

ADDRESS TO THE FULL COURT BY JUSTICE SUDERSHAN KUMAR MISRA IN A REFERNCE HELD ON 6.9.2016, ON THE EVE OF HIS RETIREMENT.

Madam Chief Justice; my colleagues on the bench; Mr Rajiv Khosla, President of the DHCBA; Mr Sanjay Jain ASG of India; Mr.Rahul Mehra, Sr Standing Counsel for the NCT of Delhi; other office bearers of the Bar Association; Advocates, ladies and gentlemen.

How very kind of you all to have taken the trouble to come here; and to have expressed such touching sentiments for a retiring judge. You are far too generous, and these are by far the greatest accolades I have ever received. I do not know if I am worthy, but I shall cherish them all the same.

On this, my last day in this court, let me say something of my experience and understanding of this institution which we all serve in different ways.

The two great pillars of this edifice are judges and advocates. If the judiciary as a whole were to consistently expect a certain standard from the lawyers in the discharge of their professional duties, lawyers would almost certainly adapt to that standard in the shortest possible time. Of course, there are relative differences in ability amongst lawyers as there are amongst judges; but there is no gainsaying the fact that whatever be the quality of the bar as a whole, it is a direct reflection of the quality of the judiciary as a whole at any given time.

I have been a practicing counsel for most of my professional life and a Judge for nearly a decade. What is it that motivates a lawyer? Mostly, it all comes down to earning one's livelihood, in a calling that one can relate to with pride and confidence.

Most young lawyers are imbued with the highest ideals. It is only when they sometimes feel that what succeeds is rudeness or aggression or heckling and the like, they feel they are justified in adopting this approach. I submit if all those appearing at the bar were to be absolutely convinced, that come what may, such an approach will not yield even an iota of relief, and may well be counterproductive to the reception of their submissions, they will the first to cast themselves in a different mould. Indeed, the vast, overwhelming majority of those who regularly practise here, have long eschewed such negative tactics. One word of caution though, there is a vast difference between pressing one's point, strongly if necessary, and rude aggression and heckling or tub thumping. To gauge this, and to then appropriately put ones point, is the mark of a superior, mature and experienced counsel. And, I dare say, to receive arguments in the same spirit of understanding, of a judge as well.

Judges are there to subject all propositions of law and fact to a logical, systematic analysis; which may sometimes also require to be tempered with maturity and experience. At the same time, there is almost no scope for emotionally charged rhetoric in the place of systematic logic; and finely crafted arguments, based on hard facts; And judges must guard against such an approach and discourage it. They are also armed with the necessary powers to be utilized in situations where the light of reason is rebuffed by a party. For example, it was once, "obvious" that the sun revolved around the earth and yet, when examined closely, it emerged that it indubitably did not. In my experience, at least in the vast majority of causes brought before me, I have found counsel always amenable to reason. Almost all counsel, in my experience, have demonstrated

themselves bound by cold logical reasoning. This is a good thing. It is the hallmark of an evolved bar consisting of mature and reasonable professionals, who are a credit to their calling. The day of the tub thumper and the heckler, the grandstander, who performs for the gratification of his clients and the public, is nearly over, at least in the Delhi High Court. No one should mourn his passing.

At the same time, judges must demonstrate an iron resolve to ensure that proceedings in their courts are always conducted in an orderly and open manner, if necessary, by recording all that is said in the court. This ensures transparency; and engenders confidence amongst parties as well as counsel. It also keeps a check on unnecessary, prolix & frivolous submissions. At the same time, it is imperative for the judge to proceed at such a pace, both while hearing arguments as well as in dictating orders, so that all those present in court can easily follow the proceedings.

Language is the indispensable tool of the legal profession and of Judicial decision making. For this purpose, and for good reason, English has been designated as the language of the court. Unfortunately, the grasp and understanding of the English language is often not what it should be. Sometimes, there is little attempt to understand the written word with clarity and precision; and petitions are filed; and arguments addressed in court on the merest notion or whim. No doubt, many of us are not comfortable in the English language; but then, with its myriad languages and dialects, there can be no one common language with which all are guaranteed the requisite mastery and comfort that will find universal acceptance throughout India. That is why English has been chosen. And it is necessary that all who have chosen this profession,

in any form, be it judge, lawyer, advisor etc. must continuously try to improve their understanding and application of that language; much like a soldier, who has to constantly sharpen, repair and improve his weapons, while continuously refining their use through constant practise. So that I am not mistaken for an anglophile, or worse, in this context, let me add that no matter what common link language is adopted for the courts throughout India, the same principles will apply.

Another area of importance is the restatement of complex propositions of law, that have been refined through centuries of application, in simple terms easily understandable by laymen. In this context, to my mind, the outmoded practise of jury trials, with its requirement of address to the members of the jury by both the advocates as well as the judge, served the salutary purpose of obliging both, judges as well as practicing lawyers, to constantly revisit the basic principles, always careful to avoid any misinterpretation; while explaining complex, well researched, legal concepts in simple, well chosen sentences to laymen with little or no legal or even other formal education, was salutary. Jury trials belong to a bygone era. This is not a plea to bring them back. It is merely a plea to examine more closely what has taken its place; and to then try and ensure that in the new system that has emerged, this beneficial aspect of jury trials on the system endures. For this, it is necessary for both the bench and the bar to continually apply themselves to this end. While the judiciary must always demand a very high standard of professional eloquence from the bar; it must also bind itself to a fair and accurate reproduction of counsel's address, coupled with a demonstrable application of judicial temper to the salient features of the matter before it. Indeed,

both must actively demand all this of each without hesitation.

