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NJA

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From the Desk of the Director, NJA

Dear Patrons,

This newsletter covers the academic activities of your Academy for the period January to March, 2019. In January, we conducted four programs at the campus; and the South Zone Regional conference at Chennai. The academic quarter commenced with a National seminar for Members of the Income Tax Appellate Tribunal during 4th to 6th January; an Orientation program for Junior Division Judges during 4th to 10th; a conference for High Court Justices on various issues arising during adjudication of Direct Taxes issues, during 11th to 13th; and a joint session seminar for judicial officers of Bangladesh and Fiji during 11th to 17th of the month. A Regional conference for the South Zone comprising judicial officers and High Court Justices of the five High Courts in the southern region was organized in collaboration with the High Court of Madras and the Tamil Nadu State Judicial Academy, at Chennai on the 19th and 20th January.

February, 2019 commenced with a National seminar for Members of the Customs, Excise and Service Tax Appellate Tribunal organized during 2nd and 3rd of the month. This was followed by a conference for High Court justices on the theme of Intellectual Property Rights held during 8th to 10th; and a refresher course for judges presiding over commercial courts during the same period, as a parallel program, at the campus. During 15th to 21st of the month your Academy organized a seminar for judicial officers of Bangladesh; and overlapping part of the period, a National seminar for Members of the Railway Claims Tribunal, on 16th and 17th. The West Zone Regional conference comprising judicial officers and justices from the High Courts of Gujarat, Bombay, Rajasthan and Madhya Pradesh was organized in collaboration with the High Court of Gujarat and the Gujarat State Judicial Academy, at Ahmedabad, on the 23rd and 24th of February.

March, 2019 was a relatively busy period. Eight programs were organized during this month. During the 1st to 3rd a National Judicial conference for High Court Justices on the regime of Goods and Services tax was held at the campus in Bhopal. The Orientation Program for Junior Division judges was held during the first week of the month, 1st to 7th. During 8th to 10th the Workshop for Additional District Judges and a National seminar for Presidents of District Consumer Fora on the 9th and 10th; followed by the Workshop

for Senior Indian Revenue Service officers (Customs and Indirect Taxes) during 15th and 16th of the month. A conference on Commercial Division and Commercial Appellate Division, for High Court justices was organized during 22nd to 24th of the month. The refresher course on critical issues arising under the Prevention of Money Laundering Act for judicial officers presiding over courts dealing with this domain was held during 22nd to 24th. The North Zone Regional conference on the theme “Enhancing the Excellence of the Judicial Institutions” was held at Nainital in collaboration with the High Court of Uttarakhand and the Uttarakhand Judicial and Legal Academy, on the 30th and 31st of March.

We have set out in this Newsletter a brief account of the themes and issues deliberated in the various programs in this quarter. As ever, we place on record our deep appreciation and wholesome gratitude to the several judges, both serving and retired; and other experts in several domains of law and allied areas, who came as resource persons, to guide the several sessions, graciously accepted our invitation, and contributed immensely to enriching the deliberations.

Justice (Retd) G. Raghuram

Director

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SE-04

NATIONAL SEMINAR FOR MEMBERS OF THE INCOME TAX APPELLATE TRIBUNAL

04th to 06th January, 2019

Ms. Ankita Pandey, Law Associate



A three day programme for members of the Income Tax Appellate Tribunal was organised at the Academy from 4th to 6th January, 2019. The programme was divided in 8 sessions and provided a forum for the participants to have discussion on statutory basis of taxation, transfer pricing, evidence in taxation law, problems faced by the judicial fraternity and how to overcome them; international treaties; constitutional concerns of equality and due process in taxation; striking a balance between the interests of the State and the interests of the taxpayer; defects in assessment proceedings and solutions to address the same; burden of proof in tax law and overview of double taxation avoidance agreements.

Session 1 - Constitutional and Statutory Basis of Taxation

The discussion began with the interpretation of Article 265 of the Constitution of India as the fundamental basis for levying taxes. The speaker emphasized that the term 'tax' under Article 265 should be read with Article 366(28). The power to levy taxes has been universally acknowledged as an essential attribute of sovereignty. In *Jindal Stainless Ltd. & Anr. v. State of Haryana & Ors.*, Civil Appeal No. 3453/2002, the Supreme Court stated that power to tax is inherent in the people and is meant to be levied in accordance with

reasonable rules or apportionment for the purpose of public expenses. It was further stated that constitutional provisions relating to the power of taxation do not operate as grants but merely constitute limitations upon that power. If the power is unreasonably exercised, it is then that the tribunals come into picture. The speaker elaborated upon Sections 4, 5 and 9 of the Income Tax Act, 1961 (herein after 'Act') which are considered to be the charging provisions of the Act.

Session 2 - Jurisprudence of Tax Administration: Neutrality and Professionalism

The session was premised on the jurisprudence of tax administration: neutrality and professionalism. The speaker initiated the session by stating that 'something cannot be taxed which need not be taxed'. He highlighted that in *Commissioner of Income Tax v. K. Ravindranathan Nair* [1990]186 ITR 709(Ker) the Supreme Court held that the Constitution of India guarantees equal protection of laws under Article 14 which must extend to taxing statutes. It was emphasised that every person may not be taxed equally but property of same character has to be taxed. Taxation must be of same standard so that the burden of taxation falls equally on all persons holding that extent of property. This is the role of equitable considerations in tax proceedings. The speaker further highlighted that a

notice under any provision of this Act which is required to be served shall be deemed to be served on time. An assessee shall be excluded from making any objections in any proceeding or enquiry under the Act who asserts that the notice was not served upon him on time or that it was served upon him in an improper manner. The speaker emphasised that in *CIT v. MRP firm, Muar* [1965 SCR (1) 815], the Honourable Supreme Court held that the doctrine of approbation and reprobation doesn't apply to income tax proceedings and are against the provisions of the statute. He stated that as long as it is income legal or illegal, it will be subject to taxation. He further explained that in *CIT v. Brijlal Lohia* (84 ITR 273) and *New Jahangir Vakil Mills co. ltd. v. CIT* (1959 AIR 1177), the rule of consistency has been explained.

Session 3 – Assessment Proceedings: Role of the Tribunal

The speaker began the session by giving an insight into assessment proceedings and the participant judges shared the defects in assessment proceedings faced by them. The resource persons suggested methods for overcoming the defects which were faced during assessment proceedings. One of the issues that judges often face is with respect to the application of the concept of *res judicata* to Income Tax proceedings. It was asserted that *res judicata* principle, as affirmed in *Azadi Bachao Andolan* (263 ITE 706) case states that something which has been adjudicated cannot be re-adjudicated. The speaker emphasised that this principle applies to *ratio-decidenti* and not to *obiter dicta*. Tax is imposed on income that the assessee has actually earned and not on any notional income. According to the speaker in the context of transfer pricing, the provisions cannot result in taxing income which has not actually been earned or any notional or hypothetical income.

Session 4 – Transfer Pricing

The speaker began the session with discussion on the basic principles of transfer pricing; major issues of dispute in transfer pricing and the role of ITAT. He stated that the Indian Transfer Pricing Regulations bars corresponding adjustments in the hands of the other party. It may be available in the case where the treaty provisions provide for such an adjustment in terms of Article 9 of the Double Tax Avoidance Agreement. He explained the method of profit split, where two entities are restrictively involved

in performing functions. It is difficult to segregate or allocate the functions performed by one entity and the return thereon that should be earned by that entity. In that situation, the combined profit is split between the two entities. Both the entities bring to the table their respective resources and their respective strengths and this contributes to the profit that is earned by the group as a whole. In such a situation, the profit split method seems to allocate the combined profit of the entities between the two transacting parties. The speaker further asserted that aggregation is also a disputable issue. The law, under Article 92(c) provides that each transaction shall be benchmarked separately. The Organisation for Economic Co-operation and Development guidelines also advocate aggregation whether transactions are continuous, interlinked or closely connected. He explained pointer system which means that one has to take a transaction as it is and benchmark that particular transaction to determine the Advertisement, Marketing and Promotion (AMP). This principle was approved by the Delhi High Court in *Lakhwani's case* wherein it was held that barring certain exceptional cases tax administration should not disregard the actual transaction or substitute other transactions.

Session 5 – General Anti Avoidance Rules

The session initiated with a brief introduction of the General Anti Avoidance Rules (GAAR) with reference to the concepts of tax planning and tax avoidance. The speaker defined the concept of tax planning and tax avoidance; impermissible avoidance agreements and arrangements lacking commercial substance under Chapter X-A of the Income Tax Act, 1961. Thereafter, the *Vodafone* case [(2012) 1 S.C.R. 573] was discussed wherein it was remarked that the concept of GAAR is not new to India and that India already had general anti avoidance rules earlier. But, in this case, the court invoked substance theory. The speaker emphasised that these are the judicial anti-avoidance rules which are stated as part of the Income Tax Tribunal and are codified. It was further explained that when tax payers expressed a lot of apprehension about the applicability of GAAR, a committee was designated to look into the grievances raised by the taxpayers and the committee came up with its report. It was recommended that where SAAR is applicable to a particular aspect, then GAAR should not be invoked to look into that particular aspect. However, the Circular of 2017 issued by the Central Board of Direct taxes (CBDT) makes the position



otherwise. The provisions of GAAR and SAAR can co-exist and are applicable as may be necessary in the facts and circumstances of the case.

Session 6 – Evidence in Taxation law

The discussion of this session was premised on the evidentiary standards with reference to search, seizure, illegally collected evidences and tax avoidance. The speaker explained various sections under the Indian Evidence Act, 1872 and emphasized on Section 31 of the said Act which states that admissions not conclusive proof, but may estop. The *Pooran judgment* (92 ITR 505) and *Dr. Paratap Singh v. Director of Enforcement* (AIR 1985 SC 989) has reaffirmed the view that evidence is admissible if relevant to the facts in issue. Thereafter, Section 65-B which deals with the admissibility of electronic records was discussed. It was further asserted that there is a lot of litigation as to the service of notice under Section 148. The notice is not only to be issued but also served. In *Shubhashri Panicker (Mrs) v. CIT* [403 ITR 434 (2018)], the Rajasthan High Court was concerned with the issue that whether ITAT was right in holding presumption of service of notice when the notice under Section 148 was sent through speed post ignoring the fact that the address on which such notice was sent was a different one. It was held that no such presumption should have been made. The speaker proceeded with the session by explaining the importance of electronic evidence in tax disputes with particular reference to metadata.

Session 7 – Interpretational issues in tax and treaty law

The session was initiated with the assertion that there can be no tax unless the words are extremely clear, showing an intention to burden the assessee with a charge. The speaker explained the various theories of interpretation including liberal, strict, contextual, harmonious, beneficial and golden rules of interpretation with reference to tax statutes. Elaborating upon the history of tax treaties the speaker explained that the first Income Tax Act was introduced in 1860. In 1920's the predecessors of the United Nations drafted the first

model tax convention. There was huge debate between the source and resident countries for the reason that different countries had different definitions of source. The speaker further discussed the Vienna Convention and OECD Model Convention provisions with respect to the interpretational issues in tax and treaty law. He further emphasised on *Essar Oil v. ACIT* (13 SOT 691) and *Sanofi Pasteur Holding SA v. The Department of Revenue* [TS-57-HC-2013 (AP)] case, where the court discussed the interpretation of the term “may be taxed”.

Session 8 - International Tax Treaty Law and Double Taxation Avoidance Agreements

The session initiated with a brief introduction of Double Taxation Avoidance Agreements and went on further to discuss OECD model law convention provisions. One of the most significant provisions was Article 10 which was discussed and interpreted with the help of various illustrations. Further, it was explained that if a treaty is enacted without Article 23 which deals with Double Taxation Avoidance Agreements then one has to be governed by domestic law only. It was highlighted that for the purposes of the OECD Model Tax Convention, Article 4 defines the term “resident of a Contracting State” which means any person who, under the laws of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to taxation in that State in respect only of income from sources in that State or Capital situated therein. Where an individual is a resident of both Contracting States, then his status shall be deemed to be a resident only of the State in which he has a permanent home, or if he possess a permanent home in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests), or if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement. It was clarified that in order to determine the question of dual residency the source country has to be ascertained. Another issue that was deliberated upon was that of double taxation wherein the speaker emphasized upon the *gramophone case* in which the Supreme Court stated that international law makes provision for extraterritorial taxation by various countries and therefore permitted double taxation.

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ORIENTATION PROGRAMME FOR JUNIOR DIVISION JUDGES

04th to 10th January, 2019

Mr. Rajesh Suman, Assistant Professor

Ms. Nitika Jain, Law Associate



The Academy organized a seven days Orientation Programme for Junior Division Judges. The programme was conceived for capacity building of judicial officers at the primary tier, viz. Civil Judges (Junior Division). The sessions were designed to facilitate participant officers to share experiences and views with counterparts from other States; better appreciation of the judicial role; responsibility of judicial officers in constitutional democracy; recent developments in juridical thinking and technological advances relevant to accreting performance standards; and to deliberate on several aspects of law and practice relevant to enhancing the quality of performance. The idea was to provide participants a unique platform to share experiences and assimilate best practices.

Session 1: Constitutional Vision of Justice

The speakers initiated the session by questioning the need to study the constitutional vision of justice. They also emphasized the role of the Preamble in interpreting the Constitution. Referring to the judgment in *All India Judges' Association case*, the speakers emphasized that judges are not subordinate to anyone, rather they are subordinate to the laws and the Constitution. The speakers discussed Article 20 (2) of the Constitution read with Section 50 Criminal Procedure Code

(Cr.P.C.) regarding rights of arrested person. The speakers accentuated that though the magistrates are not deciding constitutional matter hitherto they have to see the constitutional aspects of the cases before them. Referring to the judgments in *Hussainara Khatoon v. State of Bihar* (1979) AIR SC 1369 and *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378, the speaker stressed upon the expansion on rights of poor persons by the Supreme Court. The speakers discussed that law should meet the demands of changing society and judges should interpret law accordingly. The participants shared their concern regarding the ignorance of police towards the constitutional guidelines as framed by the Supreme Court especially in remand matters. The speakers suggested that the magistrates should not issue remand orders until they are satisfied that all the required and established procedure has been followed by concerned police officers. The speaker also opined that if judges start refusing remand in cases of violation of procedure, then automatically the police will start following the procedures as established in the guidelines.

Session 2: Role of Court in Constitutional Democracy and Adherence to Core Judicial Values

The speakers initiated the session by discussing

concepts of justice and rule of law. While explaining constitutionalism, the speakers stressed that it is necessary to internalize values and ideas of the Constitution. It was emphasized that minority is not merely those who are numerically less in number but are also weak in relation to powers for instance- farmers, transgenders and women and protection of rights of these minorities results in certain conflicting situations. The speaker expressed concern that people these days openly challenge the majesty of law and disobey it due to their own reasons. It was emphasized that one must not only think on the normative level but also on the behavioral and cultural manner to increase obedience to law. The speaker emphasized importance of Article 39A of the Constitution concerning the responsibility of the State to ensure proper support to marginalized groups in the matters of providing justice. The speaker referred to the decisions of the Supreme Court which resulted in framing of the Legal Services Authorities Act 1987. The session was concluded with a remark that sustenance of democracy is only because of the Indian Constitution and it is the judges who have the responsibility to protect and safeguard constitutional rights enshrined in the Constitution.

Session 3: Discovering Current Judicial Methods

The speakers started the session by discussing various aspects of adjudication at the trial court level and the methods that judges follow. The speaker emphasized that fairness and expeditiousness are the two fundamental values which governs adjudication at trial court level. The speakers discussed literal interpretation and purposive interpretation as methods of adjudication. Judges should rely on either of the two methods i.e. take the rule as it is or interpret it according to the situation. The purposive interpretation will be balancing of the interest. If there are two conflicting ideologies, then it depends on the personality of the judge as to which she/he will choose. The judges must ensure adherence to these values while adjudicating cases in their respective courts. The speakers suggested that to sort cases in their respective courts, judges should classify cases in the order in which a case is ready to be heard, under which cases charges are to be framed and in which cases, issues have to be framed. According to the speaker, if there is absence of expert/medical witness, magistrates should report the same to the district judge for ordering Superintendent of Police

or other civil servant for the presence of expert/medical witness. The speaker also insisted upon the use of latest technology like video conferencing for interacting with witnesses. The session concluded with discussion on role of magistrates in ensuring effective legal aid.

Session 4: Courtroom Technology: Use of ICT in Courts

The speaker stated that many courts are becoming technologically advanced while some are trying to improve but there is paucity of funds. The speaker highlighted some methods by using ICT and how by adoption of new techniques, efficiency of the court process can be improved. The speaker referred to the Supreme Court's decision where it ruled that live streaming of court proceedings in matters of national importance can be done. Various information such as the details of case, the issues at hand, the details of accused and witnesses and the source of information can be easily managed through data management techniques. The speaker focused on docket management, case tracking system and e-filing. The use of ICT to provide the judgment instantly to concerned authority/parties was also underlined. The speaker emphasized the use of bio-metric system to identify the accused or the witnesses. The participants also discussed their experiences of using laptops for writing orders, making cause list and e-mailing. The SMS alerts to the lawyers for their dates of listing is ensured by courts. The speaker discussed the future of legal practice which will be artificial intelligence, cognitive computing and conducting legal research that is capable to predict the outcome of litigation. Screening of videos were done to emphasize use of ICT in the courtroom.

Session 5: Managing the Docket: Court and Case Management

The speakers started the session by discussing various aspects of managing the docket. Efficient docket management requires classification of cases into various categories depending upon the complications of each case and this will result in better court management. The speakers referred to Lord Woolf's Report which supports categorization of case for better case management. The simpler case can be fast tracked and difficult ones must be allocated in a different category. Thereafter, the speaker emphasized developing synergy between all stakeholders for proper

docket management. There should be immediate listing of the case as soon as the case is filed and time limit must be fixed in consultation with the counsels. The speaker insisted on framing issues on facts and then resorting to pleading. If the facts are such that the case needs to be sent to mediation, it must be immediately sent. The judge should ask for written submission from the counsels. The judge must communicate with the stakeholders and should attempt to understand their concerns. Mediation is the biggest tool which can be used by the judges for case management. The speakers emphasized on minimizing the roll call time and adjournments. The speakers said that every judge has his/her own docket which he/she manages by his/her own thought process and work conditions. The judge must not be affected by the external conditions and must adhere to procedural law.

Session 6: Law of Precedent: Identification and Application of Ratio Decidendi

The speakers started the session by highlighting the importance and origin of the law of precedent. The basis of precedent started with the commencement of reporting of judgments. The main assumption behind the system of precedent was that like cases should be treated alike. Precedent must be understood in the light of the facts of the case. The judge must conduct the legal research that must be read with the facts of the case for application of the precedent. If the precedents are applied without proper understanding of the facts of cases then it may result in wrong judgment. The reasoning of a particular judgment should be analyzed and then it should be used as a precedent. The reasoning which leads to the decision i.e. *ratio decidendi* must be understood. The speakers also explained *obiter dicta* and said that the observation of higher courts with respect to matters which do not directly lead to decision are *obiter dicta* and are not binding over any courts. The speakers discussed various nuances about *ratio decidendi* and *obiter dicta* and referred to various Supreme Court judgments to explain the same. Precedent must be applied when there is an ambiguity in the position of law. The speaker gave an example related to habits of lawyers citing various precedents in a pleading. The speaker suggested that the participants should question the lawyers about the relevance of the precedents to the case. The speaker said that judges must have good co-ordination with bar and bar must

be disciplined. The speaker concluded the session by highlighting Article 141 of the Constitution according to which the decision of the Supreme Court is binding on all courts.

Session 7: Law Relating to Cyber Crime: Advances and Bottlenecks

The session started with the issue of emergence of cyber world and its legal implications. Giving a brief history of cyber world, the speakers expressed concern regarding emergence of complex cybercrimes and inadequacies to address them effectively. The speaker explained different types of cybercrimes such as malicious programming, causing disruption, assisting in unauthorized access, destroying, deleting or altering information residing in the computers and diminishing its values. The speaker explained computer source code which includes aspects like listing of programs, computer commands, design, layout and program analysis. The speaker discussed the provision dealing with source code theft i.e. Section 65 of the Information Technology Act, 2000. This provision is related to the action to conceal, destroy and alter source code. The speaker also explained the term 'Logic Bomb' which are programmes that detonate in pre-defined manner. The speaker also explained the importance of internet service provider in tracking sources of crime. According to Section 67C internet service provider is required to retain the information in the manner and format as per the direction of the Central Government. However still the Central Government needs to notify the manner and the format in which the information has to be retained. The speaker also focused on the Interception Monitoring Decryption Rules, 2009 where the competent authority is the Secretary, Ministry of Home Affairs.

Session 8: Electronic Evidence: Collection, Preservation and Appreciation

The speaker started the session by explaining provisions of the Information Technology Act, 2000. The Critical Information Infrastructure where computer resources whose destruction can debilitate national security, economy, public administration or order as well as health and safety of people was discussed. These are notified by Gazette Notification as protected system. Explaining the difference between access and secure access, the speaker said that the access is punishable



but secure access might not be punishable upto certain extent. Section 43A deals with entities which handle sensitive personal data information and ensure reasonable security practice and procedure to protect the information was discussed. The speaker discussed various aspects of personal data such as password, medical information, financial information and biometric information. The speakers then focused on regulation of private companies for using private data of the users and emphasized on having computer data protection legislation as the need of the hour. The speakers focused on intermediary liability under to Section 79 and explained the process of tracking the accused by approaching the network service provider and obtaining the IP Address. The judgment in *Shreya Singhal v. Union of India* 2015 (5) SCC 1 was also referred for explaining the liability of intermediaries. The speaker discussed judgments of the Supreme Court on the admissibility of electronic record. The requirement of certificate under Section 65B for issues of admissibility of electronic record by way of secondary evidence was discussed by referring to the judgments of *Anvar v. P.K. Basheer* [2014(10) SCC 473], *Sonu v. State of Haryana* [2017(8) SCC 570] and *Navjot Sandhu* [2005 (11) SCC 600] case.

Session 9: Forensic Evidence in Civil and Criminal Trials

The speakers started the discussion by stating that forensic science is the use of science and technology to provide scientific evidences. The forensic evidences are mainly of two kinds i.e. physical and biological. The speakers discussed both types of forensic evidence in detail. The process of forensic analysis of documents was discussed which includes various fields such as handwriting analysis, signature and initial analysis, alteration, erasure, sequence of strokes of handwriting as well as printed matter. The speakers explained the principles of handwriting analysis which consists

of identification of forgery in disputed handwriting and signature. The speaker discussed different types of forgeries which consists of freehand, simulated forgery and the cut copy paste signature. Various aspects of checking forgery including determination of authorship of forgery, comparison of handwriting, use of photocopies of signature, determination of whether a person is left-handed or right-handed and also determination of age of ink and paper were highlighted. Relevant judgments of the Supreme Court in this regard were referred and discussed. The speakers highlighted the importance of expert opinion in deciding issues of evidences. The speaker discussed evidentiary value of fingerprint and opined that it is a valuable means of identification due to its uniqueness and that it never changes. According to the speakers, judges in various cases have decided that the identification of thumb impression is almost perfect and the evidence of fingerprint expert can be relied upon. The speakers also discussed the concept of DNA and how DNA is helpful in crime investigation, identification of paternal and maternal genesis and the identification of sex of a person. The speakers focused on various protocols which investigating agencies should strictly follow during collection and preservation of physical and biological evidences.

Session 10: Judging Skills: Framing of Charges

The speakers highlighted issues regarding framing of charge at commencement of a trial. It was suggested that while framing charges a judge must be very careful, verify the charges levelled in the chargesheet and should not simply rely upon the prosecution or police chargesheet alone. The *Ajmal Kasab's* case was referred during the discussion to elaborate upon how charges were framed in that case. It was pointed out that there are two types of cases - summons case where no formal charge is framed and warrant's case which involves formal framing of charge. The speaker

also dwelt on with how to frame charge in a particular case and stated that it must include ingredients of a particular offence and the manner of committing the offence. The technicalities relating to multiple charges, which charges can be joined together, separate and distinct charges, minor and major charges etc. was also covered during the course of discussion. The speaker also gave an overview of the provisions relating to theft, criminal conspiracy and cases involving constructive liability and vicarious liability under IPC and pointed out the technicalities of framing of charge in such cases. Lastly, the speaker mentioned that framing of charge is important for a fair trial and involves application of mind.

