

ADR : AN ADVANTAGEOUS MECHANISM TO SOLVE MATRIMONIAL DISPUTES

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ABSTRACT

Alternative dispute resolution (ADR) system is not only money and time effective, it maintains and preserves the bonding between parties by motivating communication and collaboration. The paramount thought of resolving family dispute is maintenance of peace and harmony. Justice dealing system through courts have given rise to certain grave problems like huge pendency of cases and delay. Especially while dealing with matrimonial cases the alternative methods are better than court procedure. Family disputes are to be dealt with in the four walls; otherwise it will be a public issue where reunion chances are rare.

Keywords: Arbitration , Mediation' Negotiation 'Conciliation, Matrimonial Disputes

INTRODUCTION:

Discourage litigation. Persuade your neighbors to compromise. Whenever you can point out to them the nominal winner is often really a loser-in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity as being a good man. There will still be business enough. - Abraham Lincoln, 1850.

The family as the smallest unit of larger society is often under a frequent attacks of divorce, dissolution, separation and all forms of disputes. The rate of divorce is hiking in the present world. In most of the cases the marriages are ending up within six months of celebrations. Family is a group of people associated by consanguinity, empathy. Family produces and reproduces persons biologically and socially and is the chief economic and political unit of society¹.

¹ www.sociology.org.uk.

Talcott Parsons opine that families are factories where personalities are produced. No person in the world has same nature, identity though they are blood related and born to same mother. The differences in character bring disputes in a family. Marriage is another sacramental relationship where two persons are tied up with a holy knot called marriage. When persons born in a family and brought together are not same one cannot expect the couples to be together without misunderstandings and disputes. This flare up can be settled within the family. There are domestic issues to be settled within four walls, when it goes beyond a limit it comes out.

A dispute precedes misunderstanding and litigation. Ignorance about his rights is fuelled by his ego becomes a dispute which becomes a litigation. To settle down these disputes, its source must be traced.

As earlier noted, that there are short comings found in solving the matrimonial case due to long adjournments, complicated and rigorous procedure, difficult and ambiguous rules of evidence and other several obstacles are responsible for dispensation of justice system for solving. For example :- If a dispute, victim files a case on judicial separation, and conjugal right, it nearly takes 3 to 5 years; then what will happen to the children's life. "Justice delayed is justice denied". The criminal will escape without punishment, cost of litigation is high, time and material is wasted².

The alternative dispute resolution Mechanism (ADRM) is the fast becoming the best method to resolve the private disputes and matrimonial cases first. The best way to resolve conflict, to maintain peace in the world is to begin from the family. Most of the social problems today initiated from family separation results in matrimonial disputes where by children are displaced and lack the necessary paternal guard and guide to be a better asset in the society. Dispute in matrimonial life has an adverse effect on both family and society.

To avoid all the formal court procedure in settling down the private issues like matrimonial disputes, have adopted methods like arbitration, mediation, negotiations Lok Adalats, and conciliation.

² (Hon'ble Justice C.O.Puta "Human rights in political and legal culture of Nigria In law publication (1989). P.75 Muhammed Ladan AD procerses and enforcement "Paper delivered at NIALs Government legal advisers WOA August, 1997).

Mediation:- The concept of mediation is not new to India. In Ramayan period Lord Rama sent Angada (the son of Vali) as a mediator to Ravan, later Hanuman also acted as an mediator. Before commencement of Kurushetra war Lord Krishna was the mediator to mediate between Pandavas and Kauravas. From ancient period itself, India has adopted mediation as a dispute resolution method like Gram Panchayats, Gram Sabhas, etc., till today it can be visualized in some of the villages. Mediation is a voluntary process in which an impartial person helps with communication and promotes reconciliation between the parties which will allow them to reach a mutually acceptable agreement.

According to Christopher W.Moore, "Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to coordinate their activities and to be more effective in their bargaining. Mediation is an extension of negotiation processes in that it involves extending bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputant.

In this approach the parties decide about the outcome of the result instead being imposed by someone. For example:- in the court the judge decides certain issues based upon evidence and decides the facts (the facts could be true or false). Whereas on mediation there will be clear evidence of the facts, as parties themselves decide. With the help of the third party (mediator) appointed by both the parties the mediator has no authority for deciding on the outcome of the dispute, but only to guide and assist them throughout it. The mediators should focus on the dispute subject and by facilitating and communication between them. Mediators are the key persons as their skills, aptitude may represent the outcome of the dispute resolution process either it is a success or failure.

If the mediator lacks the power to impose a solution, he has to lead the disputants in to an agreement. The mediator must be able to win the parties trust, only then he will be able to guide him and suggest him to arrive at a solution. A mediator should be able to listen, have problem-solving skills and creative in it. He should be able to separate personal feelings from issues, consideration, maintain neutrality and strong physical presence, accompanied by honesty, dignified behavior and respect for the parties.

