

National Judicial Academy



Programme Report

Refresher Course For Family Courts [P-1028]

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Introduction

The National Judicial Academy organized a three-day Refresher Course for Family Courts. The course was attended by 36 participants. Family courts are conceived with a view to facilitate conciliation and speedy settlement. The 59th Law Commission report recommended that Family Courts adopt a radical approach distinct from other courts. This was reiterated in the 230th report of the Law Commission. In the light of these recommendations, the Academy has been organizing programmes for Family Court judges. These refresher courses are designed to facilitate Family Court judges comprehend family law jurisprudence. During the discourse participant judges shared experiences on various issues and concerns that arise during family disputes and identified the best practices in dealing with them satisfactorily and expeditiously. Deliberations were made on several optimal approaches for settling family disputes and proper role of judicial officers while addressing family law issues. Effective use of ADR/Mediation methods in resolving disputes formed an integral part of the discourse. Psycho-social requirements in the judicial persona dealing with disputes coming up for resolution was also a part of the deliberations.

Outlines of the Programme

Day-1

Session 1- Family Courts Functioning: The Constitutional and the Legislative Mandate

Session 2- Judging Family Disputes: Appropriate Judicial Attitudes

Session 3- Gender Justice and Gender Bias: Maintaining Equilibrium

Day-2

Session 4- Resolving Family Disputes through effective ADR methods

Session 5- Maintenance and Divorce Proceedings: Radical Approach of Family Courts

Session 6- Role of Family Courts in Protecting Rights and Interests of Children

Day-3

Session 7- Couple Therapy: Significance and Efficacy

Session 8- Challenges and Constrains affecting the working of Family Courts

DAY-1

Theme- Family Courts Functioning: The Constitutional and the Legislative Mandate

Speakers- Justice R.C Chavan and Ms. Geeta Ramaseshan

Prof..D.P Verma, Additional Director, National Judicial Academy, commenced the session by welcoming all the resource persons and participants. He then gave a brief introduction of the thematic areas and also deliberated on the objective of the workshop.

The first speaker Justice R .C Chavan started the discourse by stressing that position of a Judge hardly matters, whether she/he is a family court Judge or a High Court Judge but what matters the most is to do justice to the people who come in distress to the court. It is the primary duty of a judge to do full justice to the cause.

He further observed that a Judge should try to be as perfect as possible while giving a judgement because many accidents happen when focus of a Judge shifts from the matter before him and being a Judge he is not expected to do so. He further suggested that whenever a matter comes before a court, always consider it as a last court to deal with the matter in order to bring correctness in the decision and to avoid mistakes.

The second speaker Ms. Geeta Ramaseshan then took over the session by saying that family dispute litigation is an increasing branch of litigation and largest number of fillings have been happening in this field. She also stressed that this area of litigation not only deals with addressing the big issues but also addresses rights issues of the poor. The most important aspect of this area is to address the imbalance created on the names of customs etc. and balancing rights in a particular framework.

She further opined that Article-14 and Article-15 of the Constitution broadly come in the frame work of equality but if we take a plain reading of Article-14 we come to know that it focuses on “equal treatment” rather than on equality of outcomes. It does not take into account biological and gender differences, so there is an additional burden on women when in fact the social and economic reality of women is not similar to that of men.

Thereafter, the concepts of formal equality, protectionist equality and substantive equality were discussed. The speaker gave an example of formal equality by referring the section- 24 and 25

of Hindu Marriage Act under which both husband and wife can claim maintenance and alimony from each other. This is the only provision where husband can claim maintenance and it was enacted in 1995 when status of woman was quite different from today. On the other hand protectionist equality relies on the social assumptions as a standard for the roles and capacities attached to men and women. According to the speaker within all categories what we need is the substantive equality which is provided by Article-15 and has corrective approach that recognises that women were historically disadvantaged and corrective measures ought to be taken in order to address this discrimination. In doing so it seeks a paradigm shift from “equal treatment” to “equality of outcomes”. For example Domestic Violence Act that benefits women who have been in a long relationship under the assumption that they were married.

