

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE FOR FAMILY COURTS (P-1229)

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PROGRAMME REPORT

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OBJECTIVE

National Judicial Academy organised a refresher course for judges presiding over Family Courts to deliberate upon contemporary themes involved in adjudicating disputes by Family Courts. The Course aimed to provide an insight into the psycho-social approaches to family disputes. The course also seeks to engage the participant judges in discussion on issues involved in matters of divorce, maintenance, custody & guardianship. The refresher course would also sensitise the participant judges regarding the role of Family Court judges in, and the relevant judicial persona to encourage amicable and congenial settlement of family disputes. The refresher course also aims to provide an inter-disciplinary perspective to family disputes, the mechanisms to resolve such disputes and concerns of litigants and impacted parties involved in the disputes that need to be addressed by the Family Courts. The refresher course would familiarise the participants with mediation techniques, other skills requisite to enable qualitative and expeditious adjudication. The course seeks to facilitate accretion of knowledge and transmission of skills towards effective, speedy and quality adjudication.

RESOURCE PERSONS

1. Hon'ble Mr. Justice R. Basant, Former Judge, High Court of Kerala
2. Hon'ble Mr. Justice Ved Prakash Sharma, Chairperson, State Law Commission
3. Hon'ble Dr. Justice S.S. Phansalkar Joshi, Former Judge, High Court of Bombay
4. Dr. Sudhir Kumar Jain, Principal & Sessions Judge, North East, Delhi
5. Dr. Harish Shetty, Psychiatrist
6. Ms. S. Susheela, Senior Advocate

SESSION 1

Theme: Understanding Family Disputes: A Psycho-Social Approach

Panel: Justice R. Basant and Dr. Harish Shetty

In the first session, the speaker emphasised on marriage as an act of maintenance of social relations and opined that the concept of 'happily married' is a myth, while 'peacefully married' is the reality. The speaker stated that human relations including marriage are imperfect relations between human beings who are imperfect. Marriage therefore is like a marksheet where the spouse scores differently in different aspects but as long as the ultimate result is fair, the marriage can be considered a success. The speaker stated that marriage and marital affection are cognitive as well as emotional aspects. The speaker discussed 4 case studies to highlight on the underlying causes of family disputes. The various underlying causes highlighted include depression, mental illness, lack of communication and stress.

SESSION 2

Theme: Laws Relating to Family Disputes: Divorce, Maintenance, Custody & Guardianship

Speakers: Justice R. Basant and Justice Ved Prakash Sharma

The second session, the speaker dwelt on the evolution of marriage and its objectives. The primary purpose of marriage is procreation and continuation of the human race. The second purpose is the management of carnal urges and division of labour. However, in the present day, the roles have evolved and the present day marriage is a partnership with the goal of deriving happiness and satisfaction. The speaker stated that the continuation of marriage cannot be compelled if incongruity or toxic/ exploitative relations exists in the marriage. The speaker

opined that marriage should survive if the quality of relations is healthy and not merely due to draconian divorce laws. In this context, the role of the Family Court is to ascertain whether spouses can achieve harmonious relations and employ tools to achieve such harmony. In cases where such harmony is impossible, it is better to separate. The speaker stated that the Right to Life envisages the right to live life as per one's choice, including the right to choose one's life partner. In cases of cruelty, the role of the Family Court judge is to ascertain whether the facts substantiate the claim of cruelty. The speaker also drew the attention of the participant judges to the issue of gender justice in marriage and family relations. The speaker emphasised on the need for innovation by judges in cases of maintenance. With regard to quantum of maintenance, the speaker stated that judges must not give pittance as maintenance and must ensure that the disadvantaged party is adequately compensated. The speaker suggested that a method of quantifying maintenance can be devised similar to the method adopted by the Motor Accident Claims tribunals in calculating compensation. The speaker suggested that judges can require the parties to file an affidavit of utmost good faith of their means and absence of means; and can also require parties to provide a copy of the income tax returns to the other party.

In the discussion on children in family disputes, the speaker dwelt on the consequences of family disputes on the child i.e. parental alienation syndrome, broken home syndrome etc. The speaker highlighted the International Law provisions to emphasise that the child is not a chattel but a bearer of rights as an individual. The speaker dwelt on the doctrine of *parens patriae* as the mandate of the Family Court – to ensure the best interests of the child. The mandate of welfarism was emphasised on as the mandate of the Family Court through various judgments including *Saraswatibai Shripad Ved v. Shripad Vasanji Ved* (ILR 1941 Bom 455), *Anjali Kapoor v. Rajiv Baijal* (2009 (7) SCC 322) and *Neel Ratan Kundu v. Abhijit Kundu*: ((2008) 9 SCC 413).

