JUDICIAL DISCRETION

Rashmi Goyal and et al.[1]

Judgement is not upon all occasions required, but discretion always is.

Philip Stanhope

Discretion is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives[2]. Judicial discretion is a very broad concept because of the different kind of decisions made by judges within the same given circumstances. The exercise of discretionary power conferred on a judge is omnipotent in judicial proceedings. Some degree of discretion is unavoidable because legislature cannot foresee every eventuality which may come in judicial proceedings. The term judicial discretion has nowhere been defined in the statues though it is exercised regularly by courts of law. It is exercised when a judge is conferred a power under a statute that requires the judge to choose between several different, but equally valid, courses of action.[3]

Discretion is inevitable both in civil and criminal proceedings. It is impossible to foresee the eventualities in the judicial proceedings and for this purpose the power of discretion is conferred upon the judge to decide justly according to the facts and circumstances. It is for this reason that in every piece of legislation generally we find words like, “as courts deems proper”, “as the court thinks reasonable”, “as the court otherwise directs” and other similar expressions which confers discretionary power on the court. These expressions shows that a court has unbridled freedom to decide a case according to his subjective satisfaction. Judges are been perceived as wielding wide range of power because of the discretion conferred on them. Now the question which arises “Is the judge free to exercise discretion according to his subjective satisfaction”?

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[2] Legal- dictionary. The freedictionary.com/judicial+ discretion

[3] Sa De Smith and Jm Evans (eds), de smith’s judicial review of administrative action (4th ed, 1982) 278.

This article tries to discuss the scope of the discretionary power of the courts and the restrictions if any on the exercise of such power. To trace this we have to observe the trend of the exercise of discretionary powers by the courts and the judicial pronouncement of the Hon'ble Supreme Court and Hon'ble High Courts on the exercise of such power.

Exercise of discretion in Criminal Proceedings

Discretion of court in Sentencing

Sentencing is a very important aspect of the criminal justice system which revolves around the balancing of the interest of the society and the accused. The sentencing for any offence has a social goal. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that it serves as a deterrent for the individual and the society should not also suffer from the commission of crime time and again.

Penal laws in India generally provides for maximum extent of punishment which a criminal court can award and it is only in very few offences that a minimum punishment is provided. In the former cases court has a wide discretionary power to award punishment but while sentencing court has to base its discretion on the **principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct** as laid down by Hon'ble Supreme Court in the case of **State of M.P. v. Munna Chaubey**[4]. This principle allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the

[4] AIR 2005 SC 682

basis of punishment and create cases of apparent injustice that are serious and wide spread.

It is pertinent to mention section 354(4) of the criminal procedure code,1973 which says that if the conviction is for the offence punishable with imprisonment for term of one year or more, but the court imposes a sentence of imprisonment for a term less than three months, it shall record reason for awarding such sentence, unless the sentence is one for imprisonment till the rising of the court or unless the case was tried summarily under the provision of the code. This sub-section puts a limitation on the discretionary power of the court to impose a sentence of minimum three months in cases where the offense is punishable with term of one year or more. The rationale behind this is that sometimes the short term imprisonment does not serve any useful purpose. In this regard, the following observation of the Hon'ble Supreme Court in **Pyarali K. Tejani v. Mahadeo Ramchandra Dange**[5]**,** should also be always borne in mind in awarding sentence which is final in every criminal trial, "The magistracy in this country has yet to realise that there are occasions when an offender is so anti social that his immediate and some time prolonged confinement is the best assurance of society's physical protection. If offender (in this case under prevention of Food Adulteration Act) can get away with it by payment of trivial fines, it brings the law into contempt and its enforcement a mockery".

In matter of sentencing though the court has a conferred wide discretion but the courts has to follow a pragmatic sentencing policy. So the various factors which plays the important role in determine the awarding of sentence are the personality of the offender as revealed by his age, character, antecedents and other circumstances of tractability of the offender to reform, the nature of the offence and the manner in which offence was committed. Thus, a Judge has to balance the personality of the offender with the circumstances in which the offence has been committed and the gravity of the crime and choose the appropriate sentence to be imposed while exercising such discretion.