Speaker further discussed about the Right to choice and referred the judgement of S Khushboo v. Kanniamal¹ where the SC made observations on the acceptance of premarital sex. On talking about Right to Privacy speaker also referred another judgement of X v. Z in which Delhi High Court held that where a party seeks to rely on a document which contains details of personal or private nature, which when disclosed is likely to affect the right to privacy, or cause embarrassment, then the family court, however, at all times keep in view the requirements of protecting the rights to privacy and dignity of parties and persons. Thereafter discussion was done on the issues relating to maintenance, cruelty and custody with reference to the judgement of Minakshi Gaur v. Chitranjan Gaur² where it was held that even earning wife is entitled to maintenance. The Supreme Court in Nil Rattan Kundu v. Abhijit Kundu³ opined that question is not whether father is unfit to have the child but the positive test is whether the custody will be for welfare of the child. Similarly in the case of Ruchi Majoo v. Sanjeev Majoo⁴ the Supreme Court held that custody of one parent should not insulate the child from the other parental touch and influence.

Precisely the session discussed the need to understand the concept of equality, development of constitutional rights and how these rights have translated to family law. There are *various* issues involved in the functioning of family courts like- challenges in boxing emotions in the framework of law; understanding a rights based approach; creative interpretation of evidence to reconcile them with

¹ (2010) 5 SCC 600

² AIR 2009 SC 1377

³ AIR 2009 SC (Supp) 732

⁴ AIR 2011 SC1952

a wider objective of gender justice. Therefore, it is significant to understand the difference between Constitutional Equality and Equality in family law. The discussion stressed that family court judges should know how to balance rights and how to deal with discrimination, which could be understood in the light of Article 14 of the Constitution of India that provides for equality and Article 15 that talks about prohibiting discrimination.

Session-2

Theme- Judging Family Disputes: Appropriate Judicial Attitudes

Speaker- Justice R.C Chavan

The session emphasized that the task of family court judges is much different and difficult as compared to other judges since they adjudicate matters that involve human beings and their emotions. It was suggested that appropriate judicial attitude may be attained when a judge possesses sense of justice; is a good listener; quick to grasp; free from emotional biases; analytical abilities; good communication skills; mental flexibility and knowledge of life. It was also opined that a family court judge should be open to devise new solutions and they must possess a sense of propriety. A judge should work and derive values from legislations and not from his inherent social values. Law is to be implemented with fidelity. Judges should not be prejudiced otherwise the judge is not doing his duty because then the judge is not performing the functions of law.

According to the speaker a Judge must possess the following basic qualities:

- ✓ Sense of Justice
- ✓ Hearing and listening
- ✓ Quick grasp
- ✓ Strong logical sense
- ✓ Communicative skills
- ✓ Mental phrasability
- ✓ Knowledge of life

Thereafter, he suggested that a judge must not be a spectator judge or dictator judge rather he should be a director judge who can direct the proceedings in the right way.

Session-3

Theme- Gender Justice and Gender Bias: Maintaining Equilibrium

Speaker- Justice K. Hema

The session elaborately discussed the meaning of “Bias” and how it can be identified in oneself. It is inevitable for a judge to be unbiased. It was suggested that to eliminate bias a judge, while adjudicating should conceive every case without leaning towards any of the parties be it aged litigants, children, women etc. or any other thing that is based on impression. Rather a judge must go deep into the facts, records and related law in every case.

Referring to the judgement of Union of India v. Sanjay Jethi⁵ in which Supreme Court Observed that Bias is a condition of mind which sways Judgement and unable a Judge to exercise impartiality. The speaker stressed that Judges are expected to work only on law on given set of facts but problem is they don't act in accordance with law because of the bias already created in their minds, which is not intentional but just a pre conceived notion formed by them either because of the society in which they live or on the basis of extraneous information received.

The following suggestions emerged from the deliberations made:

- ✓ Take conscious efforts to conceive yourself you don't know anything in the case neither facts nor law in order to fight against bias in your mind.
- ✓ Don't lean towards man, woman, child, anything subject matter of case. Take conscious effort that you don't know what happened in a case. Rather than going merely by an impression and study whole records and law.
- ✓ Proceed as per law and set of facts.

According to her a judge should not go out by his/her own ideas, prejudices or misconceptions but should try to look into facts, apply law and admissibility of evidence only then he/she will have a mind set free of gender bias.

