



SJA NEWSLETTER

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Chief Patron

Hon'ble Mr. Justice
K. S. Radhakrishnan
Chief Justice

Judge-In-Charge

Hon'ble Mr. Justice
Hakim Imtiyaz Hussain

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Topic of the Month

In our opinion, judges should practice great restraint while dealing with economic statutes; they should be activists in defending the civil liberties and rights of the citizens. This is necessary because, though ordinarily, the Legislature represents the will of the people and works for their welfare. There can be exceptional situations where the Legislature, though elected by the people may violate the civil liberties and rights of the people.

It was because of this foresight that the founding Fathers of the Constitution in their wisdom provided Fundamental Rights in Part III of the Constitution, which were modelled on the lines of the US Bill of Rights of 1791, and the declaration of the rights of man during the great French Revolution of 1789.

The courts are guardians of rights and liberty of the citizen and they will be failing in their responsibilities if they abdicate the solemn duty towards the citizen. For this, they may sometime have to declare the Act of Executive or the Legislature as unconstitutional.

It is the solemn duty of the courts to uphold the civil rights and liberties of the citizens against Executive or Legislative invasion, and the court cannot sit quite in this situation but must play an activists role in upholding civil liberties and the fundamental rights in Part III.

As regards economic and other regulatory legislation, judicial restraints must be observed by the court and greater latitude must be given to the Legislature because the court does not consist of economic or administrative experts. It has no expertise in this matter and in this age of specialisation, when policies have to be laid down with great care after consulting the specialists in the field. It will be wholly unwise for the courts to encroach into the of the Executive or the Legislative and try to enforce its own views and perception.

No progress is possible without granting Fundamental freedom of speech, freedom to write, freedom to think, freedom to experiment, freedom to criticise (including criticism of the Govt) and freedom to dissent.

Hon'ble Justices H. K. Sema and Markandey Katju,
Judges of the Supreme Court of India
(on 25-2-2008)

JAMMU & KASHMIR STATE JUDICIAL ACADEMY TRAINING PROGRAMMES IN THE YEAR 2007

A Refresher Course for in Service Judicial Officers was held at Srinagar from 1-9-2007 to 9-9-2007 and 10-9-2007 to 18-9-2008. During the training, Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge, High Court of Jammu and Kashmir addressed the trainees on 'ARREARS, REDUCTION, STRATEGIES AND JUDICIAL REFORM'.

Excerpts of the address are given below.

His lordship while examining the causes for delay in the disposal of cases observed:

1/ Lack of adequate manpower:

Population has increased in extra-ordinary proportions since the dawn of independence. The legal interference has become all embracing and multifarious from private marital life to social and political activities, there is almost in every field a legislation to govern it. The business activity has expanded and corporate legislation has assumed new dimensions. Law consciousness has driven the people to seek remedies for their grievances from the courts in all these aspects. The truth, however, remain that the number of Judges and the Courts have not increased with the legal activity and the remedial requirements. This has resulted in accumulation of arrears in the Courts.

2/ Judges Role.

Before I came to other reasons responsible for accumulation of arrears in courts, I would make a humble attempt in analyzing the role of judicial officer in this context. It has been experienced that often frivolous litigation comes to the courts and after entertaining the same, it goes on for decades together by taking use of procedural technicalities. A vigilant learned and consciousness judicial officer has the potentiality of checking the inflow of such frivolous litigation.

The best strategy would be to give as much time as available and possible to the disposal of files than to be irregular and non-punctual. It is the personal virtue and the level of judicial ethics in a judicial officer which can make an improvement in the right direction rather than any legislative or administrative direction from outside. The judicial officer must control the proceedings.

3/Procedural Laxities:

The Courts in India are governed by a set procedure. The trial of cases is regulated by various procedural codes like Civil Procedure Code, Criminal Procedure Code and the Evidence Act. Procedural formalities and legal technicalities also lead to the prolongation of the trial and the consequent accumulation of arrears. It could be checked by an effective control of the proceedings and by reducing the number of adjournments. It can also be minimized by controlling the un-necessary lengthy cross examination of the witnesses.