In the same context, I must also acknowledge the practical realities in our courts. Lord Reid had once talked of advice to a young advocate, telling him to get his best point across in the first 20 minutes because, "any judge will listen to you for 20 minutes...". In the courts today, and often even in the highest court, the time available is more likely to be 20 seconds; and if you are persistent, perhaps a minute and 20 seconds. obviously, the system is overloaded thereby preventing us from giving our best. It is tending to overwhelm us all. It is also for this reason that an advocate's life is really far more stressful than that of a judge. Whilst for a judge, the strain is much more, for an advocate at the bar, the stress is far greater. Notwithstanding all these difficulties, the independence and eloquence of the bar has been the safeguard of our civil liberties and Fundamental Rights; and there are innumerable instances of innocent lives, endangered through formidable circumstantial evidence; executive high handedness; lethargy and complicity, that have been saved by the gift of eloquence and insight of advocates. In fact, Indian jurisprudence is replete with a string of far reaching and path breaking judgments that have been secured by lawyers who have themselves petitioned courts on areas of pivotal importance. For example, the Sheela Barse case which now forms the cornerstone of the law regarding custodial violence against women in prison, and the prescription, inter alia, of preventive measures; the M.C. Mehta cases on the environment; as well as the causes taken up the People's Union of Civil Liberties, and many others.

Advocates must also curb the tendency to fly kites in court, i.e., to keep positing a random association of ideas which appear attractive at first blush, but on a deeper analysis have no substance or relevance to the issue at hand; rather like a schoolboy or a lay man; and to leave it for the judge to then grapple with it. I have found that sometimes advocates raise legal issues either out of sheer misreading of the facts or the statute or merely because there appears to them to be a glimmer of something. Sometimes, even the opposing counsel is also not interested in dealing with it forensically; and merely contents himself by saying that he does not agree. In this way, both leave the matter to the judge. Such an approach does not do credit to the great profession. Sound legal research and reasoning must never be ignored at any level. Legal research is like panning for gold. Most of what you mine is useless, but the rare nugget that comes along only now and then makes it all worthwhile. The depth and understanding which an advocate brings to the bar on all aspects of the matter at hand, and the extent of his willingness to fairly engage in all issues raised, while at the same time exercising caution not to put forward propositions that he has himself not thought through with sufficient rigor, is the mark of a sound counsel of high calibre. It is to this end that the bar must apply itself both individually and collectively.

I must also say something about the value of dissent. To my mind, dissent comes naturally to all dynamic and progressive associations of individuals, and it must not be suppressed or discouraged. In fact, the only place where you will find a large number of persons without any dissent amongst them, is the graveyard; or something akin to it.

Another aspect of judicial decision making that must be mentioned is the difference between Justice according to the law; and the justice of a lynch mob. The expression, "lynch law" originated in America in the 18th Century for the punishment or execution of a person without a legal trial by a self constituted, illegal court. There are other names, e.g. Vigilante justice etc - These came about because in vast under policed & loosely administered areas, occasionally, criminals held sway unchecked. And ultimately, frustrated citizens banded together to apprehend such persons, with the almost pre conceived notion of hanging them in what they felt was a form of swift, summary dispensation of justice to the guilty; where the complainant, prosecutor, judge & executioner were all rolled into one, with the barest lip service paid to any established safeguards. Today it is a fact that in their zeal to dispense quick, almost, "instant" justice, many so called legal proceedings the World over suffer from this vice in varying degree. And both Judges as well as advocates must forever be on their guard against this slippery slope, because, although lynch mobs may often get the right man to begin with; history & experience have shown that they invariably go horribly wrong. And it is for that reason that all civilised cultures have long eschewed such decision making based on mere feelings or notions, with little or no safeguards; whilst relying exclusively on an impartial, objective analysis demonstrating a systematic, unerring logic leading to the inevitable conclusion.

In this context, often after long study and logical analysis; and the application of legal principles; because, ultimately, legal principles are really organised common sense; one arrives at a conclusion which, in hindsight seems obvious and simplicity itself. But merely because the answer is

now obvious and simple; or it tends to affirm some notion or belief, is no reason to disparage all the efforts put in to arrive at that conclusion in the first place. In fact, the approach adopted in reaching that conclusion is vital. It is like a geometrical proof; and the algebraic progression, that inexorably leads the reader to the only logical conclusion; as if to say, 'quod erat demonstrandum' or QED.

Today, there is also a tussle between the judiciary and the government involving constitutional issues concerning the selection and appointment of judges in the aftermath of recent NJAC case rendered by the Supreme Court. I have no doubt that there also, the Bar of this country, with its deep and wide understanding of not only the law; but also the environment in which it operates, from the lowest to the highest denominator, will play a pivotal role in ensuring a fitting solution.

On my appointment, I was invited to deliver an address reviving a practice that was resurrected briefly after a long gap. On that occasion, as a novice to the bench, I had expressed my resolve to do my best to live up to the oath that I had just taken. Although the formal tenure of that oath ends with this day; I should like to think that its essence binds me for the rest of my days, particularly if there is any occasion calling for impartial decision making; whilst also lending its colour to the expression of any opinion that I might venture to express on any matter of human endeavour in the days to come.

Finally let me close by saying that all of us have some part to play in this life; to contribute to the common good in our own unique way, according to our individual propensities and as fate wills it. Of



course, short comings and disappointments are what sometimes define life. However, when all is said and done, in my view, the only kingdom a Judge must seek is the kingdom of the intellect, and none other.

It has indeed been an honour and a privilege to have sat on the bench of this Court; And I Thank you all once again.