Bail

For the purpose of granting bail offence can categorised as bailable and non-bailable cases. The Criminal Procedure Code, 1973, provides

[5] AIR 1974 SC 228

provisions for release of accused persons on bail. Section 436 of the Code provides for release on bail in cases of bailable offences. Under Section 436 (1) of the Code, release on bail is a matter of right, or in other words, the officer-in-charge of a police station or any court does not have any discretion whatsoever to deny bail in case of bailable offences. Section 437 of the Code provides for release on bail in cases of non-bailable offences. In such cases, releasing on bail cannot be claim as a matter of right. Court has sufficient discretion to deny or to grant bail. In granting bail in non bailable offences court has to harmonise the conflicting right of individual freedom and societal interest. Through various judicial pronouncement it can be gathered that the Court has to take into account various factors while granting bail in non-bailable offences, such as probability of recommission of the offence, possibility of frightening witnesses, probability of evidences being tampered, the seniority of the accused, likely punishment to be imposed on the accused if punished, strength of the evidence against the accused, reasonable possibility of securing presence of accused at the trial, period of imprisonment already undergone by the accused during the pendency of the trial.

In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr.**[6], Hon'ble Supreme court observed that "The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind."

It has also to be kept in mind that for the purpose of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy itself as to whether there is a genuine cases against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.[7]

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[6] (2004 (7) SCC 528)

[7] Prahlad Singh Bhati v. NCT, Delhi, AIR 2001 SC 1444 at p. 1446

Krishna Iyer J. has said that "..... bail belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process."[8]

Thus a court has to exercise judicial discretion keeping in view the recognised principles and factors as discussed above while considering the application of bail. Every bail application should be decided by stating cogent reason as per the fact and circumstances of each case.

Remand

Remand is a very important stage in a criminal proceedings, when the accused is first time produced before the magistrate. The term **'Remand'** has not been defined anywhere in the Criminal Procedure Code, 1973. But in general terms, remand means sending back. Remand is of two kinds one is police remand and second is judicial remand. Perusal of S.167(1), CrPC, 1963 makes it clear that the officer in charge of a police station or the investigating officer can ask for remand only when there are grounds to believe that the accusation or information is well founded and it appears that the investigation cannot be completed within the period of twenty-four hours as specified under Section 57. Hence, Magistrate's power to give remand is not mechanical and sufficient grounds must subsist if Magistrate wants to exercise his power of remand. The Magistrate can remand the accused to police custody for a maximum of 15 days, and that too in the first 15 days after the arrest. and the order of remand can only be passed in the presence of the accused. While granting remand the magistrate has discretion to grant police remand or judicial remand but such discretion should be exercised judicially and the police remand should be granted only in cases of real necessity, when it is shown that there is reason to believe that the accused can led to recovery of incriminating material or otherwise assist the police and the Magistrate must record reasons for allowing police remand as provided under section 167(3) of

[8] Gudikanti Narasimhulu and Ors Vs. Public Prosecutor, High Court of Andhra Pradesh 1978 AIR 429

criminal procedure code, 1973. The Magistrate has to observe following principles while granting remand:

1. Remand should only be granted if there are grounds for believing that the accusation against the person sent up by the police is well founded; and there are good and sufficient reasons for remanding the accused to police custody instead of detaining him in judicial custody.
2. Remand ought not to be granted to enable the police to extract confession.
3. A general statement by the investigating officer that the remand is necessary because the accused may be able to give further information, should not be accepted.
4. The period of police custody remand should be as short as possible.
5. If the accused has made a confession to a Magistrate, he should be sent to judicial custody and not police custody after recording the confession.
6. To see that the liberty of a citizen is not violated by the police arbitrarily and unreasonably.
7. Police custody remand must be ordered on consideration which are available on perusal of police diary and not on extraneous consideration. The object of this provision is to see that the magistrate takes the trouble to study the police diaries and to ascertain the actual conditions under which such detention is asked for.
8. Presence of accused is necessary while the police investigation is being held.

Exercise of discretion in Civil Proceedings

Temporary Injunction

It is an extraordinary remedy, by which court orders the preservation of subject matter in dispute or for maintaining status quo. Injunctive relief cannot be claimed as a matter of right, but it depends upon the discretion of the court which varies according to the fact and circumstances of each case.