4/ Courts are over burden with extra judicial work:

A judicial officer is not to hear and decide the cases only. He is expected to look to the administration in the courts, maintain accounts and service record, to regulate and monitor the working of the staff, besides doing other works like registration of documents, giving of judicial remedies and adveting to financial matters. This cuts short the available working hours which leads to the accumulation of the arrears in the courts. A proper strategy would be to provide adequate staff for running of the administration and maintaining the accounts in the courts and also to provide separate exclusive Registrars for registering the documents.

5/ Role of Lawyers and litigants:

Lawyers role in accumulation or reduction of arrears in courts cannot be under emphasized. Lawyers are there to assist the courts by being available when the cases are called. Taking of unnecessary adjournments and remaining absent from the courts incapacitates the judicial officer from proceeding with the file. Commercialism in the legal profession devoid of professional ethics has lead to an impression that the present justice delivery system is a tool of exploitation to harass the poor masses. The learned members of the Bar can contribute a lot by their legal and expertise knowledge in reducing the arrears. Here the profession management skill and capability of judicial officer to control the file, the proceedings and the counsel will also go a long way in reducing the arrears.

6/ Judicial Reforms:

On the question of Judicial Reforms, it would be suffice to say that our dispute resolution system needs a drastic change and alternate dispute resolution system has already been attempted to be introduced. Institution of Lok Adalats is the example. Such courts are free from all the procedural restraints. Reconciliation and compromise is the key role now. The judge must first try to settle the case by taking all steps for such amicable solution, while keeping in view the present circumstances and changing need of the hour.

7/ It would be better if the already existing judicial system is remodeled according to the needs and compulsions of the present day system. A change in the procedure is the imperative to cut short the trial without, however, sacrificing the virtue of justice. Providing for transfer application in cases, filing of revisions / appeals at random should be checked and number of courts should be increased with the bifurcation of civil and criminal courts where it has not been done as in our state which can lead to reduction of arrears in courts.

8/ The old cases should be listed everyday either in the pre-lunch or post-lunch session, so that the Advocates, Litigants and other interested persons will be in know of the title of old cases which will be taken. It must be the endeavour of a judge to decide the old cases as early as possible.

Second North Zone Regional Judicial Workshop on “Techniques and Tools for Enhancing Timely Justice”

NJA’S North Zone Regional Judicial Workshop Second North Zone Regional Judicial Workshop on “Techniques and Tools for Enhancing Timely Justice” was held at Jammu from 8th to 10th of February, 2008. Workshop was held under the auspices of National Judicial Academy, Bhopal and it was



Inaugural Function of the Second North Zone Regional Judicial Workshop

organised by the High Court of Jammu and Kashmir and Jammu and Kashmir State Judicial Academy. In the Workshop about 108 Judicial Officers from the High Court of Allahabad, Delhi, Himachal Pradesh, Jammu and Kashmir, Punjab and Haryana and Uttranchal High Court participated.



Hon'ble Mr. Justice K.G. Balakrishnan addressing the audience

Workshop was inaugurated by Hon'ble Mr. Justice K. S. Radhakrishnan, Chief Justice of Jammu and Kashmir High Court on 8th of February, 2008. In this behalf an impressive function was held at Gen. Zorawar Singh Auditorium, University of Jammu, Jammu which was attended by the Hon'ble sitting and retired Judges of the High Court of Jammu and Kashmir, learned Advocated General, President, Bar Association Jammu, Senior Advocates, Secretary/Commissioner Law and other distinguished guests.