The major academic criticisms of the Family Court highlighted in the discussion are –

- The Family Court is not adopting a child-centric approach in adjudication
- Family Court judges decide issues of custody on the basis of their personal beliefs/ prejudices.
- Decision-making process in the Family Court is by and large subjective and lacks objectivity.
- In cases of dismissal or settlement of cases, the Family Court does not decide the issue of child custody properly, leaving the matter to be decided by the parties.
- No legal representation of the child's rights and interests is ensured in custody disputes.

The following suggestions were made in the discussion-

- Family Courts need to list considerations / reasons while determining custody of the child, to lend objectivity to the order of the court.
- The Family Court must be vigilant to protect the child's right to parental and grandparental association.
- In custody and guardianship matters, the Family Court must determine the person who will take decisions with regard to the child, and also the person who will bear the financial liability for the child.
- The approach of the Family court should be gender neutral.

SESSION 3

Theme: Tools & Techniques for Effective Resolution of Family Disputes

Speakers: Dr. Justice Shalini S. Phansalkar Joshi and Ms. S. Susheela

The speaker stated that Family Court judges deal with emotions and the intimate private lives of people who are troubled. The Family Court judge's decision impacts the personal lives of

the parties in the case as well as other related parties. Family Court judges must take adequate measures to provide avenues in the proceedings prior to the judicial decision, to address emotions of the parties. The speaker drew a distinction between a fight, a dispute and a conflict, and stated that a fight is a disagreement and should be sorted mutually by the parties; while a dispute is caused due to violated expectations and unmet needs, and needs to be adjudicated. The speaker suggested that in a dispute the judge should put strategic questions to the parties, in order to take the parties forward to a life changing decision. The speaker also suggested the measure of 'Reframing' to change the nature and dynamics of the dispute or conflict and to convert the complaint to a concern. The speaker explained the tools of Reframing, Circular Questions and Recapitulation and recommended the use of these tools in the Family Court. The speaker also emphasised on the need for a soothing and safe courtroom environment to convert the parties' stance and attitude -from defensive to strategic. The speaker suggested the following measure to foster a conducive courtroom environment -

- Separate the problem from the person, and attack and address the problem rather than the person
- Develop an approachable demeanour
- Encourage parties to work together
- Inculcate the skill of patient and attentive listening
- Ensure that neither party is unnecessarily disadvantaged in the procedure and/ or outcome.

The speaker advised the participant judges to cultivate the following qualities to foster settlement in the Family Court –

- Non-aggressive and pleasant voice and tone
- Respectful demeanour

- Timely Response
- Helpfulness
- Empathy

The speaker stated that the Family Court judge must possess the ability to look beyond the law, to read between the lines, comprehend the emotions and feelings involved and to hear the voice of the voiceless. Emphasis was placed on the socio-legal approach to resolve family disputes, and the role of the counsellors, experts and social welfare agencies in this regard. The speaker also dwelt on the procedural flexibility and relaxation of evidentiary standards in the Family Court proceedings; and advocated the adoption of substantive justice rather than formal/procedural justice.

SESSION 4

**Theme: Counselling, Conciliation and Mediation in Resolving Family Disputes –
Relevance and Importance**

Speaker: Dr. Justice Shalini S. Phansalkar Joshi and Dr. Sudhir Kumar Jain

The speaker dwelt on the legal mandate of Section 89, Civil Procedure Code, 1908 and discussed the features of mediation as a method of dispute resolution. The speaker stated that the role of the mediator is facilitative, evaluative and non-judgmental and emphasised on the following qualities as the necessary attributes of a mediator –

- Effective communication
- Impartiality and Neutrality
- Patience
- Creativity in generation of options

- Sensitivity
- Pleasant Disposition

The speaker discussed the process of referral of matters for mediation, the stage when the matter is to be referred and the role of the referral judge. The process of mediation and the purpose of each stage in the mediation process was explained. The communication techniques and strategies to foster settlement in the mediation process were discussed and the following measures were stressed upon –

- Asking right question
- Active listening
- Restatement/ summarising
- Empathy
- Neutrality
- Setting of Agenda.

The speaker suggested measures for impasse management in the mediation process. Precautions to be taken in drafting the mediation agreement were discussed. Lastly, the benefits of mediation as a method of dispute resolution were stressed upon to encourage greater use of this method in the Family Court.