Session 11: Judging Skills: Art, Craft and Science of Drafting Judgment

The need to learn the art of writing judgment was highlighted during the session. It was stated that judgment is a message of legal principle with reasoning leading to an outcome. The speakers pointed out essential ingredients to be included in a judgment. It was emphasized that a judgment must be concise, precise and the decision must be based on reasoning; it must be in simple language, easily understandable by the litigants. It was deliberated that two decisions are never similar even if the facts are same and this is due to the variation in application of logic and interpretation of law by individual judges. Difference between admissible and inadmissible evidence was also discussed at length. The participants were suggested not to read headnotes and editorial summation of a judgment as it does not have any authority and in cases involving complex facts the judge must include elaborations if the judgment is lengthy. The speaker also recommended the participants not to overload the judgment with precedents as trial courts are court of facts. It was further highlighted that a judgment must be decisive, use of words like 'may' or 'might' must be ignored and there should be use of specific words with well-reasoned logic. Lastly, it was stated that reasoning is the most important part of a judgment and it must be based upon quality of the evidence/ witness and not on the quantity.

Session 12: Art of Hearing: Promoting Rational Discourse in the Courtroom

The meaning of terms 'rationale' & 'discourse'

was discussed in detail during the session. It was suggested that a judge must not be a silent spectator and must completely participate in the trial. It is the duty of a judge to promote rational discourse in his courtroom. The speakers stated that strength of a judge is knowledge, personality and conduct. A judge should resort to politeness and must react to each situation logically. It was highlighted that the discourse must be constructive in a courtroom only then it can be rational. The speakers advised the participant judicial officers to read law and have command over it, over the facts and then try to maintain the discourse and rationality in the court.

Session 13: Role of Magistrate at First Production of Arrested Person

During the session the speakers deliberated that arrest must only be made when there is an offence and it must be made only in accordance to the procedure established by law. It was stated that at the time of production of an accused, the magistrate must verify the reasons for production, whether counter signed, memorandum signed by one witness and whether any 3rd degree measures have been resorted to by the police etc. In case of any 3rd degree measures resorted to by the police then magistrate has the power to produce the accused before a doctor. It was mentioned that depending on the severity of the crime a magistrate can grant police custody for not more than 14 days by giving reasons for such remand. Various landmark judgments on the subject were referred for discussion during the session such as *Nandini Satpathy v. Dani (P.L.) And Anr*, AIR 1978 SC 1025; *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579; and *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535. Article 20(2), Article 22, Article 21 of the Constitution were also referred. The speakers emphasized that it is the duty and responsibly of a judge to uphold law and to uphold the rights of an accused as enshrined in the Constitution. It was mentioned that the idea of law is that, if a person is deprived of his liberty then it must be under scrutiny. The concept of bailable and non-bailable offence was also discussed. Lastly, it was highlighted that handcuffing is not permissible except in exceptional cases. The speakers suggested the judicial officers to decide by going into the merits of the case even if they are acting as remand magistrate to avoid injustice.



Session 14: Fair Trial: Fair Processes

On the theme, the speakers highlighted that fair trial process is a check the abuse of power. Maintaining judicial calm, neutrality, impartiality is important for ensuring fair trial. The speakers stated that fair trial is a corner stone for a just society. The speakers elaborated the concept of 'Fair Process' which includes a fair prosecutor who is calm and have no vexatious and oppressive conduct. It was suggested that a judge should act as a neutral referee since there are chances that the witness and other protected person is vulnerable to biases. The session further included discussions on the rights under Article 20(1) and Article 20(3) of the Constitution. Cases of extra judicial killing and custodial violence were also discussed in detail. Giving a reference of *Sohrabuddin's Case*, the speaker stated that moral conviction is not enough unless there is evidence to link. The other speaker highlighted that the first step in a trial process is framing of charge which must be specific and accused is entitled to know the charge. It was mentioned that speedy trial is an important aspect of fair trial and the concept of fair trial is embedded in Article 21 of the Constitution. Further, three principles of criminal jurisprudence were enlisted - presumption of innocence, impartial order and right to open trial.

Session 15: Role of Courts in Securing Gender Justice

The speakers stated that creation of awareness and attitudinal change is the key to achieve gender justice. The principles of freedom, equality, dignity, equity and fairness must be ensured at all times. The speakers highlighted two tests to determine whether an issue is gender sensitive or not. Citing an example of POSCO Act, it was mentioned that there are cases where no reporting is done which is also a crime under the



POCSO Act. A judge is required to be more sensitive towards all aspects and there needs to be an attitudinal change in the behaviour of a judge towards the issues of gender justice. The speaker pointed out that there can be a lot of impact of human rights abuse such as disturbing psychology, feeling of disgust, disbelief, suspicion, helplessness, frustration, anxiety and depression, loss of confidence, fear, loss of security, fear of guilt etc. There must be judicial sensitivity and empathy while dealing with cases involving rights of women and children. It was suggested that a judge must give priority to disposal so as to provide speedy justice and ensure that victim support and representation is prioritized. A judge should work for making rich trends and progressive approach in every gender case.

Session 16: ADR and Plea Bargaining

The speakers explained the concept of mediation and discussed its essential aspects. The difference between mediation and arbitration was pointed to the participants. It was mentioned that in ADR Arbitration is affordable by few, while conciliation is used in selected kinds of disputes and mediation is the most preferred mode of ADR. Lok Adalats are intermittent. Further, it was stated that in conciliation, a conciliator who is either a judge or a lawyer knows the law. The speakers emphasized that in most of the civil suits mediation is possible which includes possession suits, commercial disputes, corporate litigation, family matters, partnership disputes and injunction suits. It was suggested that a judge should try to bring consensus among parties towards use of ADR as an alternate means to decide a matter. Maintaining the confidentiality and complete hearing of both parties are two essential aspects of mediation.

Session 17: Occupational Stress in Judges: Identification and Consequences of Stress

It was deliberated that stress has become an important facet of life since we all live in stress every moment. Management of stress is very important and it depends on one's personality and behaviour inculcated from childhood. The speaker stated that the level of stress does not depend on the tier of the judicial hierarchy. The other speaker highlighted that each judge has its unique way of processing stress. The speaker distinguished between healthy and unhealthy stress and suggested methods to tackle unhealthy stress. The speakers elaborated upon the determinants of stress like nature of event, predictability, control, ambiguity and domain. A judge suffers from occupational stress that relates to stressful job factors, sedentary work environment, work overload etc. As a judicial officer one has to manage one's emotions as well as the emotion of their case too, in one's day to day life. The speaker pointed out that a judge becomes irrational due to anger and fear and therefore, insisted the participants to write down their thoughts and see what can be done. The

speaker advised the judicial officers to take good sleep and maintain healthy diet.

Session 18: Managing Judicial Stress: Institutional Strategies and Techniques

The speaker highlighted certain reasons for stress pertaining to judiciary such as stress relating to transfer, compliance with circulars and orders, dealing with high profile cases, trial by media, troublesome advocates, promotion prospects, and complicated cases. To overcome these causes of stress the speaker suggested few techniques which included practicing yoga daily, exercise and prayer, devote sufficient time to family, plan for holiday etc. The speaker advised the judges not to read law articles or case reports while on vacation instead devote time on their hobbies, family and other things like sports, writing, cooking etc. Judge should be frank to discuss their legal problems with their seniors and colleagues and should be confident of their own actions. The speakers concluded with the remark that it is a judge who has to keep the patience so as to keep the courtroom atmosphere better for all.

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CONFERENCE FOR HIGH COURT JUSTICES ON DIRECT TAXES

11th to 13th January, 2019

Mr. Yogesh Pratap Singh, Research Fellow



The Academy organized a three day Conference for High Court Justices on Direct Taxes. The conference was conceived to facilitate deliberations among participant justices on contemporary issues and recent developments in direct taxation in India and globally. It provided a forum for discussing normative issues pertaining to the evolution of direct taxes, interpretation in tax statutes and treaty law, major dispute areas and the role of the High Court; along with case studies and an overview of the constitutional provisions for finance bills. 19 Hon'ble High Court Justices from different High Courts participated in the conference. The conference was divided into eight sessions stretched over 3 days on following themes.

Burden of Proof and Law of Evidence in Tax Law

The session began with discussion on Article 265 of the Constitution of India terming it as the guiding principle for the entire tax assessment authority and courts. The term 'evidence' in context of its applicability in tax law was explained and discussed. Relevancy of some important judgment on Sec. 65B of Evidence Act was also highlighted during the session. Issues relating to applicability of Evidence Act in taxation were raised and discussed during the session. It was stressed that evidence in tax must be confined to matters which are in issue, hearsay evidence is no evidence and

authorities must try to place best evidence at earliest point of time and it must be based on oral, documentary and circumstantial evidence.

International Tax Treaty Law and Double Tax Avoidance Agreement: An Overview

The session began with explaining basics of treaty law and plurality of laws. Historical background through some landmark judgments on tax law from pre-independence era was explained. It was pointed out that multiple taxation arose even prior to the enactment of modern day direct tax laws due to territorial nature of law. Thereafter, various sources of income such as royalty income, sale of employment services, sale of tangible goods or services, dividend income and interest income were elaborated through examples and discussed in details. Two types of double taxation such as juridical double taxation and economic double taxation were highlighted during the session. Thereafter; attention was drawn to remedying and overcoming double taxation through tax treaty. A comparison between treaty law and private international law was also discussed during the session.

Interpretational Issues in Tax and Treaty Law

While discussing domestic law and treaty interplay, it was pointed out that tax treaties are part of international



law. On the question of whether the domestic law or the treaty law would prevail, judgment of SC in *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey* AIR 1984 SC 667 was discussed, wherein court recognizes applicability of international law but not if it is in conflict with national law. Attention was drawn to Article 246 (1), Entry 14, List 1 of Schedule VII of the Constitution of India, wherein it was pointed out that the Parliament can make law entering into a treaty as well as implementing it. Section 90 of the Income Tax Act, 1961 (IT Act) was also discussed in the session. On treaty applicability, Articles 1 & 2 of OECD Model Tax Convention on Income and on Capital was elaborated and discussed. Concept of equalizer levy was also discussed in the session.

History, Basic Feature and Constitutional Aspects of Tax Law

Session began with elaborating evolution of tax law in India under following heads. *Central Excise*: Different products – different levies, Central Excises & Salt Act, 1944, Central Excise Tariff Act 1986 (CET) – “Goods, not elsewhere specified”, Central Excise Act, 1944 and GST (1.7.2017) except petroleum products & tobacco. *Customs*: Sea Customs Act, 1878, Customs Act, 1962, After 1991, reduction in rates and Huge reduction in litigation. *Octroi*: Levied earlier and Entry Tax

Attention was drawn to constitutional history of tax law. It was pointed out that there were no expressed or detailed provisions in the Government of India Act, 1915 & 1919, however in Government of India Act, 1935, there was expressive division of powers and Seventh Schedule was also introduced containing federal, provincial and concurrent list and in Constitution of India, 1950 Part XII (Taxes, Limitation and Restriction), Part XIII (Inter-state Trade & Commerce) and Article 366 was introduced. Basic features under Articles 265 and 366 (28) were highlighted and discussed. Basic components of taxation such as character (taxable event), person obliged to pay the tax, rate of tax

and measure or value were pointed out during the discussion. Some important judgments of the Supreme Court such as *Govind Saran Ganga Saran v. CST* AIR 1985 SC 1041, *Vijayalakshmi Rice Mill v. CTO* (2006) 6 SCC 763 and *Dewan Chand Builders & Construction v. UOI*, (2018) SCC Online 1087 were also highlighted in the session. While discussing the limitation on Parliament and State Legislatures, it was pointed out that the Parliament cannot levy taxes in the subject matters of the State List and State Legislatures cannot levy taxes on entries which are in the Union List. Apart from this restriction, there are other limitations also imposed on the Parliament and the State Legislatures under the Constitution.

Transfer Pricing, Basic Principles, Major Issues of Dispute & Role of High Court

The session began with discussion on basics, meaning and rationale of transfer pricing. To elaborate it further, various scenarios and judgments were discussed and analyzed, thereafter, attention was drawn to the background and regulation of transfer pricing in India, wherein various provisions under the IT Act and some important judgments were highlighted. Section 92, 92A & 92B was elaborated and discussed in detail. Concept of arm length price (ALP) under Article 9, OECD and under Sec. 92F (ii), 92C was also discussed. Discussing the concept of most appropriate method, it was pointed out that IT Act does not provide any specific hierarchy of methods for transfer pricing, Rule 10 C of Income Tax Rules, however, specify factors for determining the most appropriate method. Steps involved in transfer pricing as per the Act were also highlighted during the session.

Appellate and Writ Jurisdiction of High Courts: Powers/Jurisdiction and Limitations

Citing landmark judgments, brief history of writs and its scope and nature under Article 32 and Art. 226 of Constitution of India was elaborated and discussed. The difference between writ jurisdiction and appellate jurisdiction was also briefly discussed during the session.

Case Studies on High Court Appellate and Writ Jurisdictions and Leading Cases and Precedent

It was an interactive session. Participant Justices discussed important judgments and issues on following areas *viz.* Re-assessment; Application of circulars and principles of consistency; International tax treaty law; and Transfer Pricing.

SE-05

SEMINAR FOR FOREIGN JUDGES (BANGLADESH & FIJI)

11th to 17th January, 2019

Mr. Sumit Bhattacharya, Research Fellow

Mr. Krishna Sisodia, Law Associate



The Academy organized a training programme for Foreign Judges from Bangladesh and Fiji. It was the seventh seminar organized for the judges of Bangladesh and the first seminar organized for the judges of Fiji. The academic programme was divided into 14 sessions. The participating judges from Bangladesh and Fiji comprised a mixed group of judges including High Court Judges, Senior Judicial Magistrates, Judicial Magistrates, Members of Law Commission, etc. The programme involved deliberations on the emerging issues in the field of Constitutional Law of India, the structure and jurisdiction of the Indian Judiciary, the constitutional vision of justice, elements of judicial behavior, the art, craft and science of drafting judgments, principles of evidence, human rights etc. Efforts were made to find a common ground in the constitutional jurisprudence of different countries and to share the 'best practices.'

On the theme of Overview and Architecture of the Indian Constitutional Arrangement, the first speaker emphasized that the process adopted for framing of the Constitution adds to its endurance and strength. Explaining this argument, the speaker stated that, in India, unlike Bangladesh there has been no attempt by any external force to overthrow the Constitution.

This is because the doctrine of basic structure has been implanted in the psyche of the people and the various institutions, which commands respect to the principles underlying the Constitution. Further, countries like France and Malaysia, did not have an orderly constituent assembly where people could have deliberated peacefully and extensively. It was stated that in Malaysia and other colonized countries, the British formed the Constitution Commission that drafted the Constitution. This exercise proved futile as the Constitution failed to take into consideration the needs and requirements of the communities. Thus, the exercise that was supposed to help the colonized nations, led to chaos and mayhem. However, in India, the Constituent Assembly after careful and exhaustive deliberations, taking into account the socio-economic diversity of the nation, provided a representative form of government, free and fair elections and the process of judicial review. Thereafter, the second speaker briefly discussed the chronological events that lead to the drafting of the Indian Constitution and the international influence on the supreme law of the land. Quoting Dr. B.R. Ambedkar, the speaker highlighted the significance of the Preamble of the Constitution

and remarked that the objectives of liberty, equality and fraternity envisaged in the Preamble are mutually dependent and cannot be divorced from one another.

On the theme of **Indian Judiciary: Organizational Structure and Jurisdiction**, the first speaker discussed the hierarchy of courts in India and emphasized on how a single integrated judiciary is essential to maintain unity in the country. Thereafter, the speaker briefly touched upon Part V of the Indian Constitution, giving the participants an overview of the composition and appointment procedure of judges. The second speaker drew the attention of the participants to two fundamental questions: *firstly*, why a hierarchy of courts was required in any judicial system? and *secondly*, what is the role of an appeal in the mechanism of administration of justice? Clubbing the answers, the speaker remarked that in order to relook at a decision and analyze the errors of law, hierarchy of courts was necessary, and an appeal is an integral element of the hierarchy of courts. The speaker further dealt with instances in India where the Supreme Court has committed errors in the exercise of its power of appeal (*A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602). In order to resolve such issues, the Supreme Court devised the idea of a curative petition so that cases could be re-heard in order to render complete justice (*Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388). Further, with regard to the power of Supreme Court to review its own judgments it was pointed out that the Constitution of Fiji empowers the Supreme Court to review its own decisions and right to review is a constitutional right. Though, the intention of the legislature behind drafting such provisions was noble, the provisions of review added to the court's docket as every failed litigant started filing for review. In order to grow out of this situation, the Chief Justice of Fiji limited this right to review. To avoid a similar problem in India, the Supreme Court refused to register second or third review petitions. Moreover, a practice of in-chamber hearing, prior to allowing a review, is followed in India to curtail the misuse of review.

On the theme of **Goals, Role and Mission of Courts: Constitutional Vision of Justice**, the first speaker observed that the mission of the courts is to be in tune with the constitutional fundamentals i.e. to read every legal provision with reference to the constitutional vision of justice and the goal is to respect, regard and promote the fundamental rights. The speaker also

elaborated on the vital role played by the Supreme Court to protect the fundamental rights and to ensure easy access to justice in case of its violation as courts are non-partisan institutions. The second speaker drew a comparative analysis of the essence of justice as envisaged in the Preamble of the three Constitutions, namely Constitution of India, Fiji and Bangladesh. The speakers emphasized that the difference in arrangement of the words 'justice: social, economic and political' in the Preamble of the three countries represent the different historical backgrounds and socio-economic realities of the nations. Furthermore, the speaker shared a number of path breaking judgments of the Supreme Court that helped alter the course of administration of justice towards the principles of equality, liberty, fairness and reasonableness. Some of the decisions were as follows:

1. *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226
2. *I.C. Golaknath v. State of Punjab* AIR 1967 SC 1643
3. *Kesavanand Bharati v. State of Kerala* (1973) 4 SCC 225
4. *Minerva Mills v. Union of India* (1986) 4 SCC 222
5. *Indira Nehru Gandhi v. Raj Narain* (1976) 3 SCC 321

The session concluded by quoting Dr. Rajendra Prasad that "*even with the best of the Constitutions, man & woman can destroy the order in the society and even with the worst of the Constitutions, man and women can make the most use of it*".

On the theme of **Elements of Judicial Behaviour**, the panelists comprehensively spoke about the Chief Justices Conference (1999) and Bangalore Principles of Judicial Conduct (2002) and listed out seven core values of judicial ethics, which are sacrosanct to the life of a judge viz. Independence (individual and institutional), Impartiality, Integrity, Propriety, Ensuring equal treatment to all, Competence and Diligence, and Neutrality.

The panelists also drew a distinction between personal independence and institutional independence. Personal independence implies complete independence in making decisions and it is the characteristic of a fair, efficacious and impartial judge. Institutional independence, on the other hand, is the freedom of judiciary from executive and legislative interference.



Furthermore, the panelists discussed the following landmark judgments of the Supreme Court on judicial ethics:

1. *High Court of Judicature of Rajasthan v. Ramesh Chand Paliwal* (1998) 3 SCC 72
2. *Tarak Singh v. Jyoti Basu* (2005) 1 SCC 201
3. *Daya Shankar v. High Court of Allahabad* (1987) 3 SCC 1
4. *High Court of Judicature of Bombay v. Shashikant S. Patil* (2000) 1 SCC 416
5. *State of West Bengal v. Shivananda Pathak* (1998) 5 SCC 513

On the theme of **Judging Skills: Art, Craft and Science of drafting judgments**, the panelists elaborated on the steps to write a clearer judgment, which were as follows:

I. Beginning before the beginning:

- It is important to have a sound grasp of pleadings and important issues.
- Judges should have command over oral and documentary evidence.
- The judges should pay attention to the arguments advanced on behalf of the parties.
- Judges must identify the law applicable to the case at hand.

II. Dealing with factual history:

- After identifying the contesting issues, judges must stress on the relevant facts and suppress the remainder facts. An extensive elaboration of irrelevant facts is a lazy and laborious exercise.
- Judges should use facts in a judgment in the following ways:
 - a) As an introduction to set the context
 - b) To mention time, place and sequence of events.

c) To arrive at a logical conclusion while deciding mixed questions of law and facts.

- The speaker also discussed a summary of elements in a judgment, which are as follows:

- a) Facts
- b) Genesis
- c) Issues under consideration
- d) Reasoning
- e) Consideration/disposition.

III. Setting out the law:

- The judges ought to provide summarized provisions of law.
- The exact provisions ought to be cited in the event of interpretation of a particular word of the provision.
- Instead of quoting from the relevant cases, the judges should paraphrase the relevant portions.
- Repetitions of phrases should be avoided.
- Grammatical rules are to be followed.
- Ornamental words, high flown expressions and literary illusions should be avoided unless one is the Master of the Craft.

IV. Stating the Conclusion:

- The judges ought to resolve all issues in this part of the judgment.
- No new legal or factual material should be mentioned.
- Generally, decision should be mentioned at the end to ensure a logical flow of reason in the judgment. However, in open and shut cases, decisions can be mentioned at the beginning.

V. Choosing an Appropriate style:

- Jargons should be avoided

- Judgments should be understandable.
- Nothing should hamper communication, convenience and confidence.
- The speakers referred to the guidelines issued by the Supreme Court in
 - a) *Joint Commissioner of Income Tax, Surat v. Saheli Leasing and Industries Ltd.* (Civil Appeal No. 4278 of 2010)
 - b) *Anil Rai v. State of Bihar* [(1980) 1 SCC 81]

On the theme of **Judge, Master of the Court: Court and Case Management**, the panelists remarked that a judge should not only be a good adjudicator but also an efficient time manager. He/she should try to bring the best possible result in the earliest span of time. However, the expectation of this ideal role is a challenge for the overburdened judiciary in India as 2.95 crore cases are pending in the three tiers of the judiciary. Approximately, 25% of the cases are more than 5 years old. National Court Management System (hereinafter referred to as 'NCMS') has been established by the Chief Justice of India in order to keep the backlog of cases in control. Following are its objectives:

1. Set measurable performance standards
2. Set up systems for monitoring on quality, responsiveness and timeliness
3. Enhance user-friendliness of the judicial system by way of computerization
4. Set up a National System of Judicial Statistics (hereinafter referred to as NSJS) for recording and maintaining judicial statistics.

Further, the panelists listed certain parameters that ought to be followed by the judge while deciding cases:

1. Fixation of time limit for issuing notice: Judges' duty is to encourage the process of litigation and to kill it in the expected timeframe
2. Service of summons: It can also be done electronically
3. Procedure for the grant of interim relief: Interlocutory should not overreach the context or requirements which renders the *lis* useless
4. Reference to Alternative Dispute Resolution mechanisms should be encouraged, especially in public utility services

5. Procedure to be followed on failure of alternative dispute resolution mechanism
6. Costs involved
7. Proceedings for perjury
8. Calling of cases
9. Adjournments
10. Miscellaneous applications.

Lastly, the panelists indicated four significant points that are necessary to be taken care of while managing the court, namely:

1. Security of the Court: Installation of CCTV cameras to deter illegal activities. This is more important in the district level courts than the higher courts
2. Supervision of Staff
3. Conduct of court proceedings
4. Use of information technology for ancillary proceedings.

On the theme of **Principles of Evidence**, the panelists began by stating that objective of an evidence is to unearth the truth. In some jurisdictions, prior conduct of a person, the number of past convictions etc. might be relevant and admissible, while in other jurisdictions, it may not be considered relevant. Therefore, judges ought to determine the relevancy of facts, while taking into consideration the admissibility aspect as well, because all that is admissible has to be relevant but all that is relevant, may not be admissible. Thereafter, the panelists stated that appreciation of evidence is not a legal exercise but a logical one. Sometimes, judges might be under an indirect pressure to convict the accused due to the illusion of failure of the criminal justice system. This might lead to appreciation of scanty evidence, which would be injustice to the accused.

On the theme of **Electronic Evidence: New Horizons**, the panelists in order to make the foreign judges aware of the legal position of electronic evidence in India emphasized on the definition provided in the Information Technology Act, 2000 and remarked that the definition provided, is comprehensive as it encompasses all data in electronic form. Moreover, electronic records are part of documentary evidence and all principles applicable to documentary evidence are applicable to electronic evidence as well. Furthermore, the panelists stated that electronic legal records and electronic evidence might

not be accessible after the propriety software becomes outdated. Hence, electronic evidence requires not just preservation of e-documents but also preservation of the software that reads the document.

On the theme of **Forensic Evidence**, the speaker remarked that in most of the criminal trials, no forensic evidence is collected. Moreover, when there is a gulf of difference between evidence of the medical expert and ocular evidence, the latter is relied upon in India. The callous attitude while collecting and storing samples, and blood tests done cursorily fails science. With regard to finger print matching, in India, it is satisfactory if there is an 8 point match, however in UK, to be admissible, it has to be a 16 point match. Furthermore, blood spatter analysis is not done in India and the hastiness with which autopsies are conducted clouds the true cause of death. Apart from these, the speaker emphasized on two problems that steals the authenticity of forensic evidence:

1. The forensic laboratories are overburdened and it takes months before finally getting the results.
2. There may be loss of samples due to environment and other lack of preservation procedures.

