

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE FOR FAMILY COURTS (P-1126)

12th – 16th OCTOBER, 2018

PROGRAMME REPORT

Submitted by

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OBJECTIVE

The National Judicial Academy organized a Refresher Course for Presiding Officers of Family Courts from 12th to 16th October, 2018 which was attended by 30 participants. The objective of the refresher course was to discuss and examine the constitutional and statutory mandate of Family Courts and the evolving co-relative jurisprudence. The refresher course aimed to sensitize the participants regarding the role of Family Court judges and the relevant judicial persona to encourage amicable settlement of family disputes. The refresher course also aimed to provide an inter-disciplinary perspective to family disputes and strived to evolve mechanisms to address concerns of litigants and impacted parties. The refresher course also familiarized the participants with mediation techniques, couple therapy, group therapy and other skills requisite to enable qualitative and expeditious adjudication..

RESOURCE PERSONS

1. Hon'ble Ms. Justice Mridula R. Bhatkar Judge, Bombay High Court
2. Hon'ble Dr. Justice S. S. Phansalkar Joshi, Judge, Bombay High Court
3. Hon'ble Dr. Justice K. J. Thaker, Judge, Allahabad High Court
4. Hon'ble Mr. Justice Ved Prakash Sharma, Chairperson, M.P. State Law Commission, Bhopal
5. Hon'ble Ms. Justice K. Hema, Former Judge, Kerala High Court
6. Hon'ble Mr. Justice Rajive Bhalla, Former Judge, Punjab & Haryana High Court
7. Dr. Sudhir Kumar Jain, Principal Judge, Family Court, West, Tis Hazari Court, Delhi
8. Mr. Anil Malhotra, Malhotra & Malhotra Associates
9. Ms. Geeta Ramaseshan, Advocate
10. Ms. S. Susheela, Senior Advocate
11. Ms. Flavia Agnes, Advocate
12. Dr. Abraham P. Ruby, Head Faculty, 6th Sense Resources Pvt. Ltd., Bangalore
13. Dr. Harish Shetty, Psychiatrist, Dr. L.H. Hiranandani Hospital
14. Dr. K. Jayasankara Reddy, Associate Professor, Department of Psychology, Christ University

Session 1

Theme: Constitutional and Legislative Mandate of Family Courts

Speakers: Ms. Flavia Agnes & Ms. Geeta Ramaseshan

The speakers highlighted the increasing litigation before the Family Courts and the public perception regarding women empowerment as a cause for increase in matrimonial litigation. The speaker stated that litigation is necessary in family disputes because it allows individuals to assert their civil rights. It was further stated that the judges should keep in mind that the aim of family court is dispute resolution rather than bringing family together. It was stated that since representation by lawyers is not necessary under Section 13 of the Family Courts Act, 1984 therefore there was resistance from lawyers everywhere.

The speaker highlighted that judges do not give higher maintenance fearing that the order would be appealed and would be struck down by the High Court. It was also stated that there is no dedicated bench in High Court to handle family court matters. It was further stated that the judges should keep in mind that the aim of family court is dispute resolution rather than bringing family together.

The speakers dwelt on the objectives of setting up Family Courts i.e. reconciliation, expediting cases and amicable resolution of family disputes. The speakers discussed the concept of 'economics of marriage' by highlighting the financial elements of a marriage such as income, contribution to family wealth and other co-related elements.. The speaker discussed adultery as a ground for divorce and stated that Section 497 of the Indian Penal Code treated women as chattel and protected the right of husband over her. The speaker also discussed the challenges in execution of maintenance order and stated that parties often transfer property to avoid paying maintenance. The speakers discussed Constitutional Equality and its relevance in family law. The concepts of Formal Equality, Substantive Equality and Protectionist Equality were explained and the examples of such approaches to equality existing in present statutes were highlighted. The speakers also expressed concern on the use of multiplier in determining maintenance which resulted in discrimination in maintenance on the basis of age.

