18 SCC 303, *Municipal Committee, Hoshiarpur vs Punjab State Electricity Board & Ors* (2010) 13 SCC 216, *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545, *State Bank of India v. S.N. Goyal*, (2008) 8 SCC 92 was formed the part of the discourse during discussion.

It was suggested that at the stage of admission, a second appeal can be admitted only on a substantial question of law being framed by the High Court and practice of granting interim orders prior to admission of second appeal in cases where notice of motion, notice regarding admission and notice to parties is ordered, should be discouraged.

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