

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE FOR FAMILY COURTS [P-1168]

20TH SEPTEMBER - 24TH SEPTEMBER, 2019

PROGRAMME REPORT

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LIST OF RESOURCE PERSONS

S. No.	Name	Designation
1.	Dr. Justice Shalini S. Phansalkar Joshi	Former Judge, Bombay High Court
2.	Justice Asha Menon	Judge, Delhi High Court
3.	Justice Anjana Prakash	Former Judge, Patna High Court
4.	Justice Manju Goel	Former Judge, Delhi High Court
5.	Justice S. Vimala	Former Judge, Madras High Court
6.	Justice Mridula Bhatkar	Former Judge, Bombay High Court
7.	Justice Ved Prakash Sharma	Chairperson, M.P. State Law Commission
8.	Dr. Sudhir Kumar Jain	Principal Judge, Family Court, West, Tis Hazari Court
9.	Ms. S. Susheela	Senior Advocate
10.	Ms. Pritarani Jha	Advocate
11.	Ms. Geeta Ramaseshan	Advocate
12.	Dr. Aman Hingorani	Advocate on Record & Mediator
13.	Dr. Harish Shetty	MD Psychiatrist, Dr. L.H. Hiranandani Hospital

REPORT

The National Judicial Academy organized a “Refresher Course for Family Courts” from 20th – 24th September, 2019. The programme was divided into fourteen sessions over a period of five days. The participants were judges of Family Courts from various states. The programme facilitated deliberations among participants with the objective to discuss the Constitutional and legislative mandate of family courts, Communication Skills and Techniques for Effective Resolution of Family Disputes, Role of Judges in Divorce & Maintenance Proceedings, Adjudication of Property Disputes by Family Courts, Child custody and Guardianship issues etc.

DAY 1

Session 1 - Constitutional and Legislative Mandate of Family Courts

Speakers - Dr. Justice Shalini S. Phansalkar Joshi, Ms. Geeta Ramaseshan and Dr. Aman Hingorani

The session commenced with emphasis that Family Courts Act was introduced with a mandate to reduce the dependency on the advocates. Law specifically provides that advocates cannot appear in family courts unless specifically authorised by the Court. This provision was introduced with a view to make the Family Court more informal in its procedure and atmosphere. The procedure in family matters should be more informal, flexible and the court should be easily accessible. It is expected that a family court will have a socio-legal approach and s/he should act as a social engineer. The aim of the family court judge should be to preserve the institution of family and to render socially desirable result vis-à-vis the articulation of individuality. It was emphasized that entire personal law in India is adversarial in nature, but in family courts, adversarial procedures should be avoided. At the end, session was concluded by stressing that while deciding the family disputes, the care should also be taken that we are not violating Right to Privacy of the parties involved.

Session 2 - Family Courts: Developing the Relevant Judicial Persona

Speakers - Dr. Justice Shalini S. Phansalkar Joshi and Ms. Geeta Ramaseshan

The speaker started the session with a comment that family court judges have been tasked with the responsibility of preserving the institution of marriage. So at the outset it should be made clear that

a family court judge should be himself or herself should be a person with right attitude towards the institution of family and institution of marriage. It was stressed on the participants that a family court judge should be able to act as a Mediator, a Facilitator and also as a Counsellor to some extent to enable parties to arrive at amicable resolution of disputes. In short, role of family court judge is similar to family physician in cases of family disputes. A family court judge should be aware of the guiding principles enshrined in the Constitution and International Covenants like CEDAW. He/she should be able to get rid of his/her own inherent or acquired biases, prejudices, assumptions, presumptions and stereo-types and myths. The session was concluded with a quotation from Justice V.R. Krishna Iyer that – “A socially sensitized judge is a far greater armour against gender outrage than long clauses of section writ with protection”.