The courts exercise their power to issue injunctions judiciously, and only when necessity exists. Injunctive relief is not a remedy that is liberally granted, and, therefore, a court will always consider any hardship that the parties will sustain by the granting or refusal of an injunction. The court that issues an injunction may, in exercise of its discretion, modify or dissolve it at a later date if the circumstances so warrant. The principles which govern the exercise of the discretion as Conferred by order 39 of Code of civil procedure,1908 are to the effect that a person who seeks a temporary injunctions must satisfy the court as to the existence of the following conditions:-

First is prima facie case. The phrase 'prima facie' is used to designate legal evidence that is enough to establish a fact unless rejected. In other words the prima facie existence of a right and its infringement are the condition for grant of a temporary injunctions

Second is Balance of convenience- In applying the principle of balance of convenience, the court should weight the amount of substantial mischief that is likely to be done to the applicant if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted.

Third is irreparable loss- This term does not mean that there must be no physical possibility of repairing the injury but it means only that the injury must be material one that is which cannot be adequately compensated for in damages.

Injunction can be granted only if above mentioned three important material ingredient are satisfied by the plaintiff at a time and it is not sufficient that if only one ingredient is satisfied the two other ingredients are presumed to have been satisfied by the plaintiff automatically[9]. Besides this as grant of injunction is discretionary relief it is well recognized principle that for grant of equity relief, the plaintiff must come to the court with clean hands and must disclose all facts for and against him. Thus before granting such relief, the principle of equity is also to be given due consideration.[10]

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[9] Satya Prakash v. I[st] Additional Cistrict Judge, AIR 2002 All 198 (202)

[10] V Chandershekran & Anr Vs Administartive Officer & Anr

In the words of White CJ, "the granting of temporary injunction under the powers conferred by order 39 is a matter of discretion. True it is a matter of judicial discretion. But if the court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of a judicial discretion."[11]

Section 151- Inherent powers of Court

The language of section 151 is so drafted that its plain reading gives an idea that civil court has wide range of discretion in a civil proceedings but the inherent power conferred under this section can be exercised only for the furtherance of justice that is the justice that the code is designed to achieve or to prevent the abuse of process of the court. Further it is only when there is no clear provision in the code that inherentjurisdiction can be invoked.

The scope of Section 151 has been explained by the Supreme Court in the case of **K.K. Velusamy v. N. Palanisamy**[12] it is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

The discretion under section 151 Code of civil procedure,1908 is not unbridled and it has to be exercised only in furtherance of justice and to stop the abuse of the process of law and that too when no express provision has been provided in the code. The Hon'ble Supreme Court in **Ramji Dayawala v. Invest Import**[13] has observed that the discretion vested in the court is dependent upon various circumstances, which the court has to consider and it could be exercised to stall the dilatory tactics adopted in the process of the suit and to do real and substantial justice to the parties the suit. Besides this where an application is moved under Sec. 151, it has to be disposed of by a speaking order. Such a power is not to be exercised casually, and if at all, exercised with circumspection and not to violate any rule of law or equity. There can be no justification

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11 Subba v. Haji Badsha (1903) ILR 26 Mad 168
12 (2011) 11 SCC 275
13 (1981) 1 SCC 80

in applying the powers of the inherent jurisdiction to introduce a new form of procedure, for which no provision is made by law.

ADJOURNMENT

Order 17 rule 1 gives a discretion to the court to grant time to the parties and to adjourn the hearing of a suit on sufficient cause being shown. It is certainly the duty of the court to consider the sufficiency of the cause for which an adjournment is sought. This is in keeping with the minimum requirement of the rule of fair trial. No person can however, be permitted to have leisurely attitude to the trial of an action under the garb of the right to fair trial.

By allowing adjournment lightly, unscrupulous litigant is encouraged while court fails in its duty to protect the other side from exploitation, avoidable harassment and frustration. Court must not succumb to delaying tactics by granting adjournments in Lighter vein.[14] In the case of **M/s. Shiv Cotex Versus Tirgun Auto Plat P. Ltd. & Others**[15], the Hon'ble Apex Court has condemned the practice of giving more than three opportunities for evidence in the following terms:-

"No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII, Rule 1, CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII, Rule 1, CPC should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII, CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the

[14] 2001 All LJ 2941 (2943).
[15] 2011 AIR SCW 5789

lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether plaintiff or defendant - must co-operate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100, CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed."