Hence, the courts need to satisfy themselves fully before convicting solely on the basis of forensic evidence.

On the theme of **Human Rights**, the panelists initiated the discussion by emphasizing on the soft law and hard law aspect of human rights by mentioning various international documents such as Magna Carta, Bill of Rights, French Declaration of Rights and Duties of Man etc. that laid the foundation of human rights in UK, USA and France. Thereafter, in the Indian context the panelists observed that Articles 20, 21 and 22 embody the basic principles of human rights in India. The significance of these constitutional provisions was

realized only after the Emergency when the conscience of judiciary was shaken. Drawing a distinction between the Constitutions of the three nations, the panelists mentioned that the Preamble of Fiji and Bangladesh Constitution envisions protection and preservation of human rights, where as in Indian Constitution, though there are no express provisions, human rights are implicit in the Fundamental Rights. It is the approach, attitude and mentality of the people and the courts that goes a long way in enforcement of human rights.

On the theme of **ICT and E-judiciary: Indian Perspective**, the panelists opined that the intersection of technology and law was seen for the first time in 1992 when the cause list of Patna High Court was published online. It was then a need for digitalization was felt in Indian Judicial system. In furtherance of this need, an E-committee was constituted, comprising of a Chairman (Retired High Court judge), Government, National Information Centre (NIC) and different organs of the judiciary. The first plan of the E-Committee i.e. Phase-I was prepared in 2008 and it provided laptops to all judicial officers in the country. Each court was provided with a server room and every district was provided with a website. Information like leaves of judges, nearest police stations etc. were displayed in this website. All these facilities were provided to 14, 436 courts. From 2014, the E-Committee started Phase-II, during which each court room was provided with six computers. These computers were also given to court complexes, District Legal Services Authorities. In Phase-II, NIC developed Case Information Software-II, which ensured that when a case was filed in the court, the details of the case were fed into the server, then to the National server and finally to the Data Recovery Centre. This data is now available to everyone and can be utilized for online research. The E-Committee



then decided that the entire data should be stored in cloud and each Court should have a separate cloud. Lastly, the speaker cited the case of *Swapnil Tripathi v. Supreme Court of India* [(2018) 10 SCC 639], where the apex court held that technology can be used to ensure transparency and live-streaming of court proceedings needs to be taken to cope-up with the changing times.

On the theme of **Identification of Ratio in a Precedent**, the panelists remarked that Constitution is not limited to the bare text but also to what the judiciary interprets it to be. The law declared by the Apex Court of the land is binding on the lower courts and this constitutional status has been accorded to precedents under Article 141. The panelists thereafter discussed the two theories of doctrine of precedent, *firstly*, the Material Fact Theory, which states that law emanates from fact and it is the material facts along with reasoning that constitutes *ratio decidendi*. Though this theory is widely accepted, it is not immune to controversies. The second theory i.e. the Classical theory provides that the principles of law laid down by the judge constitutes *ratio decidendi*. Furthermore, the panelists stated that *ratio decidendi* is that part of law without which the dispute in hand cannot be decided, whereas *obiter dicta* is that part of the judgment that is not necessary to decide the dispute in hand. The panel also cited the case of *Donoghue v. Stevenson* [(1932) UKHL] case to demonstrate how courts, in the earlier times, had taken inspiration from the Holy Bible to enunciate new principles and resolve the dispute at hand.

The final two sessions were on the theme of **Landmark Judgments in India**, the panel focused on discussing the path breaking judgments of the Supreme Court of India that altered the course of administration of justice. The following cases were minutely discussed and deliberated upon:

***A.K. Gopalan v. State of Madras* (AIR 1950 SC 27)**

In this case, the Supreme Court had observed that the ‘procedure established by law’ has to be in accordance with law enacted by the Parliament. It cannot be equated with ‘due process’ which was deleted from the draft constitution by the framers of the Constitution. However, the dissenting voice of Justice Fazal Ali echoed as he opined that the procedure established by law is the same as due process under the 5th Amendment of the US Constitution.

***Maneka Gandhi v. Union of India* [(1978) 1 SCC 248]**

The principle of law expounded in this case was that mere exercise of power in accordance with procedure established by law is not enough to deprive a person of his fundamental rights. The procedure has to be just, fair and reasonable. Thus, Justice Krishna Iyer and Justice P.N. Bhagwati overruled the decision in *A.K. Gopalan v. State of Madras* (AIR 1950 SC 27).

Thereafter, the panel explained how the emergence of public interest litigation has paved the way for easy access to justice and fulfillment of constitutional objectives of social justice. In this context, the speaker elaborately discussed the case of *People’s Union for Democratic Rights v. Union of India* (1982) 2 SCC 494.

Furthermore, the panel focused on three important aspects, *viz.* Women Empowerment, Gender Discrimination, Homosexuality.

Speaking about women empowerment, the speaker observed that women have been subjected to discrimination in the patriarchal society since time-immemorial. They are yet considered inferior in various religious discourses. In the name of tradition and religion, women have been discriminated. It is because of this reason that the Constitution under Article 15 (3) empowers the legislature to make special provisions for women and children. The objective behind this provision was to bring women at par with men. Previously, Hindu law was one of the most barbaric laws towards women. But with amendments, in the course of time, it has become the most advance religion with respect to status of women. In this context, it was noted that secularism is not just the duty of the State but also an attitude that has to be inculcated in the people. The speaker then elaborately discussed the following cases:

1. *Shayara Bano v. Union of India and Ors.* (2017) 9 SCC 1
2. *Indian Young Lawyers Association v. State of Kerala* 2016 SCC 1783
3. *Haji Ali Dargah Trust v. DR Noorjehan Safia Niaz & Ors.* (2016) 16 SCC 788.
4. *Joseph Shine v. Union of India* (2018) 2 SCC 189
5. *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1
6. *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1
7. *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India* (2017) 10 SCC 1

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REGIONAL CONFERENCE (SOUTH ZONE-II) ON ENHANCING EXCELLENCE OF THE JUDICIAL INSTITUTIONS: CHALLENGES & OPPORTUNITIES

19th & 20th January, 2019

Mr. Shashwat Gupta, Law Associate

Mr. Prasidh Raj Singh, Law Associate



The Academy in association with Madras High Court and Tamil Nadu State Judicial Academy organized a Regional Conference on the theme –“Enhancing Excellence of the Judicial Institutions: Challenges & Opportunities”. The conference was held at Tamil Nadu State Judicial Academy at Chennai and was attended by 104 participants. The objective of the conference was to provide a forum for exchange of knowledge and sharing of best practices among the participants apart from holding discussions on certain specified topics i.e. constitutional vision of justice; building synergies between district court and high court; revisiting norms for appellate review; information and communication technology (ICT) in courts and court and case management.

Session 1 - Constitutional Vision of Justice

The speaker initiated the discourse by stating that the Constitution is the grundnorm and it is the ultimate beacon of guidance for the judges. He further stated that the Constitution is nebulous and is constantly evolving through judicial interpretation. The concept of equality present in the Constitution was emphasized and it was stated that the judges should keep the principle of equality in mind while deciding cases and should treat both parties equally. The speaker also expounded upon the meaning of “secular” and “socialist” as provided in the Constitution of India. It was highlighted that the term “justice” has not been defined in the Constitution consciously since the concept is capable of varied

interpretation and it should not be circumscribed to a particular interpretation. Thereafter, the meaning attributed to “justice” by different philosophers and thinkers like Salmond, Martin Luther King, Benjamin Cardozo and Amartya Sen was discussed. It was stressed that certain features of the constitutional structure are intrinsic to the Constitution and are itself part of the constitutional vision of justice. These features are so pivotal to the Constitution that if they are removed then the whole structure of the Constitution will collapse. It was also opined that constitutional vision of justice is not limited to securing justice but extends to securing liberty, equality and other ideals enshrined in the Constitution.

Session 2 - High Court and District Judiciary: Building Synergies

The speaker expressed concern that the major interaction between High Courts and the district judiciary is restricted to disciplinary proceedings. Thereafter, the speaker discussed the ambit of Article 227 of the Constitution which confers the power of superintendence to High Courts over lower courts and tribunals under their jurisdiction. The High Court judges were advised to exercise restraint in making disparaging remarks against judicial officers. The speaker discussed various situations in which discreet inquiry should be conducted and the manner in which the charge sheet should be framed in disciplinary proceedings against a judicial officer. The session

also involved discussion on the unit system and it was opined that there should be some relaxation in situations when the units of the judicial officer is impacted by events like strike by advocates. The speaker exhorted the judicial fraternity to work together by mutually supporting each other. Thereafter, the speaker discussed the role of portfolio judges and opined that judge-in-charge of a particular district should function as a guardian and should discharge his responsibility in an effective manner so that synergy can be achieved. The guardian judges were also advised to expeditiously address the grievances of the members of the district judiciary and to allow transfers in exigent situations. It was stated that immediate redressal of their grievances would positively impact their productivity. The speaker suggested that the guardian judges should complement and appreciate the judicial officers for their work as it would boost their confidence. He also suggested that positive entries should also be made into the Annual Confidential Report and it should not be restricted to adverse entries.

Session 3 - Revisiting Norms for Appellate Review: Consequence of Frequent and Excessive Appellate Interference

It was opined that excessive appellate interference reflects an image that the lower tiers of the justice delivery system are defective, which leads to faith deficit in the judicial system. The speaker discussed that the present situation requires a revaluation of

various tiers of the justice delivery system to determine whether there should be a reduction in the number of tiers. Furthermore, it was opined that the quality of appellate interference should also be improved. The speaker also opined that interference by the High Court at every stage does not allow the trial to take its proper course. The delay by High Court results in stalling of the case in the lower courts. It was stressed that appellate courts interference with interlocutory orders should be minimal. The speaker suggested that system of written arguments should be introduced in appellate forums along with restricted time limits for oral arguments. The speaker also discussed that there should be a mechanism to restrict scattering of litigation into different forums by imposing prohibitive costs on the litigants.

Session 4 - Access to Justice: Information and Communication Technology in Courts

The speaker commenced the session by discussing the initial phase of ICT enablement process of Indian courts and the framing of the First National Policy on Computerization of Indian Judiciary. Thereafter the speaker discussed the benefits of ICT enablement i.e. affordability, accessibility, transparency and accountability. He also highlighted various challenges in initial period of ICT enablement which included non-availability of high speed internet, absence of infrastructure, difficulty in changing the mindset of lawyers and reluctance of court staff in accepting new



technology. He elaborated upon the development of software used in courts i.e. C.I.S. (Case Information System) and the features of its latest version. He also discussed the issues faced in standardizing case type and development of master type. He stated that now almost all the judicial officers of the country have been trained in the use of C.I.S system. He also elaborated upon the development of NJDG (National Judicial Data Grid) and highlighted some recent developments like eFiling, ePay, and NSTEP (National Service and Tracking of Electronic Processes). It was suggested that there should be continuous training of manpower and a set of guidelines should be created relating to usage of generated data.

Session 5 - Access to Justice: Court and Case Management

The speaker initiated the discourse by stating that as no judicial impact assessment is undertaken in India while introducing new legislations, it often leads to huge influx of cases, adversely affecting the functioning of the courts due to overburdening of the existing resources. Subsequently, the speaker elaborated upon the development of National Court Management System (NCMS) and delineated the objectives of the system. Thereafter, he highlighted the problems related to recruitment of judicial officers which includes delay in the publication of notification by the high court, hampering of the functioning of the high court due to the extended recruitment process and delays in conduct

of the examination by public service commission in certain states. The speaker also highlighted the directions given in *Renu and others v. District and Session Judge, Tis Hazari Courts and Another* [(2014) 14 SCC 50] regarding court staff. The judicial officers were advised to resolve service matters of the staff expeditiously. It was suggested that a grievance redressal committee should be set up to resolve various problems and issues faced by the staff. The speaker also initiated deliberations on preparation of annual budget of the courts. Subsequently, the speaker discussed the scope of duties of court managers and the methods whereby their services can be utilized to the maximum benefit of the system. The speaker also highlighted the directions related to court managers given in the case of *All India Judges Association and others v. Union of India* [2018 (9) SCALE 393].

The judicial officers were advised to reach their courtroom fifteen minutes before the commencement of the proceedings. It was opined that the judicial officers should undertake physical verification of F.I.R. and it should be reconciled with station records. The speaker also suggested that verification of complaints should be undertaken and it should be reconciled with suit register. The speaker highlighted the issue of absconding of accused and suggested a manner by which Section 229A of Indian Penal Code, 1860 would help in securing the presence of accused. Lastly, the judges were advised that they should never meet the bar members in chamber.

SE-10

NATIONAL SEMINAR FOR MEMBERS OF THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

02nd & 03rd February, 2019

Mr. Rajesh Suman, Assistant Professor



The Academy organized a National Seminar for Members of the Customs, Excise and Service Tax Appellate Tribunal. The Seminar aimed to provide a forum for judicial and technical members of the Customs, Excise and Service Tax Appellate Tribunal [CESTAT] to discuss and share experiences, knowledge and best practices. The seminar facilitated deliberations on issues including constitutional and statutory mandate of the Tax Statutes including scope for equitable construction; generic pathologies in assessment proceedings/departmental adjudication: role of the CESTAT; appreciation of evidence including electronic evidence in taxation proceedings; judicial ethics, judging skills and objectivity in decision making and the art, craft and science of judgment writing.

Session 1: Constitutional Authority to Tax, Basis of Taxation and Interpreting Tax Statutes including Scope for Equitable Construction

The session began with discussion on the history of taxation laws in India. The speakers opined that tax collection by the government used to be the command of the sovereign. However, the scenario has changed. The speaker discussed Article 265 of the Constitution for imposition of tax. Behind legislative framework,

the tax policy is very important. The speakers dwelt on the objectives of taxation i.e. equity, convenience, economy and certainty as the basis of a fair taxation system. The speaker emphasized on the importance of equity and rationality in the interpretation of tax statutes.

The canons of taxation – elasticity, productivity, simplicity, diversity and expediency which are fundamental in tax policy were emphasized upon. The attributes of a fair taxation system i.e. equal distribution of burden of tax (progressive taxation), vertical equity (the rich pay more than the poor) and horizontal equity (persons on the same level bear the same burden of tax) in view of the mandate of Article 38 of the Constitution were discussed to emphasise the role of tax in ensuring social and economic justice. Thereafter the speakers discussed features of the taxation system. They said that State cannot have absolute equality. Quoting Rawls “*sometimes you need to have inequality because at certain point of time the lower pedestal people will come above to become rich*”. Secondly, the speakers explained the concept of distribution of power by highlighting how the Finance Act is affected when government levy tax and how immunity can be granted under this Act. The speakers highlighted how Article

246 precedes Article 253 of the Constitution of India.

The speakers explained the concept of delegated legislation and stated that there is a need for the legislature to delegate some tasks to the Executive. The speakers then focused on the problems faced by local authority such as municipality, while deciding the rate of tax. The issue of control on tax levied by the Central Government was discussed. The speakers then discussed the issue of equity in tax law and imposition of tax with due authority of law. Various aspects of judicial discretion were discussed and it was emphasised that it has to be applied within the four corners of law. The speakers focussed on the issues of interpretation and equitable construction which can affect tax collection and the revenue generation of the country. Thereafter the speakers highlighted Article 39 of the Constitution with respect to public trust doctrine according to which the resources should be used for common and maximum good of the public. The need of therapeutic jurisprudence for attaining objectives of the judicial system regarding trust and confidence of the parties and litigants was highlighted. The session concluded by discussing the relationship between law and equity and emphasising that equitable distribution is a necessary aspect to achieve therapeutic justice.

Session 2: Generic Pathologies in Assessment Proceedings/Departmental Adjudication: Role of CESTAT

The session began with the query of a participant regarding subsequent legislation and whether that can be taken into consideration for interpreting the earlier legislation. The speakers explained that the principal of subsequent legislation applies only when previous legislation is ambiguous and will not apply in situations where the previous legislation is clear. The speakers referred to a few judgments of the Supreme Court regarding this issue. The participants further raised the query that whether the tribunal has power of equitable interpretation and when the law says that a particular thing is to be done in a particular manner then whether equitable interpretation can be done and relief can be granted? The speakers responded that tribunal has given equitable interpretation in a case which has been endorsed by the High Court. The interpretation has to be done only within the legal jurisdictional limit that are also the *laxman rekha* of the judicial role.

The speakers expressed concern of commissioners regarding pro-revenue tendencies, fixation of target with time limits and imposition of huge penalty amount. Another concern shared was regarding tax authorities' insistence on collection of taxes and influencing commissioners' behaviour in this regard. Tax can only be collected on the basis of authority of law and it should not be driven by any other consideration. Many a times despite setting aside the order of commissioner by the Tribunal, the commissioner keep passing same kind of orders. It was suggested that the tribunals should set aside bad orders with either instruction for training of the concerned commissioner or should impose costs. The assessee should not pay despite having declaration of law in his favour.

The speaker said that there was a circular for increasing the threshold to ₹ 50 Lakhs for filing appeals. Subsequently 40% to 50% of appeals in high courts between 2004 and 2012 under the influence of this circular were getting dismissed. It may not have ramifications post 2012-13. Regarding reduction in pendency of cases, it was suggested that CESTAT can follow the method of direct tax tribunal i.e. ITAT for resolving matters involving common issues. The traditional practice of CESTAT from 1984 is that the constitution of larger bench is only to decide judicial order of conflict. But if there are matters of common importance then it requests the concerned parties to argue before one bench. Most of the issues before the tribunal are batch issues and they should be put together and disposed of in one go. Some participants said that they are following this practice in their respective benches. Tribunal needs to work with the Department to ensure that the parties submit a joint memo. Another concern was raised on lawyers arguing irrelevant issues.

It was suggested by the speakers that process should involve common show cause notice and issues of common interest and then only the matter should be put before the tribunal. The speaker referred to FICCI's report which mentions that 85% to 90% of departmental appeals are lost which shows the low quality of orders. The adjudicator is part of the legislative and executive wing. Instead the adjudicating authority i.e. the commissioner should be separated from the control of Ministry of Finance to improve the quality of adjudication. The grass root level training of



adjudicating officers should be strengthened.

The speaker expressed concern about the tendency of commissioners to go pro revenue. It was stated that if tax is not authorised by law then as per Article 265 it is counterfeit currency and such amount should not be deposited to the Consolidated Fund of India. The speakers concluded the session by giving following suggestions- a) institutional bias needs to be removed; b) tax payers should know what they are paying for; c) mentoring is required for efficient working of the departmental body and; d) strict adherence to the constitutional law.

Session 3: Appreciation of Evidence including Electronic Evidence in Taxation Proceedings including Common Errors in Appreciation of Evidence and Evolving Domains in Electronic Evidence

The session began with discussion about the meaning of electronic evidence and spoofing of emails and whatsapp messages. The speaker demonstrated how a selective message can be modified. The speaker stated that we all have our e-mails linked with our phone which helps the hackers to modify the messages in text or in whatsapp. The speaker stated that whatsapp claims that the chats done on whatsapp are fully encrypted but actually they are not. Thereafter, the speaker explained ways to protect oneself from such spoofed messages by hackers. The speaker discussed process of flow of information on the internet and role of servers in storing data. E-records were discussed including e-mails, ATM transaction logs, word processing documents, instant message history, files saved from accounting software, spreadsheets, internet browser history, VOIP call logs, Whatsapp chats, GPS, computer printouts and computer backup. Thereafter, the speakers discussed characteristics of digital evidences. It was emphasized that E-evidences tend to be voluminous, difficult to destroy and can be easily modified. Further, the speaker discussed offences covered under Sections 43(h) (i)

(j), 65, 65B, 66B, 66C, 66D, 67 of the Information and Technology Act, 2000. Data recovery and hash technology was explained. The use of technology for tax evasion explained through the example of Airtel e-wallet fraud in which artificial e-wallets were created. Thereafter, the speakers highlighted statistics on tax evasion. A closer look at the government data reveals that the Central Board of Direct Taxes [CBDT] has registered an over six fold increase in the number of prosecution cases filed in courts to 4524 in 2017-18 from 669 in 2014-15. Search and seizure by CBDT has also seen a spurt. The speaker finally discussed ways to improve data protection over internet.

Session 4: Sitting in Judgment: Judicial Ethics, Judging Skills and Objectivity in Decision Making including Conducting the Court and Why Precedent is Important

The session began with discussion on Bangalore Principles which are followed by many common law countries. The Bangalore Principles of Judicial Conduct, 2001 have been adopted by the judicial group on strengthening judicial integrity and have been revised at the round table meeting of Chief Justices held in Hague. These principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to provide a framework for regulating judicial conduct. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards. The Bangalore Principles of Judicial Conduct have increasingly been accepted by judiciaries across the world and by international agencies involved in strengthening integrity of the judicial process. The speaker added that not only some countries adopted the Bangalore Principles, but have also modelled their own principles of judicial conduct according to the Bangalore Principles of Judicial Conduct.

Thereafter, the speaker emphasized two ways to look



at these principles; firstly, from the point of view of stakeholders and the secondly from the point of view of judges. Judges have to decide maximum number of cases to the best of their ability by practising and upholding high ethical standards. A judge by his conduct and by his decision making process should render decisions fairly and equitably so as to earn trust and respect for the judiciary from the public and from the members of the Bar. For this purpose, a judge has to develop judicial skills, administrative skills and most importantly, strictly adhere to the canons of judicial ethics. The speaker shared several issues for ethics, judging skills and objectivity in decision making which included adequate training of the judges, proper case management, short and proper reasoned judgment, judgment in regional languages, proper management of court records, removal of biases and prejudices, social aloofness and avoiding mingling with litigants and advocates, removal of variation in imposition of penalties, care and caution in writing judgments and ensuring equal justice to all. The speaker emphasised the importance of precedent as the means of ensuring discipline in adjudication.

Session 5: The Art, Craft and Science of Judgment Writing

The speaker began the session by posing questions to the participants regarding judgment writing. The first question was why do you write a judgment? The participants cited many reasons for writing a judgment including that they write judgments for higher judicial forum, for the parties, for the stakeholders and for rendering justice to the parties. Second question posed by the speaker was how do they think litigants understand their judgments? The participants

responded that litigants who come before CESTAT are big corporations or companies and hence, they are also capable enough to understand the judgments. The speakers suggested that judgment should be in such a language that each and every group of stakeholders understands it because judgments are not for a particular party but for the whole society. The judgment should not be written only keeping higher forums in mind and it is the duty of every judge to check that the work done by them can be understood by everyone.

The speaker further suggested that higher forums may disagree with the judgment but the important thing is that the judgment should be clear and well-reasoned. The litigants must know the reasons for winning or losing. Good judgments should satisfy all stake-holders. Thereafter, the speakers discussed the style in which the judgment is to be drafted. It was explained that one should write in a style in which one is comfortable. Different countries follow different method of writing judgments. In North America judges write issues first but in India judges write facts first to put in the forefront what the case is all about. The speaker then elaborated the use of heading in writing judgments. The speaker expressed concern on practice of writing lengthy judgments and stated that it is a myth that a long judgment is a good judgment. Short and properly reasoned judgment should be preferred over unnecessary long judgments.

Further the speaker stated some more important aspects of judgment writing including thorough knowledge of procedural laws, broad acquaintance with the substantive laws and fundamental legal principles, skill of giving due hearing, skill of marshalling of facts and arriving at findings, applying legal principles to those factual findings to arrive at the correct decision and putting the facts, reasoning and conclusions in a lucid, logical, precise and coherent manner in the form of an order or judgment. The litigants, the lawyers and the appellate/revisonal courts should be in a position to understand what the judge has decided. It was suggested that judgment should be read by the judge again and again and corrections should be made if required.

P- 1150

CONFERENCE FOR HIGH COURT JUSTICES ON INTELLECTUAL PROPERTY RIGHTS

08th to 10th February, 2019

Dr. Amit Mehrotra, Assistant Professor

Ms. Sonam Jain, Research Fellow



The Academy organized a Conference for High Court Justices on Intellectual Property Rights with the objective of sensitizing judges on intellectual property rights, facilitating effective adjudication of IPR disputes, strengthening enforcement and combating economic crimes. To get acquainted with legal challenges emerging due to the shift of societal interaction from physical to virtual space, the conference covered everyday litigation challenges faced by parties and judges in such a technical field. The conference provided a platform for justices to share experiences, insights, and suggestions with a panel of distinguished resource persons. The entire conference was divided into eight sessions over the duration of three days. The conference included interactive sessions and round table discussions on designated themes among participant justices. Hon'ble Justice Sanjay Kishan Kaul, Hon'ble Justice Indira Banerjee, Hon'ble Justice Prabha Sridevan, Hon'ble Justice Manmohan Singh, Mr. O.P Gupta, Mr. Pravin Anand, Dr. G. R. Raghavender, Ms. Stuti Dhyani, Dr. Mohan Dewan, Mr. Pushpendra Rai were the resource persons for the conference.