Session 3 - Communication Skills and Techniques for Effective Resolution of Family Disputes

Speakers - Ms. Geeta Ramaseshan and Ms. S. Susheela

Chair - Dr. Justice Shalini S. Phansalkar Joshi

The session commenced with a reminder that a family court judge should always keep in mind that the law envisages him/her to keep the atmosphere of his/her court as informal as possible. A judge should take care that his courtroom does not look like a regular courtroom with all procedural rigidity. He should behave in a very informal way in his court. His/her behaviour should be very litigant friendly. A family court judge should have a measured thoughts and selectively chosen words. He/she should be very careful about his/her posture in a court. That affects the litigants more. He/she should be helpful and neutral. A family court should treat litigants with utmost respect with a certain degree of dignity and politeness. Session concluded with a remark that a family court judge should not only be sympathetic but also be empathetic towards the litigants.

DAY 2

Session 4 - Role of Judges in Divorce Proceedings; and Session 5 - Maintenance Proceedings: Radical Approach of Family Courts

Speakers - Justice Asha Menon, Dr. Justice Shalini S. Phansalkar Joshi and Justice Anjana Prakash

The session commenced with a question mark that - why it is generally the wife who has to come to the Court for grant of maintenance and not the husband even when the provisions relating to maintenance are gender neutral? It was suggested that the answer lies in the social status of men and women. Socially and economically, even today, women are not independent. There are too much inequalities and gender biases, the contribution of women towards family can't always be measured in terms of money. Therefore, while deciding the cases of maintenance this social status of women should always be kept in mind. The amount of maintenance should be at least that much which is sufficient for a wife to live a dignified life. While awarding the maintenance, social and economic status of the parties and their lifestyle before that should also be given due consideration. Some important precedents viz. Shailkumari Devi v. Krishan Bhagwan Pathak¹, Rohatash Singh v. Ramendri² etc. were discussed in detail. Judicial pronouncements with respect to maintenance rights of second wife were also discussed with great detail. The Muslim Women (Protection of Rights on Divorce) Act, 1986 was also discussed in detail with special reference to case of Mohd. Ahmed Khan v. Shah Bano Begam³, and aftermath. Judicial precedents like Daniel Latifi v. Union of India⁴ and Shabana Banu v. Iman Khan⁵ were also discussed in detail.

Session 6 - Adjudication of Property Disputes by Family Courts: Challenges & Solutions

Speakers - Justice Asha Menon, Dr. Justice Shalini S. Phansalkar Joshi and Justice Anjana Prakash

The session commenced with discussion on right of wife in the property of husband. It was emphasized that most of the times wife spends her time in family and her contribution to the family

¹ II (2008) DMC 363 SC

² I (2000) DMC 338 SC

³ AIR 1985 SC 945

⁴ (2001) 7 SCC 740

⁵ AIR 2010 SC 315

is always neglected. Husband is considered as bread earner and wife has responsibility to look after the household things. It was emphasized that this contribution from wife should always be considered while counting the property of her husband. It was suggested that at least 50% of the husband's property can be there only because of this contribution by wife towards family responsibility and hence, at the time of divorce these things should be kept in mind while deciding alimony. The provisions relating to Hindu Succession Act with respect to women's right to property were also discussed. Session was concluded with a remark that India is in need of legislation on matrimonial property.

DAY 3

Session 7 - Child Custody and Guardianship: Issues and Challenges

Speakers - Justice Anjana Prakash, Justice Manju Goel and Ms. Pritarani Jha

The session commenced with a simulation exercise given to the participants. The participants were asked to write answer of a simple question on paper. The question was – “Who would you have chosen as your guardian, had your parents decided to obtain divorce?” Then the participants divided into three groups and were given a “Case of Rose” – a child custody dispute and were asked to decide the case on the basis of their rational to the above question. One group leader from each group made a presentation on their rational and final order. It was stated that there was no right or wrong answer to this exercise. The panel only wanted to emphasize that you should be as careful in every child custody case as you would have been had it been your own case. It was emphasized that child custody dispute should not be seen as dispute between husband and wife over the rights on child, but should be seen as dispute about the rights of child. Various provisions of International Conventions like Child Rights Convention, UDHR were discussed along with corresponding provisions under The Constitution of India and other legislations.