⁵ SC October 18,2013

DAY- 2

Session-4

Theme- Resolving Family Disputes through effective ADR methods

Speaker- Dr. Sudhir Kumar Jain

The session discussed the importance of ADR and how it can be used to impart timely justice. It was highlighted during the discourse that in case of reference to mediation it is not the case but the parties who are referred to mediation and therefore it is the duty of the judge to determine the cause of conflict and perceptions of the parties before making any referral to mediation. In the light of many case laws it was stressed that mediation is well adopted in matrimonial disputes because- such pragmatic approach takes into account emotions, sentiments, social compulsions and responsibilities of the parties; it is different from other forms of conflicts; there is always a win-win situation in mediation which helps in amicable settlement of disputes. The session also discussed Mediation Process like- Introduction: Neutrality and Rapport Building, Joint Session: Relevant Information, Single Sessions: Anger Management and Flexibility and Agreement: Contents and Language.

The judgements of Salim Bar Association⁶ and K. Srinivas Rao v. DA Deepa⁷ were discussed at length. Thereafter, the speaker emphasised that mediation is well adopted in matrimonial disputes because of the following characteristics:

- ✓ Pragmatic approach includes emotions, sentiments, social compulsions and responsibilities of parties.
- ✓ Difference in its form and content from other disputes.
- ✓ Resolve disputes to the satisfaction of parties even in case of failure.
- ✓ Less time.

According to him a mediator should possess the following basic qualities:

⁶ AIR 2003 SC 189

⁷ (2013) 5 SCC 226

- ✓ Master in communication skills
- ✓ Good listener
- ✓ Neutral towards parties

Subsequently, the difference between mediation and judicial process was also elucidated upon:

- ✓ Judicial process adjudicates in favour of one party but in mediation settlement arrived at with the consent of parties
- ✓ Judicial process focused on past based on legal rights and obligations but in mediation we facilitate mutual agreement by both husband and wife
- ✓ In Judicial process only Restitution of conjugal rights or Divorce can be granted but in mediation many creative solutions are possible without any hostility and can make suitable arrangements for maintenance, custody, and sharing of property

Session-5

Theme- Maintenance and Divorce Proceedings: Radical Approach of Family Courts

Speakers- Justice Mridula R. Bhatkar, Justice R. Basant

The session underlined that in family disputes, time is the essence and it is very important for judges of the family courts to give timely decision so as to reduce the trauma faced by the parties. It was stressed that there is a lot of difference in the working of family court and regular courts. A family court judge needs to inculcate and cultivate different virtues since it is not just the application of law that is important rather it is how a judge conducts her/himself and what kind of approach s/he has towards matrimonial disputes. Judges should be radical in handling matrimonial disputes and the focus should not be just on saving the marital bond rather, they must understand that marriage is not something that needs to be preserved from outside pressure. It's a decisional autonomy, and nobody should be forced to live in an unhappy relationship.

The second speaker opined that earlier the objective of family court was to make settlement between the parties and to save their marriage but today we need to think radically that marriage is not something to be preserved from outside pressure. It's a decisional autonomy, everyone has a right to be happy and if some one is not happy in a marriage he or she shouldn't be forced

to remain in an unhappy relationship because everyone has a right to life and personal liberty. He further added that these days being a divorcee doesn't cause any social stigma in fact it is far than to compel a person to live in an unhappy relationship. Even for children it is better to live in peaceful atmosphere separately than living in a deteriorating family.

According to him economic fallout of such a breakdown must be ensured and economically fragile partner and children must be protected. It is not just about passing of orders but also to ensure its implementation in future proceedings. He added that quantum of maintenance should be such that wife can live life with proper dignity and with same status. Unilateral exit from marriage is an incident of Right to life and it is the duty of a family court judge to ensure reasonableness, social justice and should protect the legitimate rights of each party.

Session- 6

Theme- Role of Family Courts in Protecting Rights and Interests of Children

Speaker- Justice Anjana Prakash

The speaker opined that a family court judge should be a person who understands the psychology of a young child. In case of divorce the responsibility of the parents transfers to the court for deciding the best interest of a child. The rights and interests of a child are bunch together and are dependent on each other. In case of custody matters sometimes custody becomes lethal and subject matter of litigation, so in order to deal with child's rights or his welfare it is necessary for a court to minimise the hostility between the parents and to make them understand that the child is not a pawn in their divorce. At the same the family court may also suggest the parents for counselling and therapy so as to make things pleasant for the child as well as the parents.