During the three days Workshop Dr. G. Mohan Gopal, Director, National Judicial Academy and other Resource persons and distinguished guests namely Hon'ble Shri Justice Sushil Harkauoli from Allahabad High Court, Hon'ble Shri Justice V. V. S. Rao from Andhra Pradesh High Court, Hon'ble Shri Justice Manmohan Sarin from Delhi High Court, Hon'ble Shri Justice Sanjib Banarjee from Calcutta High Court delivered lectures and interacted with



Hon'ble Mr. Justice S.B. Sinha addressing the audience

the participants. The Workshop concentrated mainly on two themes - Delay and Arrears Reduction and Quality and Responsiveness of Justice.

Hon'ble Shri Justice K. S. Radhakrishnan, Chief Justice of High Court of Jammu and Kashmir and Hon'ble Shri Justice Hakim Imtiyaz Hussain,



Address by Hon'ble Mr. Justice K.S. Radhakrishnan

Judge Incharge, Jammu and Kashmir State Judicial Academy also addressed the participants.

The Valedictory address was delivered by Hon'ble the Chief Justice of India Mr. Justice K. G. Balakrishnan. Hon'ble Mr. Justice S. B. Sinha, Judge, Supreme Court of India, who was the Guest of Honour also delivered his address. Dr. G. Mohan Gopal, Director, National Judicial Academy presented the Vote of Thanks.

LOK ADALAT WEEK

Under the directions of Hon'ble Executive Chairman Jammu and Kashmir State Legal Services Authority Hon'ble Shri Justice Nisar Ahmad Kakru, the week commencing from 4th of February, 2008 was declared as "LOK ADALAT WEEK". The inaugural function of "LOK ADALAT WEEK" was held at Jammu on 4th of February, 2008 in which Hon'ble Patron-in-Chief Hon'ble Shri Justice K. S. Radhakrishnan Chief Justice delivered the



Hon'ble Mr. Justice H.I. Hussain giving his welcome address

inaugural address. The function was attended by Hon'ble Executive Chairman and other Hon'ble Judges of the Jammu wing of the High Court. Besides Judicial Officers, Members of Bar and Litigants participated in the inaugural function.



Vote of thanks by Dr. G. Mohan Gopal, Director, NJA

During the "LOK ADALAT WEEK" a number of LOK ADALAT were organised at District and Tehsil levels through out the length and breath of the State. The response to these LOK ADALATS was highly encouraging despite heavy snowfall in Kashmir valley and upper reaches of Jammu region. About six thousand cases were settled in LOK ADALATS held through out the State during the week. Out of these more than 350 cases pertaining to Motor Accident Claims were settled and compensation amount of Rs. 6.18 Crores was awarded in favour of the Victims. Another notable feature of these LOKADALATS

was that for the first time in the Jammu and Kashmir State, cases at pre-litigation stage were taken up for settlement. About 160 such cases were settled and awards of more than Rs. 2.00 Crores were passed in favour of Financial Institutions and against the borrowers.

The Valedictory function of the 'LOK ADALAT WEEK' was held on 9th of February, 2008 at High Court Complex Jammu in which Hon'ble Chief Justice



Valedictory Function of the Second North Zone Regional Judicial Workshop

of India, Shri Justice K. G. Balakrishnan delivered the Valedictory address. Hon'ble Partron-in-Chief SLSA, Shri Justice K. S. Radhakrishnan, Hon'ble Chief Minister, Shri Ghulam Nabi Azad, Hon'ble Shri Justice Nisar Ahmad Kakru, Executive Chairman SLSA and Hon'ble Shri Justice Nirmal Singh also



Hon'ble Judges of High Court of Jammu & Kashmir

delivered their addresses on this occasion. The dignitaries highlighted the importance of LOK ADALATS in dispensation of justice. The function was attended by Hon'ble Judges of the High Court, Ministers, Bureaucrats, Police Officers, Judicial Officers, Members of Bar and the litigants. Hon'ble Chief Justice of India also inaugurated Mediation Centre in High Court Complex, Jammu on the same day.