Session 8 - Counselling, Conciliation & Mediation in Resolving Family Disputes—Relevance and Importance

Speakers - Justice Anjana Prakash, Justice Manju Goel and Dr. Sudhir Kumar Jain

The speaker initiated the session by stating that Family Courts in India were established with the objective of amicable settlement of matrimonial disputes and that the Family Courts Act, 1984 recognized conciliation as means of settling matrimonial disputes. The session also focused briefly on Alternative Disputes Resolution emerging as an effective and workable mechanism for matrimonial dispute resolution. Such mechanism is voluntary, flexible, party centered and structured negotiation process in which a neutral third party assists in reaching an amicable settlement. That is to say, such settlement is a win-win for both parties as against the judicial process which adjudicates in favour of one party. The speaker further highlighted certain attributes of a mediator such as communication skills, impartiality/neutrality, patience, sensitivity, creativity etc. It was iterated that the court must consider the suitability of a case for referral by ascertaining the nature of the dispute. It was also pointed out that although a family dispute can be referred for

mediation at any stage of the proceedings but ideally it must be done after service of notice on the opposite party and before filing of objections/written statement. Finally, certain important judgments were highlighted such as *K. Srinivas Rao v. D.A. Deepa*⁶, *B.S. Joshi & Ors. v. State of Haryana & Anr.*,⁷ and *Gian Singh v. State of Punjab & Anr.*⁸

Session 9 - Gender Justice and Gender Bias: Maintaining Equilibrium

Speakers - Justice Anjana Prakash and Ms. Pritarani Jha

At the outset participant judges were divided into four groups for the purpose of conducting a simulation exercise. A set of four questions were provided to the groups which they were to discuss amongst them. The questions were as follows:

- ✓ What do you understand to be the issues and challenges of gender Justice?
- ✓ What according to your group would be the preconditions to achieve gender justice?
- ✓ What are the challenges and issues of gender bias?
- ✓ How have you tried to address these?

After the discussion was over, a representative from each group made a presentation and highlighted their responses to the questions. It included not only their express opinion and views on the subject but also their experiences while dealing with matters involving gender sensitivity. The session turned out to be a lively discussion on the menace of gender bias inherent in our society and the need for a more sensitive judicial approach in this regard.

⁶ (2013) 5 SCC 226

⁷ (2003) 4 SCC 675

⁸ (2012) 10 SCC 303

DAY 4

Session 10 - Psychological Perspectives to Determine Best Interests of the Child

Speakers - Justice S. Vimala and Justice Mridula Bhatkar

The session began with the assertion that best interest of the child is a broad concept however, there seems to be little consensus on what constitutes a child's best interest or how these criteria should be made applicable. The session further explored the issues relating to the best interest concept from the psychological and developmental perspectives while dealing with custody matters. In this regard, it was clarified that psychological best interest of the child may not necessarily be the legal best interest. Therefore, it becomes tricky for a judge as he often has to balance the welfare of the parties with that of their child. It was pointed out that the judges have also to resolve the contradictions between the welfare principle and the principles of various personal laws. The speaker stressed upon the need for a sensitive and pro-active approach of family court judges especially while dealing with custody of a child.⁹ Further, the speaker highlighted the importance of Rational Emotive Therapy and Multiple Knots Theory in connection to custody disputes. The recent decision in Vivek Singh v. Romani Singh¹⁰ was referred to wherein the Supreme Court acknowledged the parental alienation syndrome while dealing with a child custody case. It was agreed that the ideal way to decide custody disputes is through mediation/conciliation and these must be resorted to in appropriate cases.

Session 11 - Significance of Couple Therapy & Group Therapy in Matrimonial Disputes; and

Session 12 - Understanding Family Disputes: A Psycho-social Approach

Speaker – Dr. Harish Shetty

Co-Chair - Justice S. Vimala and Justice Mridula Bhatkar

Both the sessions were premised on role play by the participants on the basis of four case studies prepared by the resource person. Each role play group was so constituted so as to include the parties to the dispute, their lawyers and a counselor. The basic objective behind these simulation exercises was to make the judges understand family disputes from a psychological perspective by

⁹ Shamima Farooqui v. Shahid Khan, AIR 2015 SC 2025

¹⁰ (2017) 3 SCC 231

putting them in someone else's shoe so that they are able to empathize with their perspective, opinion or point of view.