She further emphasised that the role of a Family Court Judge doesn't end by handing over a child to his/her mother or father. Rather, a judge must ensure long-term benefits of the child and to decide after having an insight into the problem. She also suggested that a Judge should give an authoritative view to the problem. Orders can be modified keeping in mind the welfare of child.

In short a family court judge should be able to understand psychology of children and must be acquainted with good communication skills in dealing with children. The rights and interest of

a child are inter-dependent. It was suggested that in number of cases custody becomes a lethal subject matter of litigation. In such matters it is the duty of the judge to reduce the hostility between the parents and to make them realize that the child is not to be used as pawn to win the game. It was stressed that parenting plan is significant for the welfare of a child. In matters where the child is depressed, abused or ill-treated the judges should make all possible efforts to provide for counsellors who can handle the matter in a gentle and non-threatening atmosphere. Most importantly while deciding the best interest of a child, the judge must keep in mind the consequences of his decision on the very existence of the child.

Session- 7

Theme- Couple Therapy: Significance and Efficacy

Speaker- Dr. Manju Mehta

Dr. Manju Mehta commenced the session by stating that couple therapy helps couple overcome their immediate problems, resolve conflict and improve their relationship. It also equips them to meet future issues. Through counselling a couple get better insight into their deteriorating relationship, identify the crucial factors behind their differences and make rational decision rather than choosing the ultimate separate ways.

She further emphasized that couple therapy is quite different from the concept of mediation. She observed that mediation can't resolve all the matters and in such a situation couple therapy can be preferred, in couple therapy we go little deep in order to understand the problem in the marriage and try to resolve it. Every marriage at some point or other goes through crisis and couple therapy helps them to re-organise their relationship.

According to her there are many reasons which create problem in a matrimonial relationship and results into loss of faith, warmth, and respect and bonding between the parties. The major reasons maybe- miscommunication, co-morbidity or compatibility for which couple therapy can be availed by the parties. Firstly, couple therapy tries to determine what the couple wants secondly, what the problem is and lastly, how to fix it. Alongside the current problems, family background, expectations and previous treatment of the parties is also kept in loop with. Treatment through couple therapy tends to help people more than any other therapy. One of the main objective of treatment is to motivate both the parties to recognise their individual contribution to the problem. Major outcomes of the couple therapy are:

- Resolution of problem
- Reduction of symptoms
- Increased intimacy
- Increased role flexibility
- Clear communication
- Balance of power
- Resolution of conflict
- Better relationship with family of origin

It was suggested that treatment through couple therapy is very effective and motivates the parties to recognize their individual contribution to the problem. Couple therapy helps in-resolving the problem, reducing problem symptoms, increases intimacy, increases role flexibility, better communication, balance of power and better relationship with the family. It was also pointed out that when matters are not resolved through mediation then, couple therapy can be preferred as it has the potentials to go deep into the matter and subsequently, resolve it.

Session- 8

Theme-Challenges and constraints affecting working of family court

Open Discussion

Session eighth was an open discussion among the participants and resource persons. The discussion was based on challenges and constraints affecting the working of family courts. During the session many challenges and constrains were highlighted by the participants which they have to face while working as family court judges and there is an immediate need to resolve them. Some of the challenges observed by the participants in their working are as follow:

- At many places no counsellor has been attached to the family courts.
- No expert like psychologist or psychiatrist is available to the family courts to give expert advice to the parties.
- Sometimes parties are not able to bear the expenses of psychologists or counsellors etc.
- In many parts of the country there are no rules regarding the funding of counsellors and medical experts.
- Problem of multiplicity of proceedings.

- In every family court premises there must be a visiting room where children can meet their parents in a peaceful atmosphere.
- Facility of video conferencing in case one of the parties is living out of India.
- Mediation centres must work on all the working days when family court is working.

Justice G. Raghuram concluded the programme with a vote of thanks and expressed his gratitude to all the resource persons.