Exercise of discretion while granting specific performance:-

The law of specific relief is, in its essence a part of law of procedure, for, specific relief is a form of judicial redress it is a adjective law. The grant of specific relief is not only confined to the Specific Relief Act 1963 but courts are competent to grant specific remedies in other statutes as well for example the Transfer of Property Act 1882 deals with remedies open a mortgagor and a mortgagee on a contract of mortgage. The partnership grants remedy of dissolution and accounts. Similarly suit for accounts and administration of property of a deceased may be brought in a civil courts. Section 145 of criminal procedure code,1973 provides a remedy for restoration of recent dispossession. The expression specific relief is used in contrast to compensatory relief.[16]

[16] Law of Specific relief, Tagore Law Lectures, Eleventh Edition 2010, pg 4, Universal Law Publishing Co., S. C. Banerjee

The granting of specific performance is an equitable relief and it cannot be claimed as a matter of right though it is provided in specific relief act,1963. it is solely the discretion of the court to grant such relief and such discretion has to be the judicious discretion which is guided by sound principles. The principles governing discretion are provided in section 20 of the Act. The section says that the discretion of court should not be arbitrary but sound and reasonable guided by the judicial principles. The courts while exercising such discretion in granting equitable relief the principles of equity should also be borne in mind. The court must see that the person who comes to court must come with clean hands that is a party seeking an equitable relief must stand in conscientious relations towards his adversary. Thus the conduct of the plaintiff such as delay acquiescence, breach on his part play an important role in exercise of the discretion by the court. According to section 20 Specific Relief Act 1963 following are the circumstances in which the Court can exercise its discretion properly :

1. If the terms of contract give the plaintiff unfair advantage over the defendant; or
2. If the conduct of the parties of contract or other circumstances, gives the plaintiff unfair advantage over the defendant
3. If the performance of contract would involve hardship on the defendant which he did not foresee, whereas its non performance would involve no such hardship on the plaintiff; or
4. Where the defendant entered into the contract under circumstances which, though not rendering the contract voidable makes it inequitable to enforce specific performance

It is amply manifested by the discussion on exercise of discretion by courts of law in judicial proceedings that the word “judicial discretion” is a mere misnomer. It is very true that in every piece of legislation though the discretion has been provided to the courts but there are certain principles which are neither coded, nor written but always to be read while exercising such discretion. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. Discretion is the power of the court or arbitrators to decide as they think fit. The word ‘discretion’ connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a

hard and fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate.[17] Judicial discretion implies that, in the absence of positive law or fixed rule, the justice is to decide the question before him by his view of expediency or of the demands of equity and justice. Chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice, and proper "judicial discretion" is that which is guided and controlled, in the light of the facts and circumstances of each particular case, by the law and justice of the case, subject only to such rules of public policy as may have been established for the common good.

In "The nature of judicial process" Benjamin Cardozo has said that "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence, He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life. Wide enough in all conscience is the, field of discretion that remains."

There is inherent need of reasonableness and judiciousness while exercising discretion otherwise it will lead to injustice as Lord Camdon has very aptly said that "..the discretion of a judge is law of tyrants: it is always unknown. It is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is often times caprice; in the worst, it is every vice, folly and passion to which human nature is liable..."[18]

To conclude, it can be said that the judicial discretion should always be exercised according to the rules of reason and justice and not according to the individual opinion. The exercise of discretion is usually limited by guidelines or principles and is exercised on the basis of fact and

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[17] Corpus Juris Secundum, Vol. 27, p. 289 as referred in Aero Trader [p] Ltd. V. Ravinder Kumar Suri, (2004) 8 SCC 307

[18] (I Bovu. Law dict., III Revision p. 685- quoted in Judicial Discretion- National College of the State Judiciary, Reno, Nevada p. 14)

circumstances of the particular case. The discretionary power of the court is not unfettered and is not arbitrary but sound and reasonable, guided by judicial principles but if such discretion is used arbitrarily in the name of doing justice then it becomes a herculean task to undo the wrong done in the name of legality. Misuse of discretion is fatal to the cause of justice the very purpose for which it is provided.

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