The theme for session one was **Intellectual Property**

Rights: Genesis, Benefits & Importance. The session initiated with an introduction to the theme of the conference. It was stated that Intellectual Property Right is a matter of public interest and is not just a dispute between individuals. The speaker commenced by stating that Intellectual Property is divided into 3 major heads, viz, the first head includes Patents, Designs, and Trade Marks; second, Copyright and third includes Geographical Indication (herein after GI) : Semiconductor layout of Integrated circuits; Plant Variety and farmers rights. The speaker pointed out the example of a wristwatch that has registered Patent, Designs, Trade Mark and Copyright. The speaker mentioned that for the grant of patent on a product or process the invention must possess novelty, inventive step and must be capable of industrial application. For Designs, it was stressed that it is something which can be distinguished with an eye. Protection for design is granted initially for ten years which is extendable by five more years. Under Copyright, the exclusive right and bundle of rights was discussed. The community right under GI was also emphasized.

Early stages of evolution of intellectual property rights covering the Statute of ANNE 1710, Venetian Patent

Act 1474, National and International dimension of Intellectual Property Rights (hereinafter IPR), TRIPS, Paris Convention and importance and benefits of different IPR heads were discussed. It was opined that the 21st century is a knowledge-based economy and in that light disadvantage of weak IPR system and steps to strengthen it was deliberated upon.

The speaker threw light on the Berne Convention as fundamental International Treaty requiring fewer formalities while evaluating works and registering them automatically in all the member countries of the Convention. For Copyright protection the work has to fit in the pigeon hole by accommodating his work under either of the 6 fundamental heads and 2 new heads of performing and broadcasting rights. The thin line of demarcation between Invention and Innovation was discussed by giving various examples. The speaker dwelt on the Efficacy Test under *Novartis decision*, data exclusivity, patent linkage, compulsory licensing, *Quia timet* suit, *John Doe* order were also discussed.

The theme for session two was **Intellectual property Rights Regime in India: Government Policies**. This session began with a question raised by participant judges i.e. Can a GI be used against services? Which the speaker answered in the negative. The speaker initiated the discussion with a Latin phrase "*Nemo dat quod non habet*" which means "What I don't have I can't give" asserting that a balance should be maintained between the private right and a societal right. Salient features of Patents Act with the amendments introduced in 2005, Pre TRIPS and post TRIPS evolution of IPR in India, Section 3(d) and evergreening of patents and Section 92 about the special provision of the compulsory license were discussed during the session. The speaker deliberated upon the civil and criminal remedies under IP legislation and the WIPO administered treaties in India like Paris convention, Berne Convention, Patent Cooperation Treaty and Madrid Protocol. The speaker explained different schemes of government like incentives for startups and modernization scheme for Intellectual Property Offices. Video conferencing, SMS service, mobile App and e-filing were some of the modern and innovative technology that government is following was discussed. It was stated that different schemes for IP awareness and promotions were also being discussed at school, university and industry level. It was suggested that National workshops,

training sessions, and IPR enforcement toolkit should be provided in order to strengthen enforcement mechanism and build awareness of the schemes and initiative of the government.

The theme for session three was **Emerging Issues of IP Regime: India and Global Perspective**. This session discussed the *Yahoo case* wherein the public interest in IPR was emphasized. It was clarified that there is an overlapping right between design and copyright and under which section 15(2) of the Copyright Act was discussed.

Philips v. Remington, *Novartis, Roche v/s Cipla*, *Merck vs Glenmark*, were some of the cases discussed under the Patent law. The orders that were discussed showcasing the positive effect of damages includes donating black shades to blind persons, donation of spittoons by Baba Zarda and awarding community services. The concept of day to day trials, adjudication of the trials, jurisdiction issues were also discussed during the discourse.

The theme for session four was **India's IP-related Treaty Obligation**.

With regard to India's IP-related Treaty Obligation, the speaker threw light on the evolution and the history of IPR. The speaker stated that every treaty has a preamble which talks about its scope and object.

He focused on TRIPS and articulated about a minimum standard of civil and criminal remedies, anti-competitive practices, restrictive trade practices, abuse of dominance and stressed that product patent is introduced because of TRIPS obligations. The speaker talked about patent policy and Doha Declaration. While addressing the issue on Industrial Design, the speaker stressed on the Hague Agreements to which India is not a party. He touched upon the concept of reverse engineering under the Semiconductor Integrated Circuits Layout Design. The process for filing the patent application was deliberated upon. It was stated that Congress of Vienna came up with Paris Convention where certain standard rules were drafted for filing of patent application. Paris Convention, Patent Cooperation Treaty and simultaneous protection under the treaty were discussed. It was stated that Patent Cooperation Treaty is considered as a guiding document and is not mandatory for contracting States.

The theme for session five was **Challenges of**



Intellectual Property Rights in the Digital Age. The session commenced with discussion on the challenges of IPR in the Digital Age. The speaker discussed brief history of digital revolution. It was stated that from healthcare to education, technology has transformed the lives of the people. It was stated that with the advancement of global economy the digital technology plays a very vital role in regulating trade and commerce. The emerging challenges with regard to the digital technology were discussed. The speaker gave a classic example of Klip-n-Store for explaining the problems in E-marketing which is coined as Hash Tagging. The concept of digital rights, digital age, widespread use of the internet and access and control of digital information were discussed.

It was stated that digital technology has accelerated the distribution of information with speed and accuracy to disseminate literary, artistic and scientific work to a very large community of users having access to internet or digital media. The protection of content, piracy and protection of computer software were some of the major concerns highlighted by the speaker.

The theme for session six was **Jurisdictional Issues in Trademark, Copyright & Patent Disputes.** It was highlighted that the Intellectual Property Rights are precious assets, and in the present times the recognition and value of IPR is growing by each day. It was stated that the first and foremost thing for a business is to identify its IPR and to register those rights so that protection can be granted. It was emphasized that IPRs are more of a registration right. The speakers focused upon the general rule of jurisdiction under Section 20 of Civil Procedure Code, 1908 (herein after C.P.C). It was stressed that for deciding cases under Patent Act and Designs Act the jurisdiction has to be determined under Section 20 of the C.P.C. It was stated that many times when court reaches the final stage of hearing the court realizes that it has no jurisdiction to entertain such case.

The case of *Biswanath Prasad Radhey Shyam vs Hindustan Metal Industries* (1979) 2 SCC 511 wherein the concept of Novelty was enunciated. The cases of *Indian Performing Right Society v/. Eastern India Motion Pictures* (1977) 2 SCC 820, in the light of the law relating to passing off *Parswanath Developers Ltd. v. Parswanath Realty Pvt. Ltd.* 2009 (40) PTC 159 (Guj.) was discussed.

The theme for session seven was **Resolving Intellectual Property Disputes Via. Commercial Courts and ADRs.** It was stated that the principle of trust on the mediator is fundamental to make the process successful. It was emphasized that quick resolution of the disputes is the need of the hour as civil disputes take years to decide. The speaker enlightened the participants by discussing global challenges which create new type of disputes like digital environment, climate change and access to health care, protection of traditional knowledge and preservation of biodiversity. The concept and understanding of litigation and ADR was discussed. It was highlighted that current litigation costs for patent infringement cases is very high. It was stated that ADR is a neutral mechanism allowing the parties to solve their disputes outside of court in a private forum. Talking about its benefits the speaker stated the time and cost effective benefits of ADR. Cyber-squatting, abusive registration of domain names that violate trademark rights, resolving disputes of domain name registered on other person name or enterprise, ICANN which was adopted in 1999, establishment of IPAB, types of intellectual property disputes like infringement, passing off were deliberated upon during the session.

The speaker raised a concern as to the delays in adjudication of commercial disputes. The speaker summed up the session by giving suggestions that the resolution of IP disputes in India is a budding scheme which needs legislative support and a proper mechanism for better implementation. It was stated that though court rulings are quite unclear in the present scenario, still it can be inferred that IP disputes can be solved through ADRs and by commercial courts, but still there is a long way ahead.

The theme for session eight was **Role of the Judiciary in effective Enforcement of Intellectual Property.** The major role played by the judiciary in effective enforcement of ADR and the measures to

improve this mechanism were discussed. The speaker expressed his concern over counterfeiting and piracy which has become a global epidemic, leading to a significant business drain and its impact on the global economy. The *Biswananth Prasad Radhey Shyam Case* was discussed with reference to the presumption of validity of the patent. Role of the judiciary in IPR enforcement and protection of the interest of IPR holders was discussed. It was stated that sometimes general public interest is to be weighed over IPR holder's interest. The speaker articulated about the changing role of judiciary and stressed that after the introduction of TRIPS Agreement patent regime in India since 2005, the patent litigation has raised considerably.

The speaker dwelt on the three pillars of IP system i.e. Legislation, Administration and Enforcement. It was opined that enforcement is the most important element as an effective mechanism to protect the existence and exercise of IPR. The speaker coined his deliberations over the balancing interest between the interest of the



beneficiaries, competitors and the public.

It was stated that the main role of the judiciary is to ensure the rights that can be enforced and punish the perpetrators. The speakers focused upon the issues arising from TRIPS and obligations on member states after TRIPS Agreement. WIPO Development Agenda was discussed and it was opined that countries are required to legislate in harmony with the international agreements replacing pre-existing IP legislation. It was also stressed that role of the judiciary is paramount in interpreting new laws and striking a judicious balance between the interest of the nation and international commitments.

P-1151

REFRESHER COURSE FOR COMMERCIAL COURTS

08th to 10th February, 2019

Mr. Shashwat Gupta, Law Associate



The Academy organized a three day Refresher Course for Commercial Courts which was attended by 27 judicial officers from across the country. The objective of the refresher course was to accrete knowledge base and skills of the participants in the spheres of Intellectual Property Rights, Construction and Infrastructure agreements; and Joint Venture Agreements. The course was designed to facilitate discussion on issues arising during adjudication of commercial disputes and to evolve strategies for expeditious disposal of cases.

Session 1- Jurisprudential Charter of Commercial Courts & Commercial Courts: Contours of Jurisdiction

The speaker stated that delay in adjudicating commercial disputes has an adverse impact on the economy since it impedes flow of money in the market affecting the financial strength of the nation. Hence, the judges were advised to dispose the cases expeditiously as envisaged by the Commercial Courts Act, 2015. The speaker discussed that legislature has recently brought major changes for enhancing ease of business in India which includes:

- Enactment of the Commercial Courts Act, 2015 (hereinafter CCA) and Insolvency and Bankruptcy Code, 2016

- Amendment of the Arbitration and Conciliation Act, 1996 and Specific Relief Act, 1963

It was stated that these changes would build confidence in foreign investors and they would invest in the country with the belief that their disputes would be adjudicated within a given timeframe. The speaker also highlighted the recent increase in India's ease of doing business rankings which would be a major boost for investment in India. The speaker also discussed the system in Germany where the courts are strict while dealing with frivolous appeals in commercial matters. One of the major concerns raised during the session was that judicial officers have also been designated as the presiding officers of a large number of other special courts which hampers quick disposal of commercial cases.

Session 2- Amendments to the Code of Civil Procedure, 1908 under Commercial Courts Act, 2015

The speaker advised the participants to strictly adhere to the timelines and to effectively implement provisions relating to interrogatories and summary judgment provided under the Code of Civil Procedure, 1908, (hereinafter CPC) as amended by the CCA. The speaker also discussed judgments of Delhi High Court wherein it

was held that timelines provided under the CCA should be strictly complied. Thereafter, the speaker elaborated upon case management hearing provided under Order VA of CPC and stated that court is authorized to pass a variety of orders at such a hearing to ensure smooth and effective disposal of the suit. The speaker advised that judges should refrain from granting adjournments and should not favour advocates with the intention to become a popular judge. It was also stated that judges should impose exemplary cost if frivolous issues are raised by the parties to deter them from wasting precious time of the court.

Session 3 -Interplay between Commercial Courts Act, 2015 and Arbitration and Conciliation Act, 1996 & the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018

The speaker discussed major changes brought by the 2018 amendment in the structure of the Act including reduction in pecuniary jurisdiction of the court. The speaker also discussed the case of *Kandla Export Corporation v. OCI Corporation* [(2018) 1 SCC 742] and highlighted that an appeal would not be maintainable under CCA if it is not maintainable under Section 50 of the Arbitration and Conciliation Act, 1996. Thereafter, the participants raised a concern regarding the pre-institution mediation process and stated that most of the mediators are not trained in mediating commercial disputes. Another concern which was highlighted in the session was that reduction in the pecuniary jurisdiction of the commercial courts has opened floodgates and the commercial courts are now facing a huge influx of cases which normally used to be filed before the civil courts.

Session 4 - Copyright and Design Disputes

The speaker highlighted and discussed different intellectual property rights which permeates daily life. Subsequently, the speaker discussed the development of intellectual property rights regime and highlighted various international conventions which govern the field of intellectual property rights. The speaker focused upon the agreement on trade related aspects of Intellectual Property Rights (TRIPS) which is the most comprehensive treaty governing intellectual property rights in the world. Thereafter, the speaker highlighted the definition of 'literary work', 'musical work', 'performance', 'producer' and 'work' provided

under the Copyright Act, 1957 and discussed various examples which constitute infringement like downloading pirated songs, creating and selling copies of a work without authorization and performing a copyright work in public for commercial gain without payment of appropriate royalties. She also discussed the judgment of the Delhi High Court in *University of Oxford v. Rameshwari Photocopy Services* [235 (2016) DLT 409]. In response to a query, the speaker discussed the case of *Eastern Book Company v. D.B. Modak* [(2008) 1 SCC 1] and stated that there is no copyright on a judgment of a court.

Session 5 - Trademark and Patent Disputes

The speaker stated that trademarks distinguish the goods or services of a seller from his competitors and signify existence of a quality which is usually attributed to that seller. The speaker focused upon the definition of 'mark' and 'trademark' provided under the Trademark Act, 1999 and gave examples of numerals and colour combination which are also capable of trademark protection. Thereafter, the speaker discussed the Common Law remedy of passing off and the difference between trademark infringement and passing off. It was highlighted that in case of trademark infringement the court has to only determine whether the infringing mark is deceptively similar to the registered trademark. The territorial jurisdiction of courts in case of trademark infringement was also subject of intense deliberation during the course of the session. The speaker also discussed several cases on intermediary liability for sale of counterfeit goods. Lastly, the speaker discussed the conditions to be fulfilled by a product or process for patent protection.

Session 6 - Joint Venture Agreements

The speaker expounded upon the concept of joint venture and the rationale behind formation of a joint venture. Thereafter, he discussed different forms of joint ventures i.e. unincorporated and incorporated joint venture. The speaker also highlighted various important terms in joint venture agreements and their relevance. The terms which were discussed included composition of board, appointment of CEO, distribution of profits, funding, deadlock resolution etc. The clause relating to role and contribution of Joint Venture partners was discussed and it was stated that the contribution of partners may include sharing of



technology, management services, marketing expertise, distribution channels or financial support. It was opined that majority of disputes arising out of joint venture agreements are related to transferability of shares, non-compete clauses and breach of representations and warranties. Thereafter, the speaker discussed various terms related to transferability of share including rights of first offer; right of first refusal; tag along rights; drag along rights; call option and put option. He also focused on clauses relating to non-solicitation and non-disclosure and highlighted their importance in an agreement.

Session 7 - Construction and Infrastructure Contracts

The speaker stated that infrastructure development is vital for growth of the economy and huge infrastructure projects generate employment for a large number of people. It was further stated that now majority of infrastructure projects are undertaken by the government under public private partnership (PPP) model. Thereafter, the speaker highlighted different types of PPP models like Build-Operate-Transfer; Build-Own-Operate-Transfer; Build-Transfer-Operate; Build-Own-Operate and Design-Build-Finance-Operate. It was also discussed that specific legislations like Airports Authority of India Act, 1994 and National Highways Act, 1956 provide for private participation. The speaker opined that the process of allowing private participation should be fair, reasonable and non-discriminatory and should satisfy the requirements of Article 14 of the Constitution. The speaker discussed that the tender process is frequently embroiled in litigation with the award of contract being challenged before the court. It was also highlighted that currently most of the banks in India have a high exposure to Non-Performing Assets and most of the large infrastructure companies are in huge debt with their projects stalled due to litigation. The speaker also focused upon the

2018 amendment to the Specific Relief Act, 1963 which prohibits granting of injunctions in situation wherein such an injunction would cause delay or impediment in the progress or completion of specified categories of infrastructure project.

Session 8- Adjudication of Disputes under the Act: Challenges and Solutions

The session involved intense deliberations on various challenges faced by presiding officers of commercial courts. The major issues and suggestions which were highlighted during the course of the session were:

- Lack of ICT enablement in areas like service of summon and issue of notices.
- Lack of adequate infrastructure in commercial courts.
- Huge influx of cases due to reduction in pecuniary jurisdiction.
- Transfer of large number of cases to commercial courts.
- Failure in establishment of commercial courts in various states.
- It was suggested that lawyers should be sensitized about the procedures under the act
- Designation of existing courts as commercial courts in certain states rather than establishment of exclusive commercial courts for handling commercial matters.
- The mediators in many states are not adequately trained to resolve commercial disputes.

The speaker stated that it is important to train court staff and provide adequate hardware support for ICT enablement of courts. The speaker also discussed the issue regarding notification to be issued by State Governments for change in pecuniary jurisdiction under the CCA. It was stated that until the necessary notification is made by the concerned State Government there is no necessity for the courts to entertain cases below 1 crore. The speaker stressed upon the objective of the establishment of commercial courts and stated that even if judges face protest from the Bar, they should stick to the timelines. Lastly, the speaker opined that the participants should undertake expeditious settlement of disputes so that the image of the judiciary among the masses is changed and that there is more inflow of investment into India.

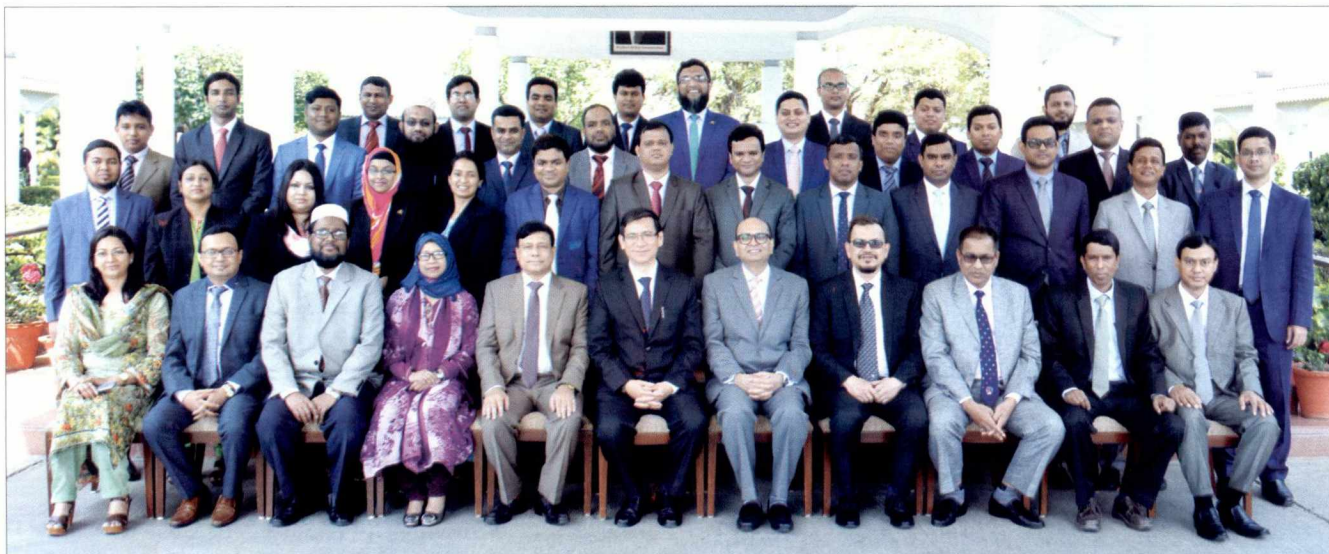
SE-06

SEMINAR FOR FOREIGN JUDGES [BANGLADESH]

15th to 21st February 2019

Ms. Paiker Nasir, Research Fellow

Mr. Rahul I. Sonawane, Research Fellow



The Academy organized a “Seminar for Foreign Judges (Bangladesh). The programme was divided into seventeen sessions over the duration of seven days along with three study tours. The participants were a mixed group of District Judges/Sessions Judges, Additional & Joint Sessions Judges and Additional District Judges. The programme facilitated deliberations among participants with the objective to discuss the Indian Constitutional Arrangement; Indian Judiciary: Court Management & Case Management; E-Judiciary; Judging Skills; Criminal Justice System of India and Landmark Judgments of India.

The first session of the programme was **Overview and Architecture of the Indian Constitutional Arrangement**. The session commenced with emphasis that the main purpose of a judge is to serve justice and to provide the same the Constitution of India was drafted. Which happens to be the world's longest codified Constitution. The uniqueness in the contents and spirit of the Indian Constitution was stressed upon. Part I and Part III of the Constitution were elaborately discussed. It was stressed that Part III of the Constitution is the most important part as it contains the provisions regarding fundamental rights. Thereafter, the difference between Part III

[Fundamental Rights] and Part IV [Directive Principles of State Policy] was highlighted. The discussion also underlined the similarities between the Constitution of India and the Constitution of Bangladesh.

Session two was **Indian Judiciary: Organizational Structure and Jurisdiction**. The session commenced by emphasising that Indian judiciary is an independent body separate from the executive and legislative wings of the Government of India. The organizational set-up of the Judiciary in India was elaborated upon with discussion on the procedure for appointment of judges in the Supreme Court, High Court and District Judiciary. The deliberation discussed some of the landmark judgments like- *I.C. Golaknath and Ors. v. State of Punjab and Anrs.* [1967 AIR 1643, 1967 SCR (2) 762], *Maneka Gandhi vs Union Of India* [1978 AIR 597, 1978 SCR (2) 621], *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225], *NJAC Judgment* [Supreme Court Advocates on Record Association v. Union of India (2016) 5 SCC 1], *the Judges' Transfer Case* [S.P. Gupta Vs. Union of India (AIR 1982 SC 149)] and their impact on the democratic set-up of India.

The next session was **Goals, Role and Mission of Courts: Constitutional Vision of Justice**. The session

commenced by emphasizing that the main goal of courts is to secure and impart justice. The role of the judiciary is to protect the rights of the people against the ever expanding powers of government. The only check that the Constitution has provided to this runaway inflation of power is the judiciary. In other words, judiciary is the guardian of the conscience of the people as well as of the law of the land. The discussion also emphasized the significance of Article 14 of the Indian Constitution, which prohibits the state from denying any person equality before the law or equal protection of laws. No discrimination is permitted between citizen and citizen and no citizen is branded as a second class citizen or suffers from any disqualification because of his caste, community or sex. *Sabrimala case [Indian Young Lawyers Association & Ors. v The State of Kerala Writ Petition (Civil) No. 373 of 2006]* was discussed in this regard. Thereafter, the rights under Article 21 of the Indian Constitution like- Right to Livelihood, Right to food, Right to Education, Right to housing, Right to health were discussed. Cases like *Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors [(2018) 1 SCC 809]*, *Bandhua Mukti Morcha v. Union of India [(1993) 3 SCC 19]* and *Olga Telis v. Bombay Municipal Corporation & Ors [(1985) 3 SCC 545 : AIR 1986 SC 180]* were discussed. The concept of *Locus Standi* was also discussed in brief.

Session four was ***Elements of Judicial Behavior - Ethics, Neutrality and Professionalism***. The session accentuated the basic tenets of ethics, neutrality and professionalism among judges. Initially deliberation focused on the 16 canons of judicial ethics and emphasized that these canons are the “restatement of the values of judicial life” and are not meant to be exhaustive but illustrative of what is expected of a Judge. These canons serve as a guide to be observed by judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice. The origin and meaning of ethics was discussed and emphasis was laid on values of neutrality, independence, professionalism and sensitivity to the needs of litigants. Various sources of ethical norms for judges were discussed that included Constitution of India, Bangalore Principles of Judicial Conduct and the Restatement of Values of Judicial Life. Further it was stated that judges survive on public confidence and in order to maintain the same, independence, impartiality,

integrity, propriety, equality and competence & diligence should be inculcated in a judge. It was highlighted that the values and standards required from a judge varies with changes in the society and it is important that judges be aware of these changes. Judges must constantly be aware of their role and position in the society.