DAY 5

Session 13 - Cases of NRI marriages solemnized in India: Issues and Challenges

Speakers - Justice S. Vimala and Justice Ved Prakash Sharma

The session began with the assertion that NRI marriages have given rise to serious issues not only for the wife and the children but also for the society as a whole and for which swift and accessible legal remedies are almost eluding. Apart from the social aspect, some of the major legal issues that arise in such cases were highlighted, such as, jurisdiction of courts; law applicable in resolving such dispute; procedure to be followed; recognition of foreign judgments; enforcement of foreign judicial orders; forum hunting for divorce decrees; interpretation of statutory law in the absence of Private International Law in India; meaning of residence and domicile in the context of NRI marriages; personal appearance & impounding of passport for defiance of Court summons etc. While discussing these issues in detail the speaker made reference to various provisions of the Civil Procedure Code, 1908; Criminal Procedure Code, 1973; Hindu Marriage Act, 1955; Special Marriage Act, 1954; Foreign Marriage Act, 1969; Passport Act, 1967 and Special Relief Act, 1963. A string of judgments on the theme were discussed the most significant being the Narsimha Rao v. Y. Venkata Lakshmi¹¹ which was elaborately dealt with. Lastly, the session concluded with reference to the Bill on Registration of Marriage of Non-Resident of India which was introduced in Upper House of the Parliament in February, 2019 which however, could not be passed. Therefore, the need for an appropriate legislation in this regard was stressed upon in order to create more accountability and offer more protection against exploitation of Indian women by their NRI spouses.

Session 14 - Challenges and Constraints Affecting the Working of Family Courts

Speakers - Justice S. Vimala and Justice Ved Prakash Sharma

The session was divided into three parts i.e. the participants were invited to provide their insight and inputs on the objective of family courts, challenges faced by family courts and solutions to overcome the said challenges. The points which emerged from the discussion on these lines were as follows:

¹¹ (1991) 3 SCC 451

Objectives of Family Courts:

- Commitment towards protection and preservation of the institution of 'marriage'
- Speedy/timely resolution of family disputes
- Quality disposal of family disputes
- Exclusive forum under one umbrella to resolve family disputes
- Protection/welfare of women and children
- Efforts towards arriving at satisfactory settlement between parties
- Flexibility of procedural laws

Challenges faced by Family Courts:

- There is lack of dedicated cadre of competent/committed counsellors. It was pointed out that in many states the counsellors neither have the requisite training nor the right mindset to deal with the parties.
- There is need for social sensitization of the judges presiding over Family Courts so as to ensure they remain independent and free from bias.
- The application of unit system to the Family Court Judges hinders the effective functioning as per the mandate of the Act.
- The allocation of other cases which are adversarial in nature to the Family Court Judges creates problems.
- Infrastructure and Location issues faced by Family Courts.
- The hindrance created by the members of the bar towards effective resolution of family disputes.

Solutions to resolve the constraints faced by Family Courts:

- Separate cadre of judges to be appointed exclusively for Family Courts (as per the mandate of the Family Courts Act).
- The unit system should not be made applicable to the Family Court Judges as the basic objective of Family Courts is defeated due to such system.
- Cases which are adversarial in nature should not be allocated to the Family Courts which requires adoption of inquisitorial approach by the judges.
- Multidisciplinary approach should be adopted towards resolution of family disputes.

- The Family Court Judges must develop a pro-active approach while dealing with family disputes.
- Developing Model Family Courts to tackle infrastructural issues.
- Simplification of procedures by the Family Courts so that they do not function as regular courts.
- Minimizing the role of advocates in family disputes unless their assistance is absolutely necessary in the interest of justice.
- Mechanism to be devised for providing some sort of legal guidance to the litigants. For example, Para-legal volunteers can be appointed to give assistance to the litigants in drafting of petitions, etc.
- Pre-litigation counselling/mediation should be made mandatory in every case of family dispute.
- Informal atmosphere in courts must be ensured by the Family Court Judges.