Session 2

Theme: Family Courts: Developing the Relevant Judicial Persona

Speakers: Ms. Flavia Agnes & Ms. Geeta Ramaseshan

The speaker distinguished between fault finding adversarial approach and problem-solving approach and thereafter expounded upon the role that a Family Court judge is expected to perform in a Family Court. The Family Court judge though situated in an adversarial system is expected to adopt a problem-solving approach. The speaker emphasised on the need for Family Courts to adopt a therapeutic approach to resolve the dispute as well as address the underlying causes for the dispute. The challenges in adopting a proactive role by Family Court judges were pointed out and emphasis was placed on balancing the authoritative role of a judge with the role played by a Family Court judge who mediates the dispute. The speakers stated that no uniform standard can be devised in view of the varying situations in different jurisdictions. The speakers advised the judges to deliver justice taking into account the social realities and to keep Article 21 of the Constitution of India at the forefront while adjudicating family disputes.

Session 3

Theme: Communication Skills and Techniques for Effective Resolution of Family Disputes

Speakers: Ms. Geeta Ramaseshan & Ms. S. Susheela

The session was initiated by the speaker by stressing upon the importance of communication skills in adjudication of family disputes. It was stated that the position of a family court judge is different from others appointments and therefore it is imperative that the judge has expertise over communication skills. It speaker also discussed importance of various traits which include tone of voice, respect to litigants, neutrality in judging, empathy, timely response and helpfulness. The speaker discussed assertive communication skills and discussed various actions to be undertaken by the judges which include setting agenda and atmosphere, filtering, deferring, redirecting, neutral reframing and reflecting. The speaker also discussed various questioning skills and the methods to elicit a response from the litigants. The questioning techniques which were discussed during the session included open ended questions, close ended questions, circular questions, convergent questions, divergent questions and strategic

questions. The speaker also highlighted various problems with listening and stated that the judges should listen attentively to the statements and assertions made by the parties. It was discussed that the judges should not be distracted while in court and should not selectively listen to only some statements of the parties. The speaker also stressed upon the power of empathy in family disputes and stated that it would help the parties since they would easily share their problems with the judges

Session 4

Theme: Counselling, Conciliation & Mediation in Resolving Family Disputes—Relevance and Importance

Speaker: Mr. Sudhir Kumar Jain

Chair: Dr. Justice Shalini S. Phansalkar Joshi

The speaker stated that the objective of Family Courts Act, 1984 is reconciliation and settlement of family dispute. The speaker stated that the judges should not consider their posting in family court as punishment since this post gives them a chance to touch lives and mediate disputes between families. The speaker stated that conflict is usual part of life and they should strive to understand the different facets of the conflict in their effort to resolve it. It was further stated that while addressing conflict, the judges should think creatively and adopt different methods for resolving disputes between the parties. It was also observed that earlier disputes were resolved by the elder members of the family. However, now a plethora of cases are filed by the parties in a dispute which further creates differences between the parties. Thereafter the speaker dwelt on mediation as ADR tool and its advantages in settlement of family disputes. The speaker also distinguished between the mediation and judicial process, and stated that mediation has a focus on the future wherein there is advantage for everyone. It was stated that mediation facilitates the parties in arriving at a settlement wherein the interest of both parties are taken into account. The speaker also discussed the essential attributes of a mediator i.e. effective communication, impartiality, patience, creativity and sensitivity. The speaker also expounded upon the role of a mediator and stated that he has to play a facilitative and a non-judgmental role. It was stated that the mediator should act as neutral third party and should facilitate an amicable settlement. The mediator should actively listen to the statements of the parties; maintain appropriate body language; empathize with the parties and should frame

the questions in a neutral manner. The speaker also highlighted the precautions which should be taken into account while drafting the mediation agreement. The speaker also discussed about referral of cases to mediation and stressed upon the factors which should be considered at the referral including the role of referral judges in such processes. The referral judge should ascertain whether the case is suitable for mediation and pass the appropriate referral order. The speaker also brought forth the difference between the concept of mediation and conciliation during the course of the session.