Session five was ***Judge the Master of the Court: Court Management & Case Management***. The session commenced with discussion on court and case management schemes in India. It emphasized the significance of court and case management in the smooth functioning of the justice delivery system. Emphasis was also placed on the fact that a judge is the master of the court and therefore, it is his/her or utmost duty to be aware about everything happening in the court. A judge must ensure that all the stakeholders of the court have faith in him and must be sure that they are at the right place to seek justice. Such public trust in the eyes of public can only be achieved when court and case management is done with the sincerity and justice is delivered. It was suggested that a judge must always remember that he/she plays the most essential role in speedy disposal of the disputes that leads to the augmentation of public trust and confidence in the justice delivery system. It was also suggested that a judge must be open to ideas from the stakeholders that may enhance the systems in the court. Scarcity of resources and lack of infrastructure also formed an integral part of the discussion.

The next session was ***ICT and E-Judiciary: Indian Perspective***. The session commenced by drawing similarities and differences in the judicial systems of India and Bangladesh. The augment of ICT in the Indian Judicial system and how the e-courts projects were implemented was elaborated upon. The use of ICT to enhance judicial productivity, both quantitatively and qualitatively was elucidated to the participants. It was accentuated that the use of ICT undoubtedly makes the justice delivery system much more affordable, accessible and transparent. Alongside, the significance of the National Judicial Data Grid (NJDG) was stressed. The working of NJDG was also demonstrated to the participants.

The session on ***Judging Skills: Art, Craft and Science of Drafting Judgments*** emphasized that judgment writing can be of two types i.e., Prescriptive or Descriptive. Writing of judgments in a story-telling manner is associated with descriptive judgment writing. On the



other hand, the language of the judgment is also very important. A judge must write in a manner that is easy for all to understand and follow rather than, resorting to the toughest form of vocabulary. The best way to write a judgment is to keep the reader in mind. A judge must have clarity of thoughts to write a clear judgment. The discussion suggested that reliance on summaries written in law reports must be avoided. The best way to write a judgment is by arranging the segments like- table of contents, issues for determination, facts and procedural history, analysis and discussion, conclusion, disposition and bibliography. It was also suggested that a judge must try dictating the judgment at the earliest to ensure lesser probability of errors in the judgment.

Session eight was on the theme ***Identification of Ratio in a Precedent*** which began with discussion on the meaning of *Ratio Decidendi* and how it is different from *Obiter Dicta*. It was stressed that the underlying principle upon which the authoritative element of a precedent is formed is often termed as *ratio decidendi*. The judges were asked to be cautious in understanding the difference between the two. The difference between Judicial Precedents and Legislative Rules was emphasized i.e., judicial precedents gets evolved with due course of time while, legislative rules are endorsed and are specific in principle. It was also pointed out that precedents are persuasive and binding whereas *Stare Decisis* means, standing by the things decided. It was also explained that it is for the judge to interpret which part of the former decision is binding.

The next session was on the theme ***Principles of Evidence: Appreciation in Civil and Criminal Cases***. The session drew similarities and differences in the civil and criminal codes of India & Bangladesh such as – key provisions on appreciation of evidence, procedure for recording of evidence, circumstantial evidence, evidentiary presumption, onus and burden of proof. It was stressed that there is no universal rule or formula

that states as to what constitutes sufficient evidence to establish a fact. It was suggested that the evidence on record should always be suitably and prudently considered and appreciated. However, conflicting versions with apparent actualities makes appreciation of evidence all the more difficult. Therefore, a judicial officer must possess fair amount of common sense, perceptiveness, knowledge and understanding to regulate her/his coherent demeanor. Some of the leading case laws in this regard were also discussed.

Session ten was on the theme ***Evidentiary Presumptions; Onus and Burden of Proof***. The session was initiated by emphasizing that the foremost requirement for a judge while presiding over a matter is that he/she needs to be unbiased. The judge must take into consideration the neutrality and credibility of evidence while appreciating the same. It was suggested that while appreciating evidence a judge should keep in mind - whether the witness is present or not, if he/she is present whether the evidence is credible or not, conduct of the witness at the scene of occurrence and whether he/she is an interested witness or not. It was observed that the rule of presumption is a rule that courts may or shall draw a certain inference from a certain fact or evidence, unless and until if so indorsed the truth of such inference is refuted. It was opined that presumption makes a *prima facie* case of a party for whose benefit it exists. The three types of presumption under the Indian Evidence Act i.e., may presume, shall presume and conclusive proof formed an integral part of discussion. Expert opinion under Section 45 of the Indian Evidence Act was also elaborated upon. It was emphasized that court is not bound by the evidence of the experts which is to a large extent advisory in nature. The court must derive its own conclusions upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point



on which he deposes. Documentary evidence and its admissibility was also discussed. Thereafter, speakers discussed Section 106 of the Indian Evidence Act which talks about burden of proving fact especially within knowledge was discussed.

Theme of next session was ***Cyber Crimes & Electronic Evidence: New Horizons, Collection, Preservation and Appreciation***. The session initiated with discussion on Digital Evidence and Cyber-crimes. In the age of technology, electronic evidence is inevitable and judiciary has been put at a task to appreciate the electronic evidence. Thereafter, the stages of leading electronic evidence and the standards of proof with reference to section 65B of Indian Evidence Act, 1872 were elaborated. The problems in proving and appreciating the magnetically recorded confessions and their evidentiary value in criminal trials was discussed. The discourse also discussed some of the important cases viz., *Anvar vs. Bashir* etc. At this point of time most of the participants expressed their problem saying that unlike India, Evidence Act & Procedural laws of Bangladesh are not suitably amended to include leading and appreciation of electronic evidence. To this problem, panel members suggested that even in absence of suitable amendment, they can accept & appreciate electronic evidence by applying the same standard as that of general documentary evidence, because in today's digital world, electronic evidence is inevitable in each and every case. With this remark, session on electronic evidence was concluded.

Next session was on ***Forensic Evidence in Civil and Criminal Trials; DNA profiling***. The session commenced with brief introduction to forensic science and its importance in civil and criminal trials. It was highlighted that forensic has two wings viz. Forensic Medicine and Forensic Science and both are useful for the judiciary in arriving at the right conclusion in a trial

before them. Forensic evidence is based on Locard's Exchange Principle which says - "Every contact leaves a trace". The job of a forensic expert is to find out that trace and render its evidence before the court. During the session various sub-categories of forensic experts and their role was discussed. Those categories included Forensic Narcotics, Forensic Toxicology, Forensic DNA analysis, Forensic Serology, Forensic Ballistics etc. Concepts like DNA fingerprinting, DNA profiling and DNA data banks were discussed in details with its importance in the justice delivery system. Furthermore, the advantages and disadvantages of forensic evidence were discussed. Major advantages included scientifically proven evidence because man may lie but circumstances may not, conclusive nature of forensic evidence, reliability etc. whereas disadvantages included improper collection of evidence may vary the result, improper sampling etc. Some of the important cases like Sheena Bora murder case, Rajiv Gandhi Assassination case etc. relating to collection, preservation and appreciation of forensic evidence were discussed. The niceties of autopsies and related evidentiary also formed an integral part of the discussion.

Another session was on ***Fair Sessions Trial***. The participants were asked what "fair" means to them and what do they understand by "fair trial"?; what fair trial means to all the stake-holders in a trial (including victim, accused, witnesses and society at large). It was emphasized that procedural justice is a very important aspect of a fair criminal trial. Thereafter, various attributes of fair trial viz. speedy trial, presumption of innocence, right of representation by lawyer of choice, right to silence of accused, importance of public trial and public hearing, fair investigation, independent and impartial courts etc. were discussed. Some practical problems like hostile witnesses, weak investigation were also elaborated with day to day illustrations. It was suggested that a judge should not be a mute spectator in a trial, rather a judge should take a lead to do the ultimate justice whenever required. This is a fair trial principle. It was submitted that most of the attributes of fair trial are provided in the Constitution and judges should try their best to follow these constitutional ideals during trial.

The next session was on ***Criminal Justice Administration and Human Rights***. The session commenced with emphasis on "Human Rights". Human Rights are intrinsic rights of which every

person by virtue of being human possess. These rights are not conferred by state on human beings but they existed even before state as an entity came into existence. State has merely given formal recognition to these rights. In fact, even if one wants, no human being can surrender/waive his human rights because by nature they are inalienable. Such is the sanctity attached to the human rights, and judiciary has been vested with responsibility to protect these rights. These human rights include rights of accused, rights of victim and rights of society at large. Rights of accused include right to be produced before magistrate within 24 hours of arrest (Art. 22 of Indian Constitution), right against self-incrimination and protection from ex-post facto laws, right to remain silent, right against exploitation, right to protection from torture in custody etc. Various important case laws on the rights of accused which included *Aghanoo Ganesha vs. State of Maharashtra*, *Maria Swaraj Case*, *Selvi vs. State of Karnataka*, *M H Hoskot Case*, *D K Basu case* etc were discussed. The later part of the session discussed that various national documents like Constitution and legislative Acts and also international documents like UDHR, ICCPR etc. have formally recognized human rights and expect the judiciary to act as a guardian of those rights.

The session on **Art of Hearing: Promoting Rational Discourse in Courtroom** accentuated that listening skill is a great skill for judges. A judge should be a very good listener. To emphasize the same, a YouTube video of William Ury on “The Power of Listening” was shown to the participants. Listening helps your mind change, it connects you to the other one, it builds trust and it makes more likely to get “YES”. Listening is a cheapest way of communication. Judges are expected to be receptive and hence, listening skill is much needed skill for a judge. It was suggested that a judge must also comprehend what is not said in the court. Judges should try to understand the emotions of the litigants. Listening from the bench builds confidence in the mind of litigant and public about the judge and the judicial system. Four major kinds of listening viz. active listening, passive listening, involved/attentive listening & detached/uninterested listening were discussed. Judges are expected to be active listeners or at least attentive listeners. It was also highlighted that hearing by judges should always be active hearing or active listening. A judge should develop humility which is the basic criteria for being a

good listener. Complexities are there and a judge must accept them as it is only then you listen patiently. It was stressed that human beings have not evolved language to express feelings but to suppress them.

Sessions sixteen and seventeen were dedicated to **Landmark Judgments in India**. The session emphasized that the Constitution of Bangladesh is similar to Constitution of India and hence, the landmark judgements of Indian Supreme Court on constitutional law issues are very relevant for Bangladesh judges. The landmark judgments of Indian Supreme Court were discussed thematically. Firstly, recent judgments on Constitutional Morality were discussed viz. *Shayara Bano vs. Union of India* (Triple Talaq), *Navtej Singh Johar vs. Union of India* [(2018) 10 SCC 1] (Sec. 377 IPC and Homosexuality case), *Indian Young Lawyers Association vs. State of Kerala* [Writ Petition (Civil) No. 373 of 2006] (Sabarimala case) and *Joseph Shine vs. Union of India* [(2018) 2 SCC 189] (Adultery Judgment). Constitutional Morality was the common thread in all these abovementioned judgements. In these judgments the Indian Supreme Court has used “Constitutional Morality” to allow things which have hitherto been banned as taboo and prohibited in religion. Secondly, cases related to the independence of judiciary viz. *Minerva Mills case*, *S.P. Gupta cases*, *NJAC Case* [Supreme Court Advocates on Record Association v. Union of India (2016) 5 SCC 1] etc. were discussed in detail. *National Legal Services Authority vs. Union of India and others* (AIR 2014 SC 1863), which takes into account the plight of transgenders in India directing state to provide identity to the third gender as Transgender was also discussed. Various cases which have expanded the right to life under Art. 21 viz. *Common cause Case* [Common Cause (A Regd. Society) vs. Union of India and another, (2018) 5 SCC 1 ; (2018 Indlaw SC 178)] (Passive Euthanasia), *K.S. Puttaswamy Case* (Right to Privacy), right to health and dignity cases, cases relating to clean environment as fundamental right etc were also discussed. Historically relevant judgments of cases like *Narasu Appa Mali's case*, *Babri Masjid Case*, *Sabarimala Case*, *Shani-Shingnapur case*, *Sarala Mudgal case* etc. formed an integral part of the session. Environmental Law Jurisprudence and Human Rights Jurisprudence in India as developed from the cases decided by Indian Supreme Court were also deliberated.

SE-07

NATIONAL SEMINAR FOR MEMBERS OF THE RAILWAY CLAIMS TRIBUNAL

16th & 17th February, 2019

Ms. Nitika Jain, Law Associate



The Academy organized a two day National Seminar for Members of the Railway Claims Tribunal (RCT). The seminar was attended by 27 members of the RCT including Judicial and Technical members. The seminar provided a common platform for members to discuss their views and concerns about day to day working and explored appropriate strategies for expeditious resolution of claims in RCT. Thematic areas covered during the workshop were scheduled in consultation with Hon'ble Justice K. Kannan, Chairman, RCT, Delhi which included overview of the charter of RCT vis-a-vis Social Welfare Scheme under the Railways Act; statutory interpretation of some key concepts such as untoward incident, self-inflicted injury and criminal act etc.; components of decision making – best practices; duplicate claims and role of registry, execution of awards; managing difference of opinions in the bench including bench etiquettes as well as improving relationship with the Bar. The workshop also included deliberations upon the need for adopting a non-litigative approach under the superintendence of RCT, methodologies for securing investigatory support for ascertaining genuineness of claims, securing statutory reports in time, to identify appropriate strategies and implementing Information Technology for expeditious disposals in RCT.

The first session was on the theme *Overview of Charter of RCT vis-a-vis Social Welfare Scheme under the Railways Act, 1989* (the Act), the speaker highlighted the hierarchy and structure of the RCT. The difference in the nature of proceeding in RCT as compared to civil courts was pointed out. It was suggested that substantial law and procedural law cannot be read in isolation. The concept of distributive justice by John Rawls was discussed with reference to social welfare schemes under the Act. It was highlighted that there are highest number of cases for accident claims but, there are a large number of fake cases as well. The speakers suggested that unnecessarily delaying the case will lead to delay in justice. Various sections of the Indian Evidence Act, 1872 were dealt with. The session also included discussion on the basis of liability as mandated by legislation: explaining the concepts of absolute, strict and common law liability. The participant members were suggested to start every case for search of truth as the duty of a judge is to find the truth and decide a case.

The session on *Interpretation of the statute: Key Concepts*, involved deliberations upon the key concepts under the Act such as untoward incident, self-inflicted injury, criminal act, violent attack and stampede. The speaker highlighted that the legislation pertaining to

railway claims is a companion legislation which deals with liability as violation of Art. 21 of the Constitution occurs, statutory liability is involved. The concept of tortious liability was also discussed. The speaker emphasized on interpretation of Sec. 124 in light with Sec. 123 of the Act for 'untoward incident'. Further, the session involved interpretation of Sec. 124A for certain aspects of tortious liability. It was stated that in case of railway accident claim, each fact will give a clue whether a person is a bonafide passenger or if it is an untoward incident, self-inflicted injury or criminal negligence.

The next session was *Components of Decision Making: Best Practices*, which included areas pertaining to examination of witness, application of precedent, reasoned orders and pro-active approach of a member for gathering evidence. It was emphasized that RCT is more powerful than a civil court. The ambit of Sec. 47 of the Indian Evidence Act, 1872 was discussed in detail relating to proving a document for evidence. Various landmark judgments were highlighted for discussion such as *A.A. Haja Muniuddian vs. Indian Railways*, AIR1993SC361; *R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.*, 2003 (8) SCC 752; and *Gulzar Ali and Ors. vs. State of H.P.*, (1998)2SCC192. Speakers deliberated upon what is a judgment and stated that the consumers of a judgment are litigant, lawyer, appellate court and academicians (for precedents). A judgment of railways claims must state the facts such as whether the incident is an untoward incident, whether the claimant was a bonafide passenger, whether the injury is self-inflicted etc. Further, it must touch upon the relevant part of the deposition or the document and not the whole deposition or entire document. It was pointed that time of recovery of body is very crucial in deciding claims in railways accidents. The judgment must include a decision and a reason to the decision. The session further involved discussion on the technical challenges faced by judicial member of the tribunal.

The fourth session included discussion on three areas - Duplicate Claims and Role of Registry, Protecting Litigants' Interest in Award Amounts through Orders and Execution of Awards. It was highlighted that the legislation aims to protect the interest of the litigants. The adverse effects caused due to delay in orders were highlighted by the speakers. It was pointed that there

should not be any upper limit for compensation in certain acts. The difference between Sec. 73 & S. 74 of the Indian Contract Act, 1872 was also discussed. The case of *Padma Sundar Rao vs. State of A.P.* [2006 (1) ALD Cri 585] was referred during the course of discussion.

In the session on *Methodologies for Expeditious Adjudication & Use of IT*, the speaker pointed out the prospects of video conferencing, online adjudication and Lok Adalat in the area of railway claims for expeditious disposal. It was highlighted that in a hierarchy there are conflicting laws, and which one prevails is decided by adjudication. The working and composition of National Green Tribunal (NGT) was highlighted and it was suggested that best practices of NGT may be implemented in RCT as well. It was further mentioned that video conferencing technology for hearing matters has been beneficial in various important cases. The participant members also discussed the challenges faced by them in implementing technology. The case *Union of India (UOI) vs. Rina Devi* AIR2018SC2362 was discussed at length.

On the theme *Managing Differences of Opinions in the Bench, Bench Etiquettes and Improving Relationship with the Bar*, it was discussed that there are two aspects 'position' & 'personality' which a judge must ignore to uphold the dignity of the institution. It was stated that there is no scope of individual conflict and only conflict of views/opinions should exist. Further, the speaker highlighted that views should be objective and not subjective to protect the right of the claimant. It was stated that differences are necessary but differences must be reconciled as far as possible. In case of RCT, the Member Judicial and Member Technical must try to reconcile their differences in order to protect rights of the claimant. It was further emphasized that as an institutional member one must try to avoid personal look outs and must work for the institution. Institutional traditions must be followed at all times in an institution.

Last session involved presentation by the RCT Members. The members from Ahmedabad, Bhopal, Bhubaneswar, Chandigarh, Delhi, Gorakhpur, Guwahati, Jaipur, Kolkata, Lucknow, Mumbai, Nagpur, Patna and Secunderabad gave presentation highlighting past performance including the cases instituted, disposed and pending in their respective Bench. The



members also highlighted the infrastructure and manpower requirements of their respective Benches.

In addition to the above deliberations other areas of discussion were:

- Improvement in the quality of DRM Report. It was suggested that if the concerned officer does not comply with timely submission of the report or the quality is not up to the mark then proper action must be taken against;
- Various districts like Gorakhpur, Lucknow, Guwahati and Mumbai where Lok Adalats is not implemented were suggested to try and implement Lok Adalats in cases pertaining to railways

accident claims. The benefits of the Lok Adalats in the related area were also discussed during the sessions.

- It was highlighted that negligence of railway is not necessary since it is a welfare legislation which is for the benefit of the people.
- If railway accident has occurred, any passenger who suffered injury is entitled to compensation. The types of accidents considered in railways include collision, fire and derailment.
- It was suggested that railways must start an anti-corruption branch to find out the cartels involved in fake cases.

P-1152

REGIONAL CONFERENCE (WEST ZONE-II) ON ENHANCING EXCELLENCE OF THE JUDICIAL INSTITUTIONS: CHALLENGES & OPPORTUNITIES

23rd & 24th February, 2019

Mr. Yogesh Pratap Singh, Research Fellow

Mr. Krishna Sisodia, Law Associate



The Academy organized a two-day West Zone Regional Conference on the theme 'Enhancing Excellence of Judicial Institutions: Challenges & Opportunities' in collaboration with the High Court of Gujarat and Gujarat State Judicial Academy at Ahmedabad. The conference was attended by High Court Justices and Judicial Officers from the High Courts of Gujarat, Bombay, Rajasthan and Madhya Pradesh. The objective was to accentuate the experiences of the High Courts and district courts, besides revisiting established and imperative norms of constitutional vision of justice, building synergies amongst hierarchies, impact of excessive appellate interference, significance of ICT and Court Management. The conference was designed to provide a forum for exchange of experiences, knowledge and dissemination of best practices to evolve horizons of relevant law and jurisprudence. Justice A.M. Sapre, Justice U.U. Lalit, Justice Navin Sinha, Justice M.R. Shah, Justice S.G. Gokani and Justice Sanjeev Sachdeva guided the discussion on designated themes.

On *Constitutional Vision of Justice*, the panelists initiated the discussion on the basic understanding of the Preamble to the Constitution and asserted

that Constitution is the source of all domestic laws. Therefore, it is important to envisage the significance of the term 'justice' in the Preamble. It was opined that what may be right according to the law might not serve justice in some cases, hence the higher courts should exercise inherent powers vested in them by the Constitution to do complete justice in such cases. Furthermore, it was suggested that it is not just the Supreme Court and the High Courts which are entrusted with duty of interpreting the values enshrined in the Constitution, but every court in this country is required to fulfill this obligation while dealing with their routine matters. It was captivatingly pointed out that matters like divorce, sexual assault etc. involve pertinent constitutional issues to be dealt by the district courts. The session was concluded by highlighting that a negligible segment of the population in our country can afford access to courts and even fewer to appellate bodies, therefore, the courts of first instance assume greater significance in maintaining the faith of the masses reposed in the judiciary.

On *High Court and District Judiciary: Building Synergies*, the panelists emphasized that the



communication that takes place between the High Courts and the district courts is predominantly disciplinary in nature, therefore, in order to accentuate harmony continuous communication between the hierarchies is required to surge the productivity of the deliverables. It was stressed that any inspection or enquiry must be fact finding rather than fault finding as the superior courts exercise the responsibility rather than the power of superintendence. The discussion further went on to examine the advantages and disadvantages of unit system. It was asserted that there must be proper assessment of the work of judicial officers not just quantitatively but qualitatively. The participant judicial officers, were advised to pass reasoned orders which reflect application of judicial mind. Other important issues that were deliberated during the course of the session were with regard to transfers/postings of judges, independence of the judiciary not only from the executive but also from hierarchies.

On Revisiting Norms for Appellate Review: Consequence of Frequent and Excessive Appellate Interference, the discussion began by stating that every judicial officer has a High Court above his/ her shoulder, hence reversals are inevitable. It is simply a fundamental nature of a tiered judicial system, but excessive appellate interference results in public loss of faith in the courts of first instance. The panelists further explained that findings made by the trial court should not be looked upon with doubt by the appellate courts as there have been cases where the reasoning of the trial court was upheld by the Supreme Court reversing the opinion of the High Court. It was stated that as a matter of fact every court must be presumed to be the court of last resort while delivering a judgment. The participant judges were advised to exercise discretion according to law and restrain themselves from exercising discretion in an arbitrary manner.

On Access to Justice: Information and Communication Technology in Courts, the panelists dwelt in detail on



the E-Courts projects besides highlighting contours of court and case management. A reference was made to the Delhi High Court by emphasizing that the entire record of decided cases upto 2012 has been digitized and 40,000 sq. ft. land has been vacated due to digitalization. Achievements of the Delhi High Courts viz. certified copies of digital records with digital signature is available within 15-20 minutes of the order, installation of kiosks for information, e-cause list, e-court fee, e-summons etc. were highlighted. It was suggested that the judiciary as a whole stands far behind in the application of technology for swifter justice administration, therefore, litigant-oriented use of technology should be adopted by the judiciary to improve the efficiency of courts. The session was concluded by asking participant judges the issues they are facing in their jurisdictions and solutions were provided by the panelists and fellow participant judges.

On Access to Justice: Court & Case Management, the session was made an interactive one so as to allow participant judges/justices to place before the house the limitations they face with respect to the management of their courts as well as to share their experiences and exchange best practices. It was widely agreed that the effective administration of justice depends critically upon a successful partnership between the judiciary and the stakeholders. The panelists described disposal of cases as the most essential function of the judiciary which needs to be expedited for speedy and impartial justice. Furthermore, it was also stressed that judicial officers must enhance their court management skills to deal effectively with frivolous litigations besides emphasizing prioritization of disposal of old cases. The panelists also highlighted that the influx of court managers in the judicial system has not yielded results but the courts play a crucial role in creating a policy to ensure that the court managers develop a congenial atmosphere in courts and an environment wherein judicial officers are able to concentrate fully on their judicial work.

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CONFERENCE FOR HIGH COURT JUSTICES ON THE REGIME OF GOODS AND SERVICES TAX

01st to 03rd March, 2019

Ms. Ankita Pandey, Law Associate



A three day conference on Goods and Services Tax for High Court Justices was organized at the NJA. The Conference was conceived to provide insight into the CGST Act, 2017. The aim was to provide a forum for deliberating normative issues relevant to the evolution of indirect taxes from a regime of distinct and multiple taxation to that of substantial uniformity across diverse tax domains and jurisdictions, i.e. federal and state; to explore and comprehend potential areas of conflict and litigation consequent to this legislative shift; the constitutional evolution in the area; and the adjudicative and socio-judicial inferences that may arise thereby.