2nd North Zone Regional Judicial Workshop on “Techniques and Tools for Enhancing Timely Justice”



Hon'ble Judges of
High Court of Jammu & Kashmir



Hon'ble Judges of other High Courts



Participants in the North Zone
Regional Judicial Workshop



Audience at the Valedictory function



Proceedings of the Judicial Workshop



Proceedings of the Judicial Workshop



Proceedings of the Judicial Workshop



Proceedings of the Judicial Workshop

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ACADEMY NEWS

Hon'ble the Chief Justice of India, Shri Justice K.G. Balakrishnan released the "SJA NewsLetter", a monthly News Letter published by the State Judicial Academy. The News Letter was released on 10th of February, 2008 in the Valedictory function of the 2nd North Zone Regional Judicial Workshop on "Techniques and Tools for Enhancing Timely Justice".



Hon'ble Chief Justice of India releasing 1st issue of 'SJA Newsletter'

Present on the occasion were Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India, Hon'ble Mr. Justice K.S. Radhakrishnan, Chief Justice, High Court of Jammu & Kashmir, Hon'ble Mr. Justice Hakim Imtiyaz Hussain, Judge Incharge, State Judicial Academy and Prof. (Dr.) G.Mohan Gopal, Director, National Judicial Academy.

Hon'ble the Chief Justice of India, His Excellency the Governor of Jammu & Kashmir and Hon'ble Shri Justice K.S. Radhakrishnan have sent their messages on the occasion.

LEGAL JOTTINGS

Powers of the Appellate Court while deciding an appeal against acquittal

While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial court. *Kallu v. State of Madhya Pradesh AIR 2006 SC 831.*

SC: No dues if worker untraceable for 7 years

The law presumes a person to be dead if he is untraceable or about whom his relatives have not heard of for the last seven years. But this will not be a ground for the kin to claim compensation from the employer under the Workmen's Compensation Act, the Supreme Court has ruled.

Through this ruling, a Bench comprising Justices S. B. Sinha and V. S. Sirpurkar quashed a Gauhati High Court verdict which had upheld a Workmen Compensation Commissioner's order directing Oriental Insurance Company Ltd. to pay Rs. 2.24 lakh to the kin of a driver who had mysteriously vanished with the vehicle since October 9, 1996.

The Commissioner said under Section 108 of the Evidence Act, which presumes a person to be dead if not traceable for more than seven years, "It is presumed that the driver is dead. Therefore the parents are entitled to get compensation under the provisions of the Workmen's Compensation Act". The HC agreed with the reasoning of the Commissioner and said as more than seven years had passed since the driver vanished without a trace, the kin were entitled to compensation. The Apex Court disagreed with the concurrent findings of the Commissioner and the High Court. (TOI)

CJI: No need for changes in kidney transplant law

As the Government contemplates amending the Organ Transplantation Act in the wake of the kidney racket, Chief Justice of India, Hon'ble Mr. Justice K. G. Balakrishnan on Saturday said the present law were sufficient but they need to be implemented properly.

"Sufficient laws are there, they just need to be implemented properly," Mr. Balakrishnan told reporters when asked about the need for stricter laws to check illegal transplantation of organs.

He was speaking on the sidelines of a conference on 'prevention of kidney disease' at the All India Institute of Medical Sciences (AIIMS) here. Health Minister Anbumani Ramadoss had recently said the Act would be amended to simplify the procedure and make the punishment for illegal transplant more stringent to curb unlawful practices.

In his speech, the Chief Justice said: "In a conference like this, I am totally a layman. I don't know the implication of kidney disease. When they say kidney, it reminds me of police, retention and arrest."

Against the need for nearly 12,000 to 16,000 nephrologists, India has only 800, Head of AIIMS Forensics Department T.D. Dogra said.

Now, Court comes to Jail

Under trials in Chhattisgarh to be tried through Video Conferencing.

Chhattisgarh government's jail department is all set to start video conferencing between prisons and Courts from June 20 instead of taking under trials to court.