Session 5

Theme: Significance of Couple Therapy & Group Therapy in Matrimonial Disputes

Speaker: Dr. Harish Shetty

Chair: Dr. Justice Shalini S. Phansalkar Joshi

The speaker discussed the differences between advice, counselling and therapy and the situations where these methods can be applied. The speaker stressed on the use of gentle persuasion, mild tone and empathy as tools in couple therapy. Advice is a useful tool in cases where-

- the dispute is small,
- the advice giver is in a position of authority or is a close relative and
- the party is ready to listen.

Counselling is suitable in cases where there is need to go behind the words to understand the cause of the dispute. Therapy is generally used as a tool to bring about modifications in behaviour pattern, beliefs, mindset and practices of an individual. The objective of couple therapy is not to bring about a change but to make the parties aware of the problem, its causes and its result. Lastly, the speaker discussed the rules of couple therapy to be observed by the therapist *viz.*

- Confidentiality
- Equity
- Awareness of automatic thoughts
- Understanding and respect of cultural background of the parties

The speaker discussed the tools that are to be adopted in couple therapy such as re-framing and neuro-linguistic programming.

Session 6

Theme: Understanding Family Disputes: A Psycho-social Approach

Speaker: Dr. Abraham P. Ruby

Chair: Dr. Justice Shalini S. Phansalkar Joshi

The speaker initiated the session by discussing the unique nature of human beings and stated that every individual has a different perception of an event. The root cause of any dispute is the difference in understanding and perception of any text or statement.

Disputes and conflict between individuals or families mostly occur due to difference in interpretation of a situation or statements. The speaker dwelt on societal influences, upbringing, family environment and personal relations as factors which influence and shape an individual's mindset. He also cautioned the judges against carrying mental baggage. The speaker stressed on the significance and impact of psychological intervention in conflict situations to identify and address the root causes of the conflict and to provide long term solutions to the same. He also stated that are mindset is evolved by human volition. He discussed the conscious and subconscious mind and the functioning. He stated that our fear and prejudices are deep rooted in the subconscious mind which does not allow us to prosper.

Session 7

Theme: Role of Judges in Divorce Proceedings

Speakers: Justice Mridula R. Bhatkar, Dr. Justice K.J. Thaker & Dr. Justice Shalini S. Phansalkar Joshi

The speakers dwelt on cruelty as a ground for divorce, its facets- physical and mental cruelty and discussed the recent developments in law. The speakers discussed Irretrievable Breakdown of Marriage as a ground for divorce and the recent judgments of the Supreme Court of India. It was also stated that the duty of the Family Court judge is to make all endeavour for settlement and to adjourn the matter if there is a reasonable possibility of settlement. It was stated that

there should be speedy disposal of divorce cases so that the parties to the case achieve closure in a reasonable time. It was discussed that it is the duty of the Family Court Judge under Section 9 to make endeavour for settlement in the first instance, depending upon the nature and circumstances of the case. If the judge is of the opinion that there is a possibility of settlement then he should adjourn the matter to give time to the parties to attempt to settle the matter. It was further discussed that family courts can adopt their own procedure under Section 10 to arrive at a settlement between the parties. The speaker also discussed section 14, 15 and 16 of the Act which provides power to the Family court judge relating to appreciation of evidence. However, conciliation should not be pursued in cases of suspected physical violence or assault. Section 10 of the Family Courts Act, 1984 enable the Family Court to adopt innovative procedures and methods to facilitate settlement and Section 14 enable the Family Court to adopt relaxed rules of evidence.

Session 8

Theme: Maintenance Proceedings: Radical Approach of Family Courts

Speakers: Justice Mridula R. Bhatkar, Dr. Justice K.J. Thaker, Dr. Justice Shalini S. Phansalkar Joshi & Mr. Anil Malhotra

The speakers stressed on the two important considerations in maintenance i.e. quantum of maintenance and the income used as a basis for calculation of maintenance. The speaker stated that maintenance generally is determined to be one-third of the income and should be determined on the basis of the following factors –

- Earning of the wife
- Ability of the wife to earn and support herself
- Standard of living and background of the wife and standard of living of the husband.