Session 1 – Indirect Taxes: Historical Perspective

The speaker began the discussion by stating that sovereign has always wanted to collect taxes in any form possible and that one of the oldest tax known to be in existence is municipal tax. In fact, the power to collect and retain tax was realized to maintain the sovereign power of the state. The history of the US and Canadian federal and taxation structure was discussed. The tax regime in India is in keeping with the federal structure as the union and states are empowered to impose taxes and if states are deprived of the power to impose and collect tax, it would result in complete dependence of the state on the centre for revenue.

Therefore, division of taxes was implemented. Further, the problem of rate war, multiplicity of taxes and creditable margin resulting in profitless margin were highlighted. Overall, the cost of doing business was going up due to multiplicity of taxes and its ability to defray taxes and claim credit was going down. In this regard, it was emphasized that the aim of bringing GST was to ensure free flow of credit. In order to change the system a constitutional amendment was needed. At the same time a convergence between the states and the centre had to be built so that the states are convinced that they are in no way giving up their power to collect and retain tax.

Session 2 – Overview of GST: Features of GST

The session opened to an elaborate discussion on some of the basic features of the GST regime in India. Such as: (i) GST is based on the principle of destination based consumption taxation as against the principle of origin based taxation; (ii) GST is applicable on “supply” of goods or services as against the concept of tax on the manufacture of goods or on sale of goods or on provision of services; (iii) It is a system of dual GST (CGST and SGST) with the Centre and the States simultaneously levying it on a common base; (iv) An Integrated GST (IGST) is levied on inter-State supply

(including stock transfers) of goods or services. This would be collected by the Centre so that the credit chain is not disrupted; (v) Exports are to be zero rated; (vi) Input Tax Credit is given a broad base by making it available in respect of taxes paid on any supply of goods or services or both; (vii) An anti-profiteering clause has been provided in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers; (viii) Provision for penalties for contravention of the provision of the proposed legislation have been made.

Session 3 – Concept of Supply

The speaker began the session with reference to Section 7 of the CGST Act and stated that the definition of supply is inclusive in nature and that supply must be for a consideration and for a business purpose. As per section 7 (1) (a) 'supply' includes transactions such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. It was further asserted that CGST is leviable on all intra-State 'supplies' on the value of the goods and/or services, thus the taxable event under GST regime is 'supply'. In other words, if an activity is covered as per Section 7 of CGST Act within the scope of 'supply' then only GST will be leviable on the same. The speaker also deliberated upon the activities/transactions mentioned under Schedule I, II and III of the CGST Act.

Session 4 – Classification: Mixed/Composite Supply

The session began with the introduction of the concepts of mixed and composite supply. It was iterated that composite supply means a supply made by a taxable person to a recipient comprising two or more supplies of goods or services, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply. Mixed supply means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply. The speaker briefly explained the distinction between 'Composite Supply' and 'Mixed Supply'. A composite supply is a naturally bundled supply while mixed supply is not naturally bundled in ordinary course of business. A supply can be mixed supply only if it is for a single price, while a supply can be composite supply



even if separate prices are charged. The speaker further shared the example of mobile and its battery and stated that it would be treated as a composite supply as these are naturally bundled goods.

Session 5 - Valuation: Time and Place of Supply

The session was dedicated to the understanding of time and place of supply which is very important in determining the tax liability on the supply of goods or services or both. In this regard, Section 12(2) of the CGST Act which deals with time of supply of goods and Section 13(2) which deals with time of supply of services were discussed in detail. The **time of supply under GST** is the point in time when the particular goods and/or services were supplied or deemed to be supplied to the recipient. The rate of GST, taxable value, and due date are determined based on the time of supply. Under GST, the taxes are liable to be paid at the time of supply. The discussion also extended to the supplies across various jurisdictions. Further, the speaker explained the valuation of taxable supply which is mentioned under Section 15 of CGST Act. Clause (3) provides that if there is any discount provided in the invoice, State GST will be payable only on the discounted price and not the original price. It was also stated that the discount can happen in two ways, first at the time of purchase while second at the time of accelerated sale.

Session 6 – Input Tax Credit

The speaker initiated the session with the basics of Input Tax Credit. It was stated that the object of Input Tax Credit is to obviate the cascading effect of multi leveling of tax and that it would be no exaggeration to say that if a dealer was disabled from getting Input Tax Credit in respect of the taxes that he paid on his goods or he was in some way prevented from enabling his customer from getting Input Tax Credit then it would be

an attack on GST system as the whole concept of GST is based on Input Tax Credit and that is to be followed efficiently and satisfactorily. The provisions relating to Input Tax Credit are found under Sections 16-21 of the CGST Act. It was explained that input, capital goods and input services are defined to mean goods/services 'used or intended to be used' by a supplier "in the course or furtherance of business". The term 'used' indicates that goods/ services are already put to use and 'intended to be used' indicates that goods/ services will be used in future. It was emphasized that eligibility to claim credit will arise only if there is actual usage or intention to use the goods or services. Thus, in case actual usage or intention to use is missing, credit availability on such goods or services would be questionable.

Session 7 – GST: Constitutional Perspective

The session began with an elaborate discussion highlighting the history of indirect taxation in India. The speaker discussed the position of taxation pre and post 1950. Further, relevant provisions of the Central Sales Tax Act, 1956 particularly Sections 3, 4, 5, 6 and 9 were discussed with reference to the Constitution of India. The session further continued with discourse upon distribution of revenue. In this regard, the speaker elaborated upon the Constitution (Eightieth Amendment) Act, 2000 by which Article 272 was

repealed and Constitution (101st Amendment) Act, 2016, by which GST was introduced in India. Under the Constitution (101st Amendment) Act, 2016, Entry 84 of List I, Entry 52, 55, 54 of List II were deleted. The session went on to have an elaborate discussion on Articles 246, 246A, 248, 253, 254, 268, 268A, 269, 269 A, 279 A, 286, 366(12A) and 366(29A) of the Constitution of India.

Session 8 – Anti Profiteering

The session began with the assertion that anti-profiteering measures are a deterrent for trade and industry to enjoy unjust profit arising out of implementation of GST in India. That is to say it would obligate businesses to pass on the benefit arising out of GST implementation to their customers. It was further stated that Section 171 provides that it is mandatory to pass on the benefits due to reduction in rate of tax or from input tax credit to the consumer by way of commensurate reduction in prices. In addition, Rules 122-127 of the CGST Rules relating to duties of the Anti-Profiteering Authority were also discussed. The Authority will determine the method and procedure for determining whether the reduction in rate or the benefit of Input Tax Credit has been passed on by the seller to the buyer by reducing the prices.

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ORIENTATION PROGRAMME FOR JUNIOR DIVISION JUDGES

01st to 07th March, 2019

Mr. Rajesh Suman, Assistant Professor

Mr. Prasidh Raj Singh, Law Associate



The Academy organized Orientation Programme for Junior Division Judges with the objective of capacity building of judicial officers at the primary tier, viz. Civil Judges (Junior Division). The sessions were designed to facilitate sharing of experiences and views amongst participant from different States on the themes, better appreciation of the judicial role; responsibility of judicial officers in a constitutional democracy; recent developments in juridical thinking and technological advances relevant to accreting performance standards; and to deliberate on several aspects of law and practices relevant to enhancing the quality of performance. The emphasis was on enabling deliberations through clinical analysis of statutory provisions, case studies and critical considerations of the relevant judgments, minimizing the lecture format.

Session 1: Constitutional Vision of Justice

The session was initiated with discussion on the meaning of justice and the rationale of justice. The speakers explained the importance of the Constitution and stated that the Constitution is a living organism that grows, moulds, and changes according to the social scenario. The Constitution is not a product of legislation

but a source of legislation and all laws are to be tested on the standards prescribed by the Constitution. The speakers explained the Basic Structure Doctrine by referring to *Kesavananda Bharati* judgment and they participants gave illustrations on the Basic Structure Doctrine. The speakers then discussed development of Constitutional law from Government of India Act, 1935 to the latest amendment of the Indian Constitution. The speakers emphasized the importance and relevance of the Preamble to the Constitution of India. Rights which are included in Article 21 by way of judicial pronouncements were discussed. The speakers observed that Article 21 is a big umbrella under which other rights are included. The increasing scope of the right to live with dignity and how Directive Principles of State Policy and Fundamental Duties, which are non-justiciable are being placed under Article 21 to impart justice was highlighted. The history of foreign constitutions and foreign judgments reflecting freedom, equality and importance of fundamental rights were discussed.

Session 2: Role of Courts in a Constitutional Democracy and Adherence to Core Judicial Values

The session was initiated by discussion on the role of courts in constitutional democracy to dispense justice. The speakers explained that the judiciary has a socio-economic role and a creative function. Reference was made to judgments of the Supreme Court where in it was observed that the role of a judge is to apply the law according to the social and economic scenario. The speakers discussed the methods by which judges can interpret and apply the law to fill the gap between law and society and impart pure justice. The role of purposive interpretation, judicial activism and international conventions and treaties as tools in adjudication were discussed; and the examples of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 after the *Vishakha case* (1997) 6 SCC 241 was discussed. It was stressed that courts are not required to merely interpret laws in literal sense, but also have to adhere to the norms of social justice and strike a balance between the weaker or vulnerable party and the stronger party in cases before. The need for change and then for preservation must be balanced by the judge. The speakers then discussed judicial values and stated that determining the law includes creating the law. Judging is not a job, it is a way of life. There should be open mindedness between the Bar and the Bench and the judges must be courteous towards the Bar.

Session 3: Discovering Current Judicial Methods

The speakers asked the participants whether they make up their minds before the hearing is complete and whether they rely on first impressions and decide the case accordingly? According to the speakers at the time of recording of evidence, a judge may get an intuition that where the case is going to lead. The speakers then discussed the art of decision making process and said that decision making is a two way process. They discussed the role of intuition while judging and shared some examples where the first impression was totally opposite of the final judgment. The speakers emphasized that deliberative thinking process must be adopted and speedy disposal must be done. The speakers then explained what comes first while judging. They said that the deliberations and the conclusion are the two stages of a case. The conclusion is eventually achieved by way of deliberations. A judge must not develop his mind first and then listen to the deliberations. The deliberations must take the case to a conclusion and

not vice versa. The speakers stressed that there is no thumb-rule to decide and a judge is guided by wisdom. They also interacted with the participants and asked them to share the conditions in which they work.

Session 4: Courtroom Technology: use of ICT in courts

The Speakers started with issue of proper implementation of information and communication technology and explained how technological development is needed in courts. The speakers appreciated National Judicial Data Grid (NJDG) and considered it to be one of the most important reform of recent times. NJDG promotes efficient court management and allows judges at every level to know about essential information about cases. The discussion highlighted the enhancing role of Information Technology (IT) in today's scenario, for litigants as well as for judges. With the help of technology, judges can monitor cases and dispose old cases on priority basis. The speakers explained how NJDG can be useful for a judge. Then they focused on management issues, discussed objectives of a good management system. The speakers asked the participants to share ideas about management of courts. The speakers then discussed the importance of technological developments in courts and stated that transformation will lead to usage of less paper in court processes. It will also empower every judge to dispense speedy and effective justice. The speakers highlighted the process of implementation of ICT tools in the Delhi High Court and how it is becoming a paperless court. The speakers then discussed "E-FIR" and use of Adobe Acrobat, MS Office, SCC Online and online Bare Acts etc. It was emphasized that nature of evidences produced in courts is changing and judges must be ready to deal with such advancements. The speakers also presented a video showing how E-Evidences help in prosecution of cases and discussed foreign cases where fingerprints were extracted from a photograph and bullet shell.

Session 5: Managing the Docket: Court & Case management

The session started with sharing of experiences by speakers related to management of docket and explained how it must be managed. It was stressed that a judge must maintain his own docket and this work must not be left upon the court staff. Practices in courts

by the court staff with regard to docket management and how to address these problems was elaborated. The speakers interacted with participants regarding the management of docket in different courts of India. The speakers said that with changing times, a judge should actively participate in court proceedings because she/he is the captain of the ship. A judge must be patient and must maintain all the rules. It is the duty of the presiding judge to explore every field to ensure justice. The speaker explained Section 165 of the Evidence Act, 1872 in detail. The speakers discussed 3 aspects of docket management i.e. administrative aspects, management of civil cases and management of criminal cases. Management as optimum utilization of resources and motivation of stakeholders was stressed upon. The speakers gave many suggestions for effective court management which included monitoring of all the records of the courts and fixing similar cases together. The speakers then discussed some of the practical problems faced by judges related to their staff and suggested ways by which judges can control and handle their courts effectively. The speakers shared their own experiences related to court management and also invited participants to share their experiences and solutions they follow to address the issues.

Session 6: Law of precedents: Identification and application of Ratio Decidendi

The speakers initiated the session by saying that substantial number of cases are decided on facts and not on law. The speakers emphasized focusing on the language of bare acts to clear doubts and understand how the law applies to the facts of a case. The speakers said that not every case needs to be rested upon precedents. Every case has different set of facts and some facts are bound to be different especially in criminal cases. The speakers then explained what is relevant evidence and when precedents are required. The speakers advised the participants to read commentaries to get a better understanding of laws before referring to the precedents. The speakers explained Article 141 which makes the judgments of the Supreme Court binding on all courts. It was highlighted that while analyzing judgments, it is usually seen that the final operative part of the judgment becomes different from the body of the judgment, reflecting inconsistency, which must be avoided. The institutional trust must be kept in mind and there should be consistency in writing a

judgment. The difference between *ratio decidendi* and *obiter dicta* was explained. If the judgment has not been properly reasoned and referred to the decisions, it can be subject to appeal. The speakers concluded the session by discussing provisions related to marking of evidence, self-incriminating material and burden of proof. They emphasized the importance of NJDG for monitoring the cases and also advised the participants to write a letter to the District Judge if they observe any unnecessary pendency.

Session 7: Law relating to cyber-crimes: Advances and Bottlenecks

The speakers discussed the recent technological developments. They explained John Doe injunction and its use in cases of various pirated content and websites and software like torrent which facilitate illegal data exchange. In these cases the courts face a challenge as there is no particular person to point out in order to obtain injunction and the exchange that takes place is anonymous. The speakers then explained how digital evidence is extracted. The speakers shared statistical data on internet penetration and cybercrime. The speakers discussed operating systems in smartphones and said that in android phones, the e-evidences can be constructed as well as destroyed creating a lot of mischief in the field of e-Evidence. The speakers also discussed how messages on WhatsApp can be easily spoofed and how to detect spoofing. Various aspects of call data recording such as production of record to analyze them were explained by the speaker. The speakers stated that even if the call data record is obtained, the contents of the message is not stored. The speakers then explained Section 66 of the Information Technology Act, 2000 which deals with hacking, identity theft and spoofing. WhatsApp encryption was referred by the speakers and they said that there is no end to end encryption which is claimed by WhatsApp and messages can be easily spoofed. The speaker discussed various case studies where cyber criminals were apprehended using various methods. The speakers explained the concept of root server and that all the root servers are out of India and this makes investigation of cybercrimes in India difficult. Different types of cybercrimes such as cyber stalking, cyber contraband, cyber trespassing, cyber laundering, cyber vandalism, cyber defamation, cyber theft, cyber terrorism, cyber pornography and cyber fraud were also explained.



Session 8: Electronic Evidence: Collection, Preservation and Appreciation

The speakers initiated the discussion with the concept of cyber murder and cyber fraud through the use of internet. The cases of prescribing lethal drugs through email and committing fraud through the use of emails were discussed. The speakers covered the topic of online job scams and how evidences are found and extracted in such cases. The speakers then focused on biometric hacking. It was highlighted that 96% of fingerprint capturing technology is image based biometric machine which is susceptible to fraud as it stores the image of the fingerprint. It was emphasized that the image can be used in many different ways to commit a cybercrime as fingerprint is a very important form of giving access. The speakers explained that mobiles are the easiest to target as the hackers can put applications in the app that contain malware. According to the speakers, Artificial Intelligence may be able to defend against cyber-attacks and cyber risk insurance is going to become prevalent in future. Thereafter, cyber security scams like Cosmos Bank fraud and Aadhar breach case were discussed. The speakers explained that the electronic evidence may be found in photos, videos, email, messages, internet, history, backups, GPS, call logs, print outs, audio clips etc. They also explained how the date and time of messages can be changed which can mislead the investigation. The speaker emphasized that essential data related to the evidence including size of the file must be documented in the panchnama. But tampering with electronic evidence is also possible with the help of software that alter the attributes of a file. The speakers then discussed 'rooting' of a mobile phone and stated that mobile phone come unrooted by default from the manufacturer. But, for the purpose of getting unauthorized access, many people root the

phone which enables anyone to alter the information as well as location. The IP address can be used as an e-evidence in order to know the origin of crime.

Session 9: Forensic Evidence is Civil and Criminal Trials

The speakers started the discussion by highlighting the relevance of evidence and infrastructural issues pertaining to preservation and analysis of evidences. The speakers discussed difference between primary evidence and corroborative evidence. They also focused on limitations of forensic evidence. Major problems in collection and assessment of evidence including delays in collection of evidence, poor infrastructure, improper chain of custody, lack of accreditation or reputation and lack of defence labs were discussed. The speakers explained changing nature of evidence in rape and sexual harassment cases. According to the speakers, nowadays even if there is no forensic evidence, a person can be convicted for rape as the law has been changed. The speakers discussed reports on analysis of Protection of Children from Sexual Offences Act (POCSO) cases across 5 different states of India. They also discussed presumptive test and confirmatory test. Then the speakers focused on the issue of relevance of blood sample and hair in forensic evidence. The speakers explained the relevance of injuries in case of rape and interacted with participants that whether injuries are necessary to ascertain the fact that a person has undergone rape. There were many different views of participants but the speakers said that injuries are not necessary for proving the offence of rape. The speakers dwelt on issues related to clothes of victim as it contains many small factors which, if extracted properly, can become a very strong forensic evidence. The discussion further analyzed the concept of DNA and explained different ways of DNA sampling in the

light of Supreme Court judgment where the principles regarding assessment of DNA evidences were enunciated. The problems of non-matching of DNA due to improper samples was highlighted. The speakers further, focused on lie detectors and narco analysis and how these techniques can be used in forensic evidence. Relevance of blood groups in identification of a child's biological parents was also discussed. Other methods of forensic evidence such as sex verification and age estimation were also discussed.

Session 10: Judging Skills: Framing of Charges

The session highlighted procedural as well as substantive laws pertaining to framing of charges. Reference was made to the case of *V.C. Shukla v. State*, (1980) Suppl SCC 92 where the Apex Court issued guidelines relating to framing of charges. The speaker deliberated on the admissibility of evidence based on which conviction and acquittal can be done. The speaker further explained various stages during which charges can be framed adding a reference to Section 240 of the CrPC. The speaker also mentioned many noteworthy areas related to common intention, common object and burden of proof along with Section 106 of Indian Evidence Act, 1872. Furthermore, with the help of different hypothetical case studies by the speaker, various aspects related to the possibility of conviction were explained and discussed.

Session 11: Judging Skills: Art, Craft and Science of Drafting Judgment

The session commenced with an introduction highlighting the importance of art, craft and science of drafting judgments. The speaker stated that judgment must be based on strong logic & reasoning. Further, it was added that relevant fact of the case must be taken into consideration before reaching a conclusion. It was suggested that superfluous and fancy use of language must be avoided. The speaker emphasized that unnecessary observations in the judgment must be avoided and findings should be recorded with regard to issues involved. The admissibility and inadmissibility of an evidence were discussed. The speaker expressed his concern that in the near future artificial intelligence will substitute everything, however in judging, human role is indispensable. The speaker further stressed upon the importance of expert opinion, their qualification and reasoning before arriving at the conclusion.

Session 12: Art of Hearing: Promoting Rational Discourse in the Courtroom

The speaker initiated discussions pertaining to recording of statement, and suggested that statement must be recorded at the earliest to avoid discrepancies. The speaker also deliberated upon the importance of Section 165 of the Evidence Act, 1872 and it was emphasized that intervention by a judge is essential in trial. The speaker stated that a judge should control proceedings to ensure justice. During the course of discussion, it was emphasized that adequate time should be given to witnesses considering various facets such as; communication skill, responding time and their educational background. It was further highlighted by the speaker that mistakes in recording of facts must be avoided since it is arduous to ratify when the matter goes for appeal. It was emphasized that mistake in law can be corrected, but errors in recording of facts will create impediments in administering justice. The speaker further discussed the importance of cross-examination and it was stated that complicated questions asked during cross-examination might cause injustice.

Session 13: Role of Magistrates at First Production of Arrested Person

The session involved discussion on the role of magistrates in case of bail, police custody, judicial custody, and discharge. The speaker discussed about cognizable and bailable offenses and it was highlighted that in many instances the police arrest the person in non-cognizable offences. The speaker further emphasized that it is the responsibility of the magistrate to check whether an offence is falling under the category of cognizable offence or non-cognizable offence. It was further deliberated that bail is a matter of right with limited exceptions. The practice of handcuffing in courts at the subordinate level was pointed out and it was highlighted that the Apex Court has strongly condemned the practice of handcuffing and directed that contempt proceedings could be initiated against the magistrate for entertaining such practice. A reference was also made to various landmark judgments of Supreme Court and High Courts on the subject for the purpose of discussion.

Session 14: Fair Trial: Fair Process

It was emphasized by the speaker that the journey to acquittal or conviction is a slow process where evidence



is presented and proper attention to detail is required. It was suggested by the speaker that a judge should not jump to conclusions and form an opinion at an early stage of the trial. The speaker further deliberated at length upon the social and media pressure emerging in contemporary times and how to tackle such challenges without affecting the outcome of a case. The importance and lacunae of fast track courts were also discussed. The speaker suggested that the penal sections should be carefully examined to avoid any discrepancy pertaining to minimum punishment prescribed by law. A reference was also made to Universal Declaration of Human Rights (UDHR) with regard to fair trial. Lastly, Section 279 CrPC was discussed in detail.

Session 15: Role of Courts in Securing Gender justice

The session began with an introductory remark by the speaker stating that gender is the social construction of masculinity and femininity. The speaker further highlighted various attributes of a broken home such as; anger, frustration, insecurity, violence, depression, anxiety, confusion and child problems. A reference was made by the speaker to the global studies where it was identified that women do 66% of work with access to just 1/10th of resources. The speaker further cited a report compiled by International Labour Organization which highlighted that the value of the work done by women in terms of money, amounting to \$11 trillion is neither paid nor asked. Various landmark judgments on the subject were referred for discussion during the session such as; *Government of Andhra Pradesh vs. PB Vijay Kumar* (1995) 4 SCC 520, *Air India vs. Nagesh Meerza* (1981) 4 SCC 335, *P.Geetha vs. Kerala Livestock Development Board and Vijay Sharma vs. Union of India* 2015 SCC Online Ker 71, *Vishaka vs. State of Rajasthan* (1997) 6 SCC 241, and *Indian Young Lawyer Association vs. State of Kerala* 2018 SCC Online SC 1690.

Session 16: ADR and Plea Bargaining

During the session different types of ADR mechanisms were discussed such as; arbitration, mediation and conciliation. A comparative structure was highlighted by the speaker where a reference was made to ADR procedures followed by USA and European countries. The speaker further elucidated upon Information Centered Mediation and Process Centered Mediation. Further various types of cases where matter cannot be referred for mediation were highlighted such as; matters involving points of law, interpretation of documents, alleged fraud and acts against society or human rights. The speaker further elaborated upon stages of mediation which included; introduction, opening statements, understanding problems, developing options, solutions and conclusion.

Session 17: Occupational Stress in Judges: Identification and Consequences of Stress

It was emphasized by the speaker that stress is bound to happen irrespective of profession. It was discussed that judges normally agonize more from stress since they are involved in judicial decision making. During the discussion various methods to reduce stress were emphasized upon such as; listening to music, exercise, sports in order to purge stress and remain healthy. Further, it was stated by the speaker that judges should acknowledge, identify, accept, express and exhaust their feelings since holding back emotions could lead to occupational stress. Lastly, it was emphasized by the speaker that sadness is a positive emotion whereas depression is a negative emotion.

Session 18: Managing Judicial Stress: Institutional Strategies and Techniques

The speaker identified stress as a mental, emotional and behavioral reaction. The speaker suggested various methods to reduce stress such as; talking to someone, changing the attitude, being realistic, getting organized, taking breaks, taking good care of oneself, learning to say no and getting regular exercise. A reference was made to a book called *Power of Now* by Eckhart Tolle by the speaker. It was emphasized by the speaker that change is persistent and important for overall growth. The speaker lastly highlighted the importance of time management and advised participants to be punctual and adhere to time schedules.