This will help jail department prevent prisoners from escaping. In the past, many a prisoner has managed to give the police slip either during transit between jail and court or from premises of courts.

According to senior jail officers, there is a lot of risk in escorting under trials to court and bringing them back safely. One police officer said more and more police personals were being deployed to escort under trials to court at a time when police department was facing acute shortage of personnel and was reeling under Maoist menace.

"The move to introduce video conferencing between courts and jails was mooted as the department wanted to avoid security lapses that had occurred during transit of prisoners," said Director General (Prisons) Anil M Nawani. The step was being taken on a pilot basis and was likely to be replicated in Maoist-affected districts of the state after its successful implementation in Raipur.

"Once video conferencing facilities are installed, we will be able to bring down prospects of corruption as undertrials will not be needed to be taken out of prison premises," Nawani added.

The trial run has already commenced and the facility will be inaugurated within the next few days. Nawani said, "Besides basic training, the jail staff is being trained in frisking, use of wireless and hospital duty (when inmates are hospitalised)".

"Twenty-four recruits from various parts of the state have undergone training to make them up-to-date in dealing with growing number of Maoists lodged in various prisons of the state," Nawani added. There are about 400 alleged Naxalite cadres, both hardcore and sympathisers lodged in state's jails. (TOI)

CASE COMMENTS

Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344

In Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344 the Hon'ble Supreme Court has emphasized the need for dispute resolution through mediation and has directed the High Courts to frame Rules in this regard.

Mediation has been time tested dispute resolution mechanism for last about 30 years in USA and for about 20 years or so in UK and Australia etc. Our legislature has also recommended recourse to ADR as would be clear from the enactment of J&K State Legal Services Authority Act, 1997 and Arbitration and Conciliation Act, 1997. Under Section 3 of J&K State Legal Services Authority Act, the State Legal Services Authority has been constituted. As per the Rules and Regulations framed under the said Act, the Authority is duty bound to provide Legal Service to eligible persons and to encourage the settlement of disputes by way of negotiations, arbitrations and conciliations. Rule 21 of the Rules framed under the aforementioned Act, inter alia, provides that legal services may be given through Mediation Centres or Family Counseling Centres. Hitherto, the Legal Services in our State were being provided to eligible persons only in the shape of engaging the services of a lawyer or by organising legal literacy camps. A dire need has been felt for setting up Mediation Centres so that eligible persons can avail the legal services through such Mediation Centres as postulated by Rule 21 of the Rules. In this background, mediation centres have been set up at Srinagar and Jammu which have been inaugurated by the Hon'ble Chief Justice of India.

The existing system of Arbitration, Conciliation and Lok Adalats are statutorily regulated but there is no independent mechanism for regulation of mediation. The State Authority is in the process of framing Regulations for Regulating the Mediation. Though State Legal Services Authority has taken a lead in establishing a Mediation Centre and in initiating framing of Regulations to regulate the functioning of said centres, yet in the absence of applicability of newly added Section 89 of Code of Civil Procedure to our State, no obligation is cast upon the Courts to refer even a suitable case for mediation. The matter needs to be taken up with the Government for incorporation of the provisions of Section 89 of the Central Code of Civil Procedure in the State Code.

Mediation is definitely a faster method of dispute resolution compared to the conventional Court process. We need trained mediators and conciliators, who can see the problem objectively without bias and facilitate affected parties to come to an agreed solution. Senior Judicial Officers having aptitude for ADR methods need to be trained in mediation & conciliation etc. However, ultimately the responsibility of mediation has to be on the shoulders of members of Bar. The system of dispute resolution by mediation is definitely cost effective and it leaves all the litigating parties satisfied with the outcome. So let us give the system of dispute resolution by mediation, a chance

There is bound to be some criticism and doubt about the system, but if we doubt every thing there will be nothing left, except our ability to doubt.

Sanjay Dhar
Secretary,
High Court Legal Services Authority.