The speaker also stressed that judges should try to ascertain the veracity of salary slips given in maintenance proceedings since sometimes husband produce doctored salary slips to pay less maintenance amount to wife. The speaker emphasized that maintenance is neither dole nor charity but is rather the value of contribution of a spouse to the marriage. The session involved discussion on quantum of maintenance and it was stated that no arithmetic formula for determination of maintenance can be devised and it depends upon the needs of the wife.

Thereafter, there was a discussion on the issue whether maintenance can be paid in foreign currency and method for execution of a maintenance order against a person residing in another country.

Session 9

Theme: Adjudication of Property Disputes by Family Courts: Challenges & Solutions

Speakers: Justice Mridula R. Bhatkar, Dr. Justice K.J. Thaker & Dr. Justice Shalini S. Phansalkar Joshi

The speakers discussed the concept of 'matrimonial house' and 'matrimonial property' as a phenomenon that evolved in USA and UK and distinguished between the practices prevalent in USA, UK and India. The concept of 'matrimonial home' in India usually refers to the house of the in-laws unlike the practices in USA & UK of establishing a new setup on marriage. The speakers highlighted the issue of adjudicating personal rights and proprietary rights in property involved in the marital setup in India and the challenges in determining proprietary rights on the basis of contribution to the marriage and marital property. The speakers discussed the concept of 'shared household' in Protection of Women from Domestic Violence, Act, 2005 and the rights over a shared household. The speakers highlighted the absence of substantive law determining the rights of persons over property acquired in the course of marriage and inability of the Family Courts to adjudicate on this issue in the absence of such provisions.

Session 10

Theme: Child Custody and Guardianship: Issues and Challenges

Speakers: Justice K. Hema & Mr. Anil Malhotra

Chair: Justice Ved Prakash Sharma

The general rules of custody under the law were discussed and it was emphasised that in matters of child custody the family court should develop a child-centric rather than a parental rights centric approach. A major concern which came to the forefront during the session was the issue of inter-county inter-parental child removal. The speaker also discussed the concept of first strike and closest contact in determining jurisdiction of foreign courts and recognition of orders of foreign courts. The speaker discussed the cases of *Ruchi Majoo*, *Surya Vandanan*, *Prateek*

Gupta, Nitya Anand Raghavan and Kanika Goel to highlight the development of law on the issue of Inter-country Inter-parental Child Removal. It was stated that Section 9, Guardians and Wards Act, 1890 mandates that the petition for guardianship should be filed where the child ordinarily resides and not the place where the child is detained or is residing on the day that the petition is filed. The speaker also discussed various factors which should be considered while ascertaining guardianship which included:

- Age, gender and religion of minor
- Character and capacity of guardian
- Closeness of relationship
- Wishes of deceased parents

Session 11

Theme: Psychological Perspectives to Determine Best Interests of the Child

Speaker: Dr. K. Jayasankara Reddy

Chair: Justice Ved Prakash Sharma & Justice K. Hema

The speaker discussed the concept of 'Best Interests of a Child' and highlighted the various factors which should be taken into account by the court to ascertain the best interest of the child. These include –

- wishes of the child
- mental and physical health of the parents
- home environment
- age and gender of child
- evidence of drug addiction or sexual abuse
- use of force by either parent
- employment status of parents
- ability and willingness of the parents to provide stability to the child
- negligence on part of parents
- special needs of the child
- previous living arrangements

The participants were given case studies on custody disputes between parents, parental alienation, psychological effect of parental depression on child, psychological effects on child in divorce and custody disputes to analyse the issues involved in such cases and develop possible solutions to such issues keeping in mind the Best Interests of the Child.