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WORKSHOP FOR ADDITIONAL DISTRICT JUDGES

08th to 10th March 2019

Dr. Amit Mehrotra, Assistant Professor



The Academy organized a three day workshop for Additional District Judges. The workshop focused on critical areas concerning adjudication at the District level, explored challenges in implementation of ADR system, deliberated upon sentencing practices and advantages of integrating court and case management systems in Subordinate Courts. The sessions covered topics such as issues and practices pertaining to collection, preservation and appreciation of electronic evidence; and advances and inadequacies in laws regulating cybercrimes. During the discourse, the participants discussed, evaluated and shared best practices on exercise of appellate and revision jurisdiction of District Judges, in criminal and civil domains, as well. The emphasis was on facilitating deliberations through clinical analysis of statutory provisions, case studies and critical consideration of the relevant judgments and minimizing the lecture format. The theme for Session One was *Challenges in the Implementation of the ADR System in the Subordinate Courts*.

In the first session the speakers discussed the need and advantage of ADR System in our legal system; as there are approximately four crore cases pending in the courts which may get settled amicably through the proactive approach of the judges. Emphasis was laid on Section 89 of the Arbitration and Conciliation

Act, 1996 and Order 10 of Civil Procedure Code, 1908 (herein after CPC). Some of the major challenges faced in the implementation of ADR System was also explained, such as: advocates pressuring their client not to settle, non-appearance of parties, lack of orientation of litigants, officers and advocates not considering or not knowing the importance and advantages of ADR, no faith in the ADR System and anti-ADR attitude of the party.

The speakers also gave some suggestions to address the challenges of ADR System, such as: personal indulgence of judicial officers, as judge's indulgence is more effective than that of a trained mediator, direct communication with the parties, jointly or separately, use of unambiguous and comprehensible language, informing the parties about the importance and benefits of ADR and to make a genuine attempt for settlement. It was highlighted that Legal Service Authority Act 1987, which has given the statutory status to Lok Adalats was a result of *Hussainara Khatoon RR's* judgment. It was explained that only those cases which come under section 19 and section 20 of the Legal Service Authority Act, can be referred for Lok Adalats.

The theme for Session Two was *Court and case Management: Role of Judges*. In this session the speakers emphasized that proper time management is very vital for better court and case management.

The punctuality of a judge is very important. It was suggested that proper notes must be maintained by the judge regarding the date of cases and urgent matters must be taken urgently.

The concept of Time-Motion Study was explained and it was emphasized that court time should not be wasted in unproductive work which is irrelevant to the justice delivery system. It was highlighted that there should be a specific time-line for disposal of a case. Suggestions made in the session for good court and case management, included - Posting of cases in cause list be limited to cases that can be entertained by a particular court, Adoption of special list system as followed by Kerala High Court, Developing skills of dealing with lawyers, giving fair hearing to lawyers to argue the case, Managing stress, Avoid getting emotionally involved with the matter in proceedings before the court and Positive attitude.

It was stated that District Court Monitoring System (herein after DCMS) was introduced to help in assessing and remarking the judges on daily basis. However, it was opined by the participants that DCMS increases their stress level which in turn affects their efficiency in court.

It was suggested that judges need not to worry about the remarks and assessment if they are working sincerely and honestly, and it was recommended that judges should also devote their time towards their family. The case of *Sharad Birdhi Chand Sarda vs State of Maharashtra* (1984) 4 SCC 116 was discussed during the discourse.

The session further highlighted Kerala's 'Special List System' introduced by Chief Justice P.D. Dinakaran, which aims at reducing stress in judges. According to this system, only two cases, that has to go for hearing before the court should be listed on the same day apart from the interlocutory and other miscellaneous applications.

The speaker discussed 'Case Flow Management' as another criteria for case management. It was stated that case flow management was introduced in *Salem Advocate Bar Association vs. Union of India* (2005) 6 SCC 344, when Civil Procedure Code Amendment Acts 1999 and 2002 were passed and provisions like Order 6 Rule 17 of Civil Procedure Code, 1908 were amended and reintroduced. The constitutional validity

of both the amendments were cross-challenged by Salem Advocate Bar Association in the same case and this case changed the course of civil litigation in India.

The theme for Session Three was *Civil Justice Administration: Appellate and Revision Jurisdiction of District Judges*. In the third session the speakers elucidated that appeal is the creation of a statute, which can be filed against the decree or appealable order. In order to get a brief understanding, three aspects of appeals were explained:

- a) Appeal from Decrees- Related provisions: Sections 96,97,99,99A and Order 41 CPC,
- b) Appeal from Order- Related provisions: Sections 104,105,106 and Order 43 CPC,
- c) General provisions related to appeal: Section 107 and 108 CPC.

It was stressed that the appeal cannot be filed by a person in whose favor the decree has been issued by the court. It was stated that there are two ways to set aside an ex-parte decree viz. firstly, when the appeal has been filed and disposed and Secondly, by filing application under Order 9, Rule 13 CPC.

The speaker posed a question to the participants as to whether Section 5 of Limitation Act, 1963 is in conflict with Rule 3A Order 41 CPC. After obtaining views of the participants, it was explained that there is no case of conflict between the two and both provisions will prevail separately. It was highlighted that an appeal can only be filed against a decree. Under Section 96 CPC an appeal is not permissible if there is a judgment and in that light the case of *Smt. Ganga Bai vs Vijay Kumar* AIR 1974 SC 1126 was discussed.

The case of *Deep Chand vs. Land Acquisition Officer*, AIR 1994 SC 1901 was also discussed wherein it was held that findings cannot to be considered as a decree. The case of *Banarasi and Ors vs. Ram Phal* (2003) 9 SCC 606 wherein it was emphasized that the decree, to the extent to which it is against the respondent cannot be interfered, set aside or modified to his advantage unless he files an appeal or takes cross objection was discussed in the session.

The importance of Order 41 Rule 27 CPC was emphasized which provides for production of additional evidence in the appellate court. There are two remedies available to set aside an ex-parte decree either a person



can go under Order 9 Rule 13 CPC or the person can directly approach the first appellate court.

The speaker discussed revisional and appellate jurisdictions and explained distinction between the two. It was explained that appeal is a matter of right of parties to the suit and revision depends on the discretion of the court. The provisions of Section 115 CPC was also stressed upon which enables the High Court to call for records of any case decided by the court subordinate to the High Court. The session concluded with discussion on the case of *Suryadev Rai vs. Ram Chander Rai* (2003) 6 SCC 675 in which it was held that the curtailment of revisional jurisdiction of the High Court does not take away the constitutional jurisdiction of the High Court to issue the writ of *certiorari*. It was also asserted that the writ of *certiorari* is directed against the act and order of proceedings of the subordinate court and can also be issued between two private parties.

Some of the leading cases such as *U.O.I. vs K.V. Lakshman* (2016) 13 SCC 124; *Madhukar and Ors vs Sangram* (2001) 4 SCC 756; *Chintamni Ammal vs Nandagopal Gowder* (2007) 4 SCC 163 were also discussed during the discourse.

The theme for Session Four was *Criminal Justice Administration: Appellate and Revision Jurisdiction of District Judges*. It was stated that right to appeal is not an inherent right but is a statutory right provided in the Chapter XXIX of Code of Criminal Procedure (herein after CrPC). Right to appeal against acquittal and conviction was discussed during the discourse. It was stated that if right to appeal does not prevail then only revision is applicable. The case of *Murgesan and Ors vs State through Inspector of Police* (2012) 10 SCC 383 was discussed where the general principles regarding the powers of appellate court while dealing with appeal against the order of acquittal was enunciated.

The power of appellate Court was discussed and in

that light the interpretation of Section 386 CrPC was deliberated upon. Appeal by the State government against sentencing was discussed. The procedure for filing of appeal when the appellant was in jail was also discussed. The resource person emphasized the grounds on which the appeal may be summarily dismissed and the procedure for hearing of such appeals. Special right of appeal in certain cases were also deliberated upon.

Provision of revision enunciated in Chapter XXX CrPC was elucidated and in that light, revisional powers of the sub-ordinate court was discussed in detail. The case of *Popular Muthiah vs State represented by the Inspector of Police* (2006) 7 SCC 296, was deliberated upon whereby it was held that the revisional powers of the High Court and the Sessions Court are pointed out in the Code separately. It was stated that High Courts exercises larger revisional power than sessions court. The revisional court during pendency of the trial may exercise its revisional jurisdiction under Section 397 CrPC and may also direct further inquiry in terms of Section 398 CrPC. It was further stressed that in the event of any conviction by a court of sessions, an appeal would lie before the High Court. It was further emphasized that an appellate court while exercising its power under Section 386 CrPC may also take further direct evidence under Section 391 CrPC in order to cull out the truth.

Right of filing a revision petition and revisional jurisdiction of court were also discussed in the light of *Girish Kumar Suneja vs CBI* (2017) 14 SCC 809. While the text of sub-section (1) of Section 397 of the CrPC appears to confer very wide powers on the court in the exercise of its revision jurisdiction, this power is equally severely curtailed by sub-section (2) thereof. There is a complete prohibition in a court exercising its revision jurisdiction in respect of interlocutory orders.

The theme for Session Five was *Fair Sessions Trials*. The session commenced by putting a question to the participants as to, what should be the first issue which should be raised in the minds of the judges when a sessions trial commences. Different views emerged but the speaker opined that, when a trial commences, the first thing a judge must see in relation to fair trial is whether the accused is represented by a lawyer or not, and if he is not, the trial becomes *void ab initio*. Reference was made to *Mohd. Ajmal Amir Kasab vs State of Maharashtra*, (2012) 9 SCC 1, in which it was

held that absence of lawyer is a breach of human and fundamental right under Article 21 of the Constitution but it does not vitiate the trial. The Supreme Court held that at any stage of a trial if the parties are not represented by an advocate, it will be a good ground to hold that the trial is in violation of 'fair trial'.

It was also emphasized that in order to have fair trial, every individual must be informed about his right to be represented by a competent lawyer. Two suggested methods to appoint a lawyer in case of absence of the same are, firstly, lawyer can be appointed through Legal Service Authorities, and secondly, appointment can be done according to Section 3 and Section 4 of the Code of Criminal Procedure, 1973. Various provisions of CrPC that included Sections 313, 321, 193, 203, 204, 209, 227, 228 and 226 were also discussed during the discourse.

Significant points stressed by the speakers with relevance to fair trial are:-

- The rights of the accused has to be considerably protected, opportunity must be given to prepare and present the case.
- Supply of all the relevant materials/ documents to the accused.
- Examination of witness under Section 164 of CrPC and recording of the statement of accused under Section 313 must be done in a fair manner. The question put to the accused under Section 313 of CrPC should be short and comprehensible language should be used.
- The trial should be practical, pragmatic and must arrive at correct decision at the earliest.
- Delay and slowing down tactics and practices must be avoided.
- Protection of witness is also a crucial part in conducting of fair trial as held in one of the leading case of *V.K. Sasikala vs State represented by the Superintendent of Police* (2012) 9 SCC 771.
- In order to protect the witness from exploitation, the court has the power to restrict the cross-examination if any dilatory, or harassing question are asked.

The cases of *Nagaraj vs State* (2015) 4 SCC 739 and *Parshuram vs State of Bihar* (2002) 8 SCC 16 were



also highlighted where the Supreme Court held that the court is not supposed to assume that the accused is guilty.

The theme for Session Six was *Sentencing: Issues and Challenges*. The session initiated with a brief introduction on sentencing. It was stated that the provisions for sentencing comes into play when the judge convicts the accused.

The provisions regarding sentencing were discussed. Section 235(2) CrPC was emphasized which provides that, if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360 CrPC, hear the accused on the question of sentence and then pass sentence according to law. It was asserted that unlike the western countries, India awaits the policy on sentencing. The main focus of sentencing must be on the attributes of criminals and an accused must be sentenced considering the gravity of the offence committed. It was also stressed that no adjournment should be given to the accused on the point of hearing as per Section 309 of the CrPC. While dealing with the issues and challenges in sentencing policy following broad points may be adhered:

- A level of uniformity and consistency must be observed,
- There should be lack of arbitrariness,
- A standardized format is often helpful and may be followed,
- Certainty of punishment is a bigger deterrent than quantum of punishment.

The speakers also discussed the provisions of death penalty by referring to the case of *Bachan Singh vs State of Punjab* (1982) 3 SCC 24. It was emphasized that the punishment of death penalty must only be given in the rarest of the rare case and where there is no other option left with the judge, otherwise it would lead to the failure of judicial system as there is no uniform rule to

decide the same. It was also stated that the aggravating and mitigating factors are to be decided by the judge. The speaker also cited the example of Saudi Arabia, where imposition of death penalty does not result in the failure of the deterrent theory. In *Santosh Kumar Satishbhushan Bariyar vs State of Maharashtra* (2009) SCC 498, the Supreme Court held that where only the gravity of the offence is seen, are perhaps not the right indicator for determining the rudiment parameters for imposing death penalty. It was emphasized that the Apex Court, in the number of decisions, has taken aggravating and mitigating factors into consideration for deciding the sentence. Some examples for migrating factors that were discussed are education, adolescent age, offence committed due to grave and sudden provocation, co-operative and sociable approach of the convict. Many provisions like Sections 432, 242(2), 319 of CrPC were also examined and discussed. The session was concluded by giving a brief on the case of *Jogendra Yadav vs State and Ors* (2015) 9 SCC 244. It was suggested that a matured system of sentencing would be, a grown sentencing guideline which creates fields of operation for the judges open for judicial creativity in appropriate cases.

The theme for Session Seven was *Laws relating to Cybercrimes: Advances and Problem Areas*. The session started with a brief introduction about cybercrimes and its historical aspects. It was stated that according to the Oxford English Dictionary, cybercrime is a scientific study of communication and control especially concern to compel human and animal brains with machines and other electric devices. An inclusive account of the kinds of commonplace cybercrimes was projected and discussed in detail such as: cyber-bullying, abuse, coercion or harassment, cyber piracy, cyber spotting, cyber stalking, identity-theft, unauthorized use of trademarks, corporate espionage, financial crimes, internet terrorism.

The speaker also provided with the definition of Cybercrimes as, offences committed by using computers or other electronic devices, or where such computer or such device is a victim or merely a facilitator of commission of an offence. It was stressed that copying and removing of data from a computer or any other device also amounts to 'theft' under section 43-B Information and Technology Act, 2000.

Number of instances with respect to illicit use of

technology were illustrated. Non-registration of a complaint is one of the major reasons for increase in cybercrime. It was also emphasized that in the cases of cybercrimes, time plays a crucial role as now a days 'proximity crimes' are very prevalent.

One of the major challenges in the government does not own cyber space, hence control over it by the government becomes difficult. Absence of uniform rules at the international level also poses a challenge. Examples of Estonia (2007) and Georgia (2008) where a series of cyber-attacks occurred targeting the websites of parliaments, ministries, newspapers and broadcasters were discussed. The concepts of 'Denial of Service attack' and 'Distributive Denial of Service attack' was also explained by citing the example where the website of the Apex Court was hacked and all the e-filings were blocked and as a result everything came to stand-still for a day. The legislators firstly accorded punishment to such acts only as a civil penalty under Section 43 Information Technology Act, 2000. It was only by 2008 amendment that it was converted into criminal penalty by converting the provisions of section 66 of the I.T.Act. The case of *Shreya Singhal vs U.O.I.* (2015) 5 SCC 1, was also discussed in which the provisions of Section 66A Information Technology Act, 2000 were struck down.

There were innumerable cases with reference to the provisions related to Cybercrimes such as: *Kartar Singh vs State of Punjab* (1994) 3 SCC 569; *Ramesh Rajgopal vs Devi Polymers Pvt. Ltd.* (2016) 6 SCC 310; *Vishal Kaushik vs State (Govt. of NCT of Delhi)* 2016 SCC Online Del. 1631; *Shashank Shekhar Mishra vs Ajay Gupta* 2011 SCC online Del.374; *Ronald D' Mello vs State of Maharashtra* (2016) SCC Online Bom 3424; *Prajwala vs Union of India* (2018) SCC Online SC 775 – Supreme Court orders whatsapp to improve redressal system to curb circulation of rape videos; *Sharat Digumarti vs Govt. (NCT of Delhi)* (2017) 2 SCC 18.

The theme for Session Eight was *Electronic Evidence: Collection, Preservation and Appreciation*. The session included visual illustrations on various aspects of electronic evidence. Section 3 and 29 Indian Evidence Act, 1872 defines the term 'Document' which includes electronic documents. It was stressed that the authenticity, integrity and non-repudiation of documents are important factors. It was emphasized that every document including electronic record which



the prosecution rely on should be supplied to the accused. The speaker also enlightened the participant on the concept of 'hashing'. Hashing is a system which ensures the integrity and the authenticity of the data, it reads the document very precisely and then it creates a unique number which is considered to be the coding or the cryptography of that particular document. The impact of digital footprint were also elucidated with the help of illustrations.

The provisions of Section 65B Information Technology Act, 2000 and number of case laws as to what has been recognized by the Supreme Court of India as an electronic evidence (e.g. e-mails, digital photo, video,

tape recordings, ATM machines etc.) were discussed and debated including *Sujoy Mitra vs State of West Bengal* (2015) 16 SCC 615; *Preeti Jain vs Kunal Jain* 2016 SCC online Raj 2838; *Puneet Prakash vs Suresh Kumar Singhal and Ors* 2018 SCC online Del. 9857; *Tomaso Bruno vs State of U.P.* (2015) 7 SCC 178; *Vikram vs State of Punjab* (2017) 8SCC 518; *Shafhi Mohd. Vs State of Himachal Pradesh* (2018) 2 SCC 801; *Pramod E.C. vs Louna V.C.* (2019) SCC Online Ker 165; *Anwar P.V. vs Basheer P.K.* (2014) 10 SCC 473; *CBI vs Abhishek Verma* (2009) 6 SCC 300; *Sri Padmanabha vs Syndicate Bank* 2007 SCC Online Kar. 547.

SE-11

NATIONAL SEMINAR FOR PRESIDENTS OF DISTRICT CONSUMER FORUM

09th & 10th March, 2019

Mr. Krishna Sisodia, Law Associate



A one and a half day Seminar for Presidents of District Consumer Forum was organised by the Academy. 23 Presidents of District Consumer Forum from across the country participated in the seminar. The seminar provided a forum to participants to discuss the inadequacies in the Consumer Protection Act and methods to overcome problems faced by the District Consumer Forums. The objective of the seminar was to provide a forum for participants to deliberate amongst themselves and share experiences, knowledge and best practices in exercise of jurisdiction evolving new horizons of relevant law and jurisprudence.

On the theme ***Consumer Disputes Redressal Mechanism in India: Emergence and Overview***, the speaker initiated the session by discussing the evolution of consumer protection in India. It was pointed out that India always had a culture of valuing consumer and consumer protection is deeply rooted in the Indian civilization, which dates back to 3200 B.C and continues till independence. Post-independence, the rights of the citizens were guaranteed by the Preamble, Fundamental Rights, Directive Principles of State Policy and by the following major enactments: The Drugs (Control) Act, 1950; The Prevention of Food Adulteration Act, 1954; The Essential Commodities

Act, 1955; The Monopolies and Restrictive Trade Practices Act, 1969 (Replaced by the Competition Act, 2002). The above stated enactments were not adequate as they were operative in different areas and did not provide for unified and effective redressal machinery; therefore furtherance to a resolution passed by the United Nations in the year 1985 laying down certain guidelines for better protection of the consumers, the Parliament of India enacted the Consumer Protection Act in the year 1986 to provide for quality and timely redressal to consumers grievances. Elaborate discussion took place on the following features of the Act-

- Consumer on his own can approach the Consumer Fora;
- Complaint should be decided within 90/150 days from the date of receipt of notice by opposite party;
- Summary proceedings;

It was emphasized that the Supreme Court in the case of *Virendra Jain v. Alaknanda Cooperative Group Housing Society Ltd. & Ors.* [(2013) 9 SCC 383], has categorically stated that the availability of alternative remedies is not a bar to entertain the complaint. It was stated that section 24A- consumer fora shall not admit a complaint if it has been filed after two years from

the date on which cause of action arose. In *ABI v. B.S. Agricultural Industries* [(2009) 5 SCC 121], scope of this section was discussed in detail by the apex court.

On the theme **Enhancing Consumer's Access to Speedy and Quality Justice: Role of District Consumer Forum**, the speaker commenced the deliberations by discussing the leading cases *Carlill v. Carbolic Smoke Ball Company* [(1893) 1 Q.B. 256] and *Donoghue v. Stevenson* [(1932) A.C. 562]. Thereafter, the speaker asked the participants about the impediments in delivering quality and speedy justice. The main problems involved were: non-service of summons, no assistance of legal experts, poor infrastructure and low funding for stationary. Further, the speaker stated that in the era of science and technology it can be seen that the market is influenced by false and misleading advertisements; gifts, prices and discounts are offered to deceive the consumers. It was suggested that *Caveat Emptor*, i.e. buyers beware may be replaced by *Caveat Venditor*, i.e. let the seller beware of the laws and policies.

On the theme **Housing and Construction Industry: Timely Delivery, Quality and Maintenance**, the speaker initiated the session by stating that housing construction was included in the definition of 'Service' by *Ordinance No 24 of 1993* which led to *Lucknow Development Authority v. M.K. Mehta* [(1994) 1 SCC 243] wherein the Supreme Court held that, housing construction by a private person or statutory body is a service included within the meaning of Section 2(1) (o). Furthermore, the speaker discussed landmark judgments of Supreme Court under five heads pertaining to housing sector.

1. **When allotment is not made** - In *Chandigarh Housing Board Society v. Avtar Singh and Others* [(2010) 10 SCC 194] it was held that members are covered by definition of "consumer" under S. 2(1) (d) (ii), thus, members of Societies had every right to complain against illegal, arbitrary and unjustified forfeiture.
2. **When there are defects in service** - In *H.P. Housing Board v. Varinder Kuma Garg and another* [(2005) 9 SCC 430] the respondent was given the option to either keep the flat or to take the compensation, when the defects were found in the service.
3. **Illegal Construction in violation of Sanitation Plan** - In *Esha Ekta Apartments Co-operative*

Housing Society Ltd and Others v. Municipal Corporation of Mumbai and Others [(2013) 5 SCC 357], the court held that the builder had knowledge of the permissible limits, hence, illegal constructions cannot be regularized. While in *Dipak Kumar Mukherjee v Kolkata Municipal Corporation and Ors* [(2013) 5 SCC 336] the court held that the Courts shall pass order of demolition of unauthorized construction if it is based on violated sanctioned plan.

4. **Delay in Delivery** - In *Haryana Urban Development Authority v. Darsh Kumar & Others* [(2005) 9 SCC 449] it was held that when a development authority is not in a position to deliver the allotted plot, they must offer an alternative plot immediately at the same price in the same sector or near thereto. While considering a long delay in giving possession, compensation at the rate of 12% from the date of deposit till delivery of possession was awarded.
5. **Compensation** - In *Bangalore Development Authority v. Syndicate Bank* [(2007) 6 SCC 711] it was held that where the grievance is delay in delivery of possession and the development authority delivers the house during the pendency of the complaint at the agreed price, and such delivery is accepted by the allottee (complainant), the question of awarding any interest on the price paid by him from the date of deposit to the date of possession does not arise. Further in *Charan Singh v. Healing Touch Hospital & Others* [(2000) 7 SCC 668] the court held that calculation of damages depend on facts and circumstances of each case. It is for the Consumer Forum to grant compensation to the extent it finds reasonable, fair and proper according to the established judicial standards.

On the theme **Consumer Disputes: Medical Negligence and Insurance Sector**, the speaker began the deliberations by listing the significant medical records that the forum should consider while adjudicating cases on medical negligence. It was stated that names of the patients must be changed in cases of detection of contagious diseases. It was stated that hospitals are under an obligation to preserve the report for 3 years from the date of discharge according to the guidelines issued by the Medical Council of India in 2002. Thereafter, on the issues in insurance sector the speaker stressed that in cases where insurer is



the opposite party, the forum must make the insurer pay because the insurer is in the business for making payments in lieu of premium. Before proceeding with the case, the forum must check the extent of insurance cover and the amount claimed by the claimant; if the gap between the two is narrow it should effect a settlement or refer it to a mediator but if the gap is broad, the forum should make efforts to convince the parties to bridge the gap.

On the theme **Determination of Compensation: Key Issues**, the speaker began by explaining the multiplier principle in light of the Supreme Court's judgment in *Balram Prasad & Anr. v. Kunal Saha* [(2014) 1 SCC 384]. While making a reference to *Sarla Verma v. DTC* [(2009) 6 SCC 121], deliberations were on the factors

to calculate compensation in case of death. Further, the speaker pointed out that pecuniary damages could be awarded involving medical negligence of past, future and ancillary damages in cases such as transport expenses and loss of income should also be awarded. Non-pecuniary damages for pain and suffering, loss of amenities and functional disability require specific considerations on case to case basis. Furthermore, it was mentioned that the Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 issued guidelines for the assessment of disability, on 13th June 2001 which can be resorted to in computing damages under various heads of claims. Finally, the speaker urged the participants to be innovative while awarding compensation or imposing costs.