S. Deepak vs. George Philip

AIR 2007 Kerala 94

An important question arises as to what procedure should be adopted by the Courts when a counsel for a party reports 'No Instructions' on behalf of his party in a case pending before the Courts.

There is a tendency amongst the Judicial Officers and the Advocates that when Advocate appearing in a case reports that he has 'No Instructions', the Court automatically and in a routine manner issues notice to the party on whose behalf the Advocate has submitted that he has 'No Instructions'.

This approach of issuing notice in a case of 'No Instructions' is fallacious. A reference was made in this regard to the Larger Bench of Kerala High Court in case titled S. Deepak vs. George Philip, AIR 2007 Kerala, 1994. In the said case, the Hon'ble High Court has held that the Courts in case of 'No Instructions' should assume and presume that the report of 'No Instructions' is being made by an Advocate after notifying the party on whose behalf he appears. The Hon'ble High Court has further held that when an Advocate reports 'No Instructions' the Court is to enquire from the said Advocate whether he has informed his client about the date of the case or to ascertain whether the client is aware of the date fixed. or to ascertain whether the client is aware of the date fixed.

From the principle laid down in this case, it appears that when an Advocate reports 'No Instructions' the Court has to satisfy itself as to whether the party for whom said Advocate is appearing is aware of the fact that his case is posted or listed in the Court on that day. In such circumstances, it is presumed that despite the knowledge of case, the party is negligent and no notice is required. However, if the party has no knowledge about the posting or listing of the case, Court is required to issue notice to the party.

Therefore, a 'No Instructions' by an Advocate can not be made a ground to issue notice to the party as a matter of routine and it is only after ascertaining from the Advocate about the correct position, the Court can either issue fresh notice to the party or proceed in the case in accordance with provision of C.P.C.

R. S. Jain
Addl. District Judge, Jammu

State of Rajasthan v. Parthu

AIR 2008 SC 10

Supreme Court in State of Rajasthan vs. Parthu, AIR 2008 SC 10 has held that refusing to rely on dying declaration in absence of certificate by doctor about fitness of the patient at the time of making the declaration, when such declaration recorded in presence of the doctor, is too technical view. The Apex Court resolved the difference of opinion between the decisions expressed by the two benches in **Paparambika Rosamma and Others v. State of A.P. (AIR 1999 SC 3455)** and **Koli Chunilal Sarji and another v. State of Gujarat (AIR 1999 SC 3695)** and accordingly held that there is no requirement of law that there should be always a medical certificate that the injured was in a fit state of mind at the time of making declaration.

There is a legal maxim "**Nemo Moriturus Praesumitur Mentire**" meaning "that a man will not meet his maker with lie in his mouth". A dying declaration has got sanctity and therefore tests of oath and cross examination are dispensed with.

Dying declaration is a substantive piece of evidence to be relied on, provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind at the time of the deposition. It must inspire confidence so as to make it safe to act upon. It is now settled principal of law that conviction can be recorded on the basis of the dying declaration alone subject to the satisfaction of court that same was true and voluntary. The rule requiring the corroboration is a merely a rule of prudence (**AIR 1992 SC 1817**).

Therefore, for the purpose of ascertaining truth or voluntariness of the dying declaration, the court has to look to the other material available on record and certificate including medical evidence. Therefore, a certification by the doctor is essentially a rule of caution and as such voluntary or truthful nature of the declaration can be established otherwise.

In bride burning cases, usually the dying declaration of the deceased is recorded. If such declaration be excluded, it will result in miscarriage of justice because the victim being generally the only eye witness in a serious crime, the exclusion of the statement would leave the court without an evidence, resulting in acquittal of the accused by taking hyper technical view of such declaration by the courts.

Therefore, the law laid down by the Apex Court that there is no requirement of law that the declaration must necessary contain a certification by doctor that the patient was in fit state of mind, especially when a dying declaration was recorded by Magistrate, is of utmost importance.

Ghous-ul-Nisa Jeelani
Addl. District & Sessions Judge, Srinagar