Session 12

Theme: Gender Justice and Gender Bias: Maintaining Equilibrium

Speakers: Justice Ved Prakash Sharma & Justice K. Hema

The speaker discussed the concept of gender bias and reminded the participants about the Constitutional mandate of equality and non-discrimination under Article 14 of the Constitution of India. The speaker also discussed protective discrimination permitted under Article 15(3). The speaker further discussed the gender bias present in Section 6 of the Hindu Minority and Guardianship Act, 1956 which holds the father to be the natural guardian in preference over the mother. The term “after him (father)” in the section was interpreted to mean that the mother would only get custody of the child after the death of the father. The landmark judgment in *Gita Hariharan* and *Roxann Sharma* were discussed to highlight the development of law in this regard. It was opined that the concept of “best interest of the child” is gender neutral and the welfare of the child is of paramount importance. The speaker discussed the concept of bias and stated that humans have a tendency to stereotype. It was stated that judges sometimes have preconceived notions and opinions which affect their judgments. It was further discussed that bias arises from various factors which include extraneous information, previous experience, lack of knowledge etc. These bias affect the adjudication of cases since it affects interpretation and appreciation of evidence. The participants were advised to develop a mindset free of gender bias so that they are able to adjudicate neutrally.

Section 13

Theme: Challenges and Constraints Affecting the Working of Family Courts

Speakers: Justice Ved Prakash Sharma, Justice K. Hema & Mr. Anil Malhotra

The speakers emphasised that the role of the Family Court was not to protect the institution of marriage at all costs but to adjudicate taking into account the best interest of parties in a marriage. The judges were advised to adjudicate keeping in mind the unequal relations and position in a marriage but should not be biased or unduly sympathetic to either party in a matrimonial dispute. The speakers stated that maintenance amount should be determined keeping mind the wife's contribution, monetary or otherwise, to the marriage.

The constraints highlighted by the participants were - non-cooperation by advocates, problem posed by unit system in recognising and appreciating efforts made in mediation and counselling, filing of baseless complaints against family court judges, delays caused by advocates and litigants, inadequacy of legal aid provided to litigants, practice adopted by advocates of determining their fees as a percentage of permanent alimony granted to wife, non-availability of counsellors, delay in payment or no payment to counsellors, delay in execution of the orders of the court, contravention of visitation orders and non-availability of children's room in court.

The speaker suggested that video conferencing should be utilized in family court for examination of witness. It was also suggested that the judges could invoke section 12 to take help of counsellors if no counsellors are attached with the Court. It was advised that the judges should seek assistance of amicus to assist them under Section 13. The speaker discussed that visitation can be supervised by the DLSA so that there is no contravention of the orders of the court.

Session 14

Theme: Strengthening the Family Courts: The Way Forward

Speakers: Justice Ved Prakash Sharma, Justice K. Hema & Justice Rajive Bhalla

In this session the panel of expert provided suggestions to various problems put forth by the participants. The speaker opined that in case of difficulty in process serving abroad the judge can contact the Indian embassy in the concerned nation. The speakers stated that Section 125(3)

of the Code of Criminal Procedure doesnot provide for part payment of maintenance and advised the participant that part payment should not be considered as a ground to release the person imprisoned under Section 125(3). The participants raised the issue of conflict between customary laws in Nagaland and the central legislation which poses a problem in adjudication of dispute before the court. The participants raised the issue that in cases where no property is found for realisation of maintenance amount, whether the court can order rigorous imprisonment to ensure that the payment received by the husband in jail can be used to provide maintenance to the wife. In response, the speakers stated that the statute doesnot prohibit the court from taking this action. The speakers further suggested that if the husband shows no income and no property, then the court can ascertain his income by assessing his lifestyle to determine maintenance amount for his wife. The participants also discussed measures for partition and attachment of coparcenary property for payment of maintenance, and it was suggested that the share in a coparcenary property is attachable and maintenance can be ordered as a charge on the share in the coparcenary property.