Prominent Suggestions by Participants (Presidents of District Consumer Forum)

- Creating additional benches to dispose of the increasing number of cases.
- Extensive use of ADR mechanism in light of *Bijoy Sinha Roy v. Biswanath Das & Ors.* [(2018) 3 SCC 224]
- Strict adherence to the guidelines stated under Consumer Protection (Administrative Control over the State Commission and the District Forum) Regulations, 2018.
- Training to newly appointed members.
- Recruitment of stenographers and legal researchers.
- Uniformity in honorarium to Presidents and Members.

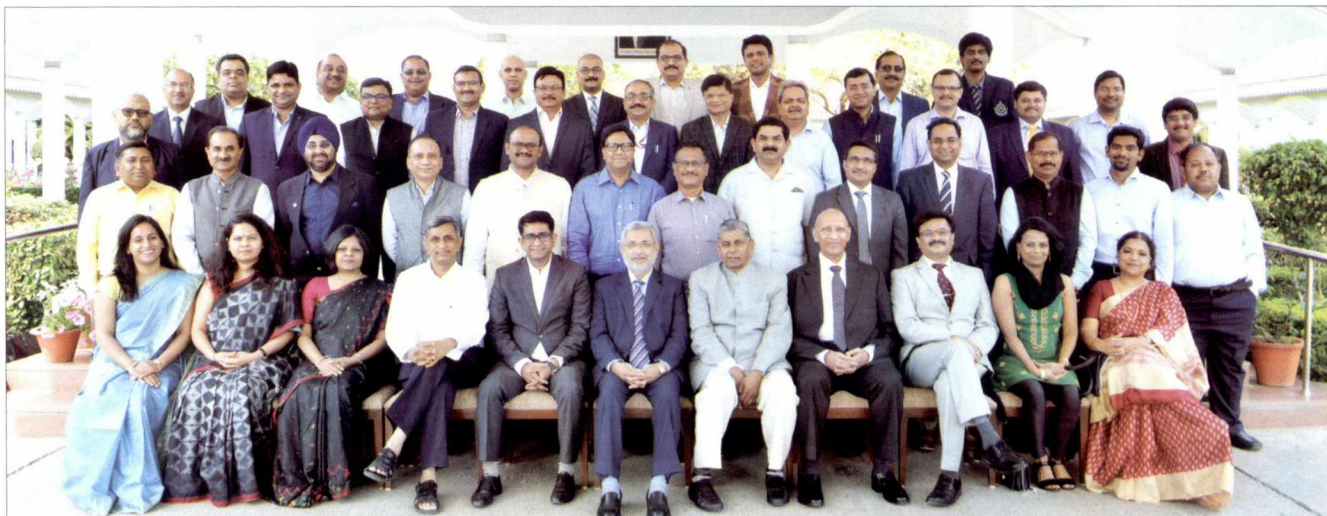
SE-08

WORKSHOP FOR SENIOR IRS (C& IT) OFFICERS ON 'ADJUDICATION SKILLS'

15th & 16th March, 2019

Mr. Sumit Bhattacharya, Research Fellow

Ms. Shruti Jane Eusebius, Research Fellow



The Academy organised a workshop for senior IRS (C&IT) officers for capacity building in 'Adjudication Skills'. The workshop aimed to explore and understand the role of civil services in a democracy. The allocation of fields of legislation in our federal context, nuances in identification of ratio(nes) and the law of precedents, fundamentals of interpretation of fiscal statutes, elements of ethics professionalism and neutrality in process of adjudication, and the art, craft and science of drafting judgments were themes deliberated during the workshop. The workshop provided a platform to share views and experiences, assimilate best practices, to clinically enrich participant officers and accrete competence with efficient and stable outcomes.

In his brief introductory message, the Director NJA welcomed the participating officers and emphasized upon the need for training and the advantages of periodic revisits to the fundamentals to enrich and evolve the core professional competencies. Participants were quizzed for the deeper understanding of the meanings and scope of 'adjudication' and 'skill' for contextual appreciation of the captioned subject matter of the instant workshop. The distinction and nexus between knowledge, wisdom and skilfulness was drawn as

acquired information, its application and qualitative or best application.

Session 1: Role of Civil Service in Democracy

The session began by dispelling the prevalent myth that in a democracy the legislature, judiciary and executive run the civilized nation. Civil servants in its literal sense are servants of the nation and should not mistakenly assume to be the master to execute government policies. They are qualified and skilled professionals entrusted with the duty to serve the nation with responsibility and humility. Emphasizing the vitality and role of civil services, it was highlighted that even in a feudal nation-state like China, the mandarin society historically nurtured a merit based executive system. Historically, civil services manifests a merit founded hierarchical system even in the Indian sub-continent. The balance between meritocracy and counter factors impacting the same in a functional democracy was critically analysed. It was vociferously opined that legitimacy of a democratic system is based on the efficiency of the civil services of a nation.

Session 2: The Constitutional Authority to Tax

The session was premised on the facts that the strength of the administration is drawn from the strength of the

State, and the strength of the State depends on three important factors namely, 1) generation of revenue, 2) maintenance of law and order and 3) development in which the former two can be traced to traditional systems while the last is a third generation adaptation. It was pointed out that with the dropping of the State's ability to garner revenue and the adverse impact of fiscal deficit, the legitimacy of a State is in its decline. It was underscored that Jharkhand is the only State with no fiscal deficit. It was argued that even a buoyant private sector needs to grow on the notion of legitimacy of State. Taxation for revenue harvesting was discussed emphasizing the need of professionalism in tax administration system. The concerns and expectations of tax payers were discussed. The constitutional principles of equality and due process in taxation formed pretext of discussion citing relevant examples. The speakers argued that taxation policies should not be exclusively pivoted for gaining populism, since populism is often the manifestation of dropping legitimacy of a State. It was also discussed that rise in GDP may not be necessarily a factor for rise in development of a country. Taxation should never be done by a State dictate. The socio-economic impact of tax law was discussed with reference to Constitutional provisions (*viz.* Articles 14, 19, 21 and 38). It was cited that tax is used as a regulatory tool to protect the domestic market. It is countered by elasticity of demand e.g. taxation on cigarettes and alcohol. Pathologies of tax administration include a) cost of administration, b) often tax payer is presumed to be a tax evader in India (in contrast to OECD wherein tax payer is regarded as a client), c) adjudicating authorities act as an investigatory agency thereby often violating due process, d) violation of natural justice *viz.* sham, protracted and unfair hearings.

Session 3: Ethics, Professionalism and Neutrality in Adjudication

Discussions in this session rolled around themes which included core judicial values in adjudication and ethical challenges in adjudication. The participants were sensitized by projecting a short talk by Ms. Roopa Moudgil (IPS) to set the context. Contemplating the genesis and roots of ethics, it was examined as to whether it is genetic, acquired or can it be cultivated. One of the problems shared in the course was the systemic distrust prevalent in bureaucracy. The intangible political alignment in civil services

was identified as a factor which further depletes trust amongst the civil servants. A reference to Article 311 as a shield against mala fide transfers etc. formed a part of the discussion. A brief history of genesis and development of tax law was laid down. The customary law relating to neutrality, rule of law and principles of natural justice was discussed to understand the prevalence and evolution of these concepts in the Indian municipal legal system. The codification of natural law in the Constitution of India was discussed. The schools of natural law with inherent morality and positivism to ensure enforcement was discussed in context of ethics, professionalism and neutrality in adjudication. The significance and application of the Bangalore Principles of judicial conduct, 2003 was deliberated upon. The bipolar perspectives of a taxpayer and the taxing authorities on morality was discussed. The basic factors which State must consider before legislating and implementing a tax statute included: 1) Equity (in context of assessment by the State as to one's ability to pay taxes), 2) Certainty (awareness of the taxpayer), 3) Elasticity (*viz.* Flexibility in tax rates), 4) Expediency (assess the real necessity to tax), and 5) Multiplicity (whether it's better than a single tax model).

Session 4: Law of Precedents: Identifying the Ratio

The speaker stressed on the relevance of precedents in adjudication and stated that precedents prevent ambiguity in law and ensure certainty and predictability in judicial outcomes. Courts must nurture precedents as they are constituent source of law. Decisions of a superior court is binding on lower courts. Similarly, the decisions of larger bench are binding on smaller benches. Precedents must be adhered to except where the judgment is *per incuriam* or the facts of the earlier case are different from facts in the present case. In cases where the decisions of 2 High Courts differ on the same point of law, decision of the supervisory High Court would be binding on the lower courts under its supervision. The speaker raised the issue as to why there is so much variance in judicial outcomes on the same question of law or on similar factual scenarios. The human factor in judicial decision making was held to be the reason for such variance as the perception of facts would alter the outcome. Machine made output of decisions by a bare reading of cases would not suffice as the judge as a person is able to perceive the situation, read between the lines, assess the unspoken

issues in the case and decide accordingly. In dealing with conflicting judgments on an issue, the court can exercise its discretion and adhere to the precedent which provides a beneficial interpretation in favour of the assessee. However, in cases of interpretation of exemption notification, the interpretation in favour of the revenue must be adhered to.

Session 5: Art, Craft and Science of Drafting Judgments

The speaker dwelt on the provisions of Order 20 Rule 5 of CPC which specifies how a judgment is to be written and stressed on recording of reasons in the judgment. Reasoning in a judgment is essential as it specifies the material in possession of the court which forms the basis of the decision. The reasoning is also necessary as it provides the aggrieved party with matter to base his appeal, and also provides material to enable the appellate court to review the matter in appeal and verify the correctness of the decision of the lower court. The necessary skills for effective judgment writing were discussed at length and the speaker advised the participants to be conversant with the facts of the case, principles of law applicable to the case and the relevant precedents. The participants were advised to give reasoned judgments as reasoning is the most important contribution of the judge in a case. The reasons link the material on which the conclusions are based to the actual conclusion drawn. It was stated that if the advocate argues 2 out of 4 issues before the court, the judge should limit himself to the 2 argued issues and avoid dealing with the unargued issues as the other party has not been given an opportunity to be heard on the said issues which is a necessary element of natural justice. The judgment must deal with every fact, issue, argument and precedent placed before the court to evidence the application of the judicial mind to every aspect of the case. The judgment is the calling card of every judicial officer as it evidences the approach, reasoning process of the judge and indexes one's personality. The speaker stated that the mere recording of pleadings of both parties would not amount to recording of reasons as reasons are the result of the application of judicial mind of the judge to the facts, law and precedent and would be the conclusion that the court arrives to. Mere quoting of all judgments referred to by the parties does not amount to consideration and dealing with the precedents by the court. Furthermore,



merely stating that a judgment is distinguishable without giving reasons for such conclusion is a flawed method of judgment writing. The speakers stressed on organisation in judgment writing so that the judgment is written in a sequentially and is coherent. The judgment can include a summary and table of contents.

Session 6: Variety of Taxes: The Federal Context

The speaker dwelt on the dual roles of a tax collector – as an investigator and as an adjudicator. As an investigator, a tax collector is required to decipher the facts in a case and as an adjudicator, he is required to hear the parties and decide the case. The speaker discussed the maxims of taxation elaborated by Adam Smith – certainty, continuity, convenience and consistency. The speaker also discussed Article 265 of the Constitution of India and stressed on the authority of law as a necessary element of a constitutionally valid tax, which means that levy and collection of tax must be authorised by a legislation and not by customs, circulars etc. The speaker distinguished between levy and collection of tax, and stated that levy refers to the charge or charging section which creates a liability and by itself it does not entitle to collect the tax. Collection of tax is based on the levy of tax under the charging section and assessment of liability. The speaker discussed the judgments of *Sales Tax Officer, Benares v. Kanhaiyalal* (AIR 1959 SC 135) and *Mafatlal Industries v. Union of India* (1997) 5 SCC 536 to highlight the doctrine of Unjust Enrichment in tax law. The speaker also discussed the *Jindal Stainless* (2017) 12 SCC 1 case to stress that taxes do not constitute restriction on trade and commerce and that a high levy does not mean that the provision is unconstitutional. The guiding principles of a good tax policy (equity and fairness, certainty, convenience, effectiveness of tax administration, information security, simplicity, neutrality, economic

growth and efficiency, transparency, minimum tax gap, accountability and appropriate government revenues) were discussed and the participants were advised to ensure objectivity and neutrality in taxation. The speaker also discussed the constitutional authority of local self-government bodies to levy tax as delegates with their own revenue requirements. The speaker also dwelt on diversity as a canon of taxation.

Session 7: Elements of Interpretation of Fiscal Statutes

The speakers discussed the principles of interpretation of statutes and stressed that a literal interpretation is the Rule for taxing statutes. In cases of interpretation of tax law, words should not be omitted or added, and it must be considered that inclusion or omission of words in the provision has been done purposefully thereby indicating purposive interpretation. Taxing

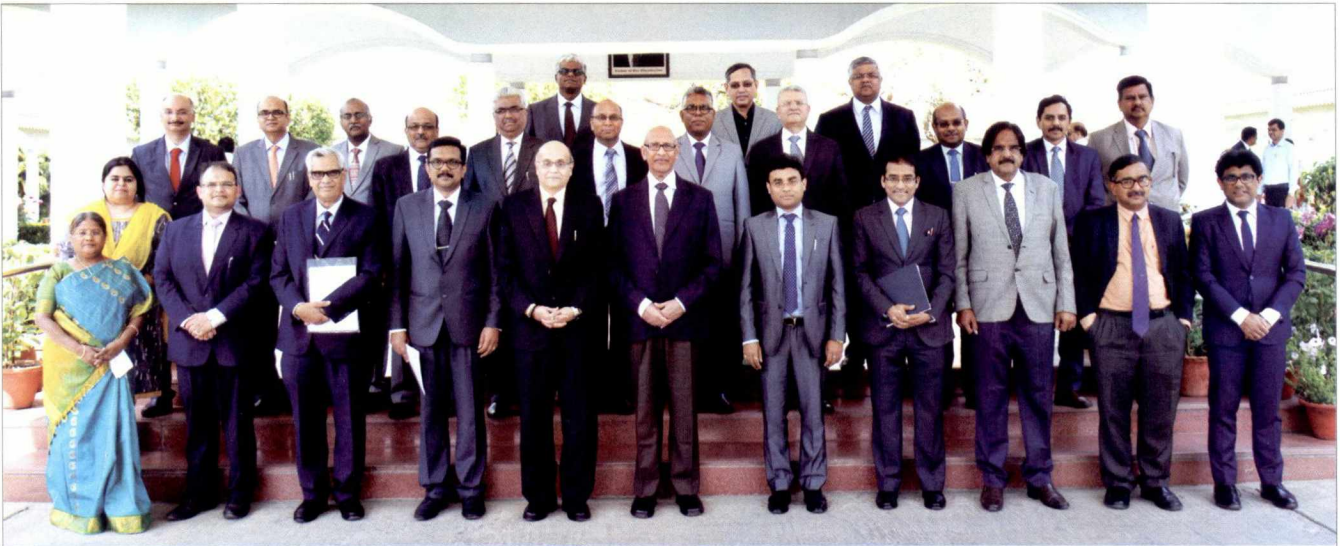
statutes must be strictly interpreted except in cases where plain reading of the provision leads to absurdity. The section should not be read in isolation but should be read in harmony with the entire statute. The definition clause provides a guidance point or radar to interpret the provision. In case where the word has not been defined in the statute, assistance can be taken with reference to *statute pari materia*. On the issue of whether an amendment to a statute can be used to interpret other provisions of the statute, it was clarified that the amendment can only be used to interpret the law that was vague. Technical terms must be understood from technical sources or documents. The speaker distinguished between charging sections, procedural sections and exemption provisions and stated that while charging sections are to be strictly interpreted, procedural and exemption provisions have some degree of relaxation in interpretation.

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CONFERENCE FOR HIGH COURT JUSTICES ON COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION

22nd to 24th March, 2019

Ms. Paiker Nasir, Research Fellow



The Academy organized a three day “Conference for High Court Justices on Commercial Division and Commercial Appellate Division”. With the advent of the Commercial Courts Act, 2015 (hereinafter referred as 'Act'), High Courts have been empowered to manage adjudication of a variety of high value commercial disputes and concerns. The issues are new and intricate in nature, and require in-depth knowledge and practical understanding in the light of steady rise in industrialization and globalization.

The conference facilitated deliberations among participant justices on contemporary issues and recent developments in commercial disputes. It provided a forum for discussing normative issues pertaining to the genesis, importance, benefits & challenges: commercial courts, interplay between Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996, interpretation of distribution & licensing agreements: disputes & resolution, intellectual property rights : copyright, design, trademark and patent, joint venture agreements, interpretation of construction and infrastructure contracts and adjudication of commercial disputes. Creating expertise at the High Court level is a

critical factor for capacity building in order to address backlog increase competencies to serve as a fair arbiter both in domestic and international aspects.

Session one of the conference was on the theme ***Commercial Courts: Genesis, Importance, Benefits & Challenges***. The session was chaired by Justice Kurian Joseph and the key speaker was Mr. Somasekhar Sundaresan. The session commenced by discussing the genesis of commercial courts. While discussing the procedure involved in any legislative process it was accentuated that in many foreign countries background studies are conducted that includes both judicial and financial impact of a particular legislation on the country. Whereas in India, no background studies take place. It was opined with respect to Commercial Courts, lack of such related studies makes it difficult to align the Act with all the stakeholders involved; rather there is a need for a new jurisprudential theory to be devised to know the expectations of the people. It was also suggested that there is a requirement to understand whether we have the required of expertise?

It was highlighted that Section 20 of the Act provides for training of judges who may be appointed to the

commercial courts, commercial appellate courts, commercial division or the commercial appellate division in a High Court. Various definitions under Section 2 of the Act were discussed elaborately. The scheme of the Act, constitution of commercial courts at the district level under Section 3, power of the judiciary to create commercial court division under section 4, appellate courts under section 14, pre-institution mediation under section 12A(1) and various other significant sections of the Act i.e. - Section 7, 10(1) etc. were also deliberated upon.

Session two was a special session with Prof. Timothy Endicott (Professor of Legal Philosophy) University of Oxford as the key speaker. This special session was intended to benefit from the rich academic experience of Prof. Endicott and to facilitate an interaction between him and participant High Court Justices. The theme of the session was *A Written Constitution: Construing the Sounds of Constitution's Silences* which was chaired by Justice Kurian Joseph. The session initiated with discussion on the Bill of Rights, 1689 and the Habeas Corpus Act, 1679. The relevance of the Doctrine of Basic Structure in the Indian Constitution was elaborated. The procedure for appointment of judges in India and U.K. was deliberated and it was observed that cultural and political force do affect the acceptance of a judges, however, with changing times these cultural and political forces do tend to change themselves. On the point whether there ought to be, or are any guidelines for construing silences; what could be the legitimate sources from which such extra-textual interpretation could be traced, it was suggested that silences must be reached out through the constitutional vision of justice. In the light of Aadhar judgment [*Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors* (2018) 1 SCC 809] and the earlier judgment *Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors* [(2017) 10 SCC 1], on construing the Right to Privacy as comprehended within the spectrum of entrenched rights under the Indian Constitution (In Part III), though not textually spelt out, it was suggested that judicial review is the remedy for the silences in the constitution. The Supreme Court's NJAC Judgment [*Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1], which also interprets silences formed an integral part of the deliberation.

The session on *Intellectual Property Rights : Copyright and Design*, had Mr. Rajiv Agarwal as the key speaker and Justice Kurian Joseph as the chair. The session underlined the seven objectives of the National Intellectual Property Rights Policy, 2016 i.e., IPR awareness: outreach and promotion, generation of IPRs, legal and legislative framework, administration and management, commercialization of IPR, enforcement and adjudication, human capital development. Various intricacies involved in taking enforcement action against online copyright piracy like- territorial limitations, change of URLs, statutory safe harbors, anonymity etc. was discussed and it was pointed out that CIPAM (Cell for IPR Promotion and Management) is working closely with NIXI (National Internet Exchange of India) to combat piracy on .IN domain. It was further highlighted that the John Doe Orders have emerged as an effective judicial remedy for protecting copyright material online, it is a restraining order against unknown defendants and such order prohibits all known and unknown defendants from communicating, making available, displaying, release, uploading and downloading copyrighted work.

The session on *Intellectual Property Rights: Trademark and Patent* had Mr. Rajiv Agarwal and Mr. Anand Grover as speakers and Justice Kurian Joseph as the chair. The session commenced with a brief on the Indian patent regime and its evolution from 1911 to 2005. Significance of the TRIPS agreement was emphasized. Key issues with respect to Patents i.e. - compulsory license, working of patents, evergreening, patent lineage and data exclusivity were discussed in detail. The significance of the *Novartis* judgment [*Novartis Ag v. Union of India*, (2013) 6 SCC 1] was also highlighted. Compulsory License in the light of *Nexavar* Case [*Bayer Corporation v. Natco Pharma Ltd. (Natco v. Bayer) Order (No. 45 of 2013)*] in which the Apex Court upheld the decision of the Intellectual Property Appellate Board and the Bombay High Court, sanctioning the grant of a compulsory license for Bayer's anti cancer drug 'Nexavar' was also discussed.

The session on *Interplay between Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996*, had Mr. Anil Xavier as the key speaker and Justice S.C. Dharmadhikari as the chair. The discussion initiated by highlighting the introduction of mandatory pre-institution mediation as per the

Governing Bodies of the NJA

A. The Governing Council

1. Chairperson of the NJA the Chief Justice of India
 - Hon'ble Mr. Justice Ranjan Gogoi
2. Two Judges of the Supreme Court of India
 - Hon'ble Mr. Justice Sharad Arvind Bobde (from 11.01.2019)
 - Hon'ble Mr. Justice N.V. Ramana (from 11.01.2019)
3. Secretary, Department of Justice, Ministry of Law & Justice, GOI
4. Secretary, Department of Expenditure, Ministry of Finance, GOI
5. Secretary, Department of Legal Affairs, Ministry of Law & Justice, GOI
6. Secretary General, Supreme Court of India
7. Director, National Judicial Academy, Bhopal

B. The General Body

1. Chairperson of the NJA the Chief Justice of India
 - Hon'ble Mr. Justice Ranjan Gogoi
2. Two puisne Judges of the Supreme Court of India
 - Hon'ble Mr. Justice Sharad Arvind Bobde (from 11.01.2019)
 - Hon'ble Mr. Justice N.V. Ramana (from 11.01.2019)
3. Chief Justice of a High Court
 - Hon'ble Mr. Justice Hrishikesh Roy, Chief Justice, High Court of Kerala (from 11.01.2019)
4. Judge of High Court
 - Hon'ble Mr. Justice D.N. Patel, High Court of Jharkhand
5. Ex- officio Members:
 - i) Minister for Law & Justice, GOI
 - ii) Chairperson Bar Council of India
6. Secretary, Department of Justice, Ministry of Law & Justice, GOI
7. Secretary, Department of Expenditure, Ministry of Finance, GOI
8. Secretary Department of Legal Affairs, Ministry of Law & Justice, GOI
9. Secretary, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, GOI
10. Two Law Academics
 - Dean, Faculty of Law, Delhi University
 - Director, National Law Institute University, Bhopal
11. Secretary General, Supreme Court of India
12. Director, National Judicial Academy, Bhopal

National Judicial Academy

Conceived in early 1990s by the Supreme Court of India, the NJA had to wait nearly a decade to get its infrastructure in place. On September 5, 2002 the then President of India, Dr. A.P.J. Abdul Kalam, formally dedicated to the Nation, the beautiful sprawling complex of the NJA, spread over a 62 acre campus overlooking the Upper Lake at Bhopal. The President on the occasion released a Second Vision for the Republic in which a new and dynamic role for the judiciary was envisaged with a view to make India a developed country by 2020. *"The Academy"*, he said, *"may aim at developing attitudinal changes to improve judicial integrity and efficiencies"*. The NJA commenced the rather challenging journey towards achieving higher standards of excellence in delivery of justice through human resource development and techno-managerial upgradation. Since 2003, NJA has successfully imparted training to more than 32,000 judicial officers of various levels.

Registered as a Society in 1993 under the Societies Registration Act (1860), the NJA is managed by Governing Council chaired by the Chief Justice of India. The Governing Council consists of two senior most Judges of the Supreme Court of India and three Secretaries to the Government of India from the Departments of Law and Justice, Finance and Legal Affairs. The mandate of the Academy under the Memorandum of the Society include following objectives:

- (i) to establish a center of excellence in the study, research and training of court management and administration of justice and to suggest improvements to the judicial system;
- (ii) to provide training and continuing legal education to judicial officers and ministerial officers of the courts; and
- (iii) to disseminate information relating to judicial administration, publish research papers, books, monographs, journals etc. and collaborate with other institutions both within the country and abroad.

With the support and guidance of the justices of the Hon'ble Supreme Court of India, the NJA has launched an ambitious plan of research, education and training activities to give the judiciary - the required intellectual inputs to assist the judicial system in dispensation of quality and responsive justice.



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