He should advise the parties at correct time with the objective of easing the process without forgetting to maintain his neutrality. He must be efficient and possess with strong will power to work under different angles and assessments, recognizing their expectations and frustration of the parties, and react accordingly. It is necessary that he shows the ability to calm down the parties when needed and at the same time support and encourage them to reach a solution or outcome. He should be capable of reading the parties feelings about the disputed subject and understand the significance of it. The mediator should possess an efficient communication skills.

Mediation is a private process which is confidential in nature where the parties have no legal obligation between them at the end of the process. The settlement reached out in any form (settled or unsettled) should be kept in writing and it should be signed by the parties, and is filed in the court for any appropriate order. In case if mediation fails they need mention the reason, they can just say “not settled”.

Mediation is a tool often used in wide range from a mother trying to calm down two brothers that are fighting for a toy car to conflicts between countries. One of the most widely known exp.. is the one of the U.S. mediating the Israeli -Palestinian conflict in the Middle East, with the objective of achieving a long lasting armistice (Feste 1991).

Arbitration: As in mediation in Arbitration also there are two parties involving a third independent and neutral person for solving a dispute. Arbitration is an adjudicatory process and remaining four ADR methods (non adjudicatory). The mediator or arbitrator simply listens to the parties and based on the facts they speak out, take a decision without influencing the parties during their presentation i.e., the arbitrator acts as both judge and jury. In binding forms of arbitration the arbitrator’s decision is final and cannot be disputed or appealed.

Arbitration is governed by the provisions of the arbitration and conciliation act. For a reference to arbitration under sec. 89, CPC there must be the consent of all parties to the suit. The parties to the suit can agree for arbitration by means of joint memo or the court may record such agreement in the order sheet signed by the parties. With this the case will go outside the court permanently and will not come back to the court.

According to their convenience they can have one arbitrator. Each side may select its arbitrator and the two arbitrators select the third one. The award of the arbitrators is binding on the parties and is enforceable as a decree of the court in view of sec 36 of the Arbitration and Conciliation Act 1996. If any settlement is made in arbitration proceedings then the award passed on this settlement will have same status and effect as any other arbitral award as per sec 30 of the arbitration and conciliation Act³.

Conciliation: Conciliation is a non-binding process. In this method the conciliator has usually no legal authority i.e., the conciliator can't seek evidence or call witness, nor endorse an enforceable award. In conciliation also the consent of the parties to the dispute is a must. If the parties do not agree for conciliation there can be no conciliation when a matter is referred to conciliation, it does not go outside the court, if conciliation fails, the matter is returned back to court for hearing. The process of conciliation is also governed by the arbitration and conciliation Act.

According to sec-74 of the Arbitration and conciliation Act, settlement by the conciliator will have same status and effect as an arbitral award. The settlement is enforceable as a decree of the court as per section-36 of the Arbitration and conciliation Act.

Negotiation : Negotiation is one of prime method to settle the dispute. The parties to dispute, are expected to negotiate to settle their problems without the interference of third party. This is an informal process by means of which the parties communicate and, without the influence of third party, to come out with a decision or solution to settle the dispute. The parties can directly negotiate with other person. If the party wishes can hire an attorney to negotiate directly with the other side on your behalf⁴. A third party like a organizational Ombuds person or social worker or a skilled friend may be advise one or both of the parties behind the scene a process called "Helping people Help themselves".

³ ADR Mechanism in modern Indian Society by Mahaboob Ali - Direction, Judicial training and research institute, U.P. Lucknow, uploaded on 7th Jan, 2016).

⁴ <http://www.adrserivces.org/conciliation.phd.>

Lok Adalat: Lok Adalat means a people's court. The concept of Lok Adalat has gained popularity as established by the government to settle disputes through conciliation and compromise. The first Lok Adalat was held on March 14th 1982 at Junagadh district of Gujarat state. The Legal Services Authorities Act 1987 has provided a statutory, status to Lok Adalat for the smooth functioning of the scheme of organizing the Lok Adalat and also for providing legal services and free legal aid to the needy persons, different legal service institutions have been created across the country, right from the Taluka to National level.

Section 89 of the Civil Procedure Code also provides as to referring the pending civil disputes to the Lok Adalat. As soon as matter is referred to Lok Adalat then the provision of legal service authorities Act 1987 will be applied. Section 19 of the legal Services Authorities Act 1987 provides as under:

Section 19 Organization of Lok Adalats: (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluka Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such provided that the Lok Adalat have no Jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

2) Every Lok Adalat organized for an area shall consist of such number of:-

a) Serving or retired judicial officers: and (b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Service Committee, or as the case may be, the Taluka Legal Service Committee, organizing such Lok Adalat.

3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalat organized by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(4) The experience and qualifications of other referred to in clauses (b) of sub-section (2) for Lok Adalat other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of (i) any case pending before it; or (ii) any matter which is falling within the jurisdiction of, and is not brought before any court for which the Lok Adalat is organized:

Selection of the Arbitrator and the two arbitrators select the third one. The award of the arbitrators is binding on the parties and is enforceable as a decree of the court in view of sec 36 of the Arbitration and Conciliation Act 1996. If any settlement is made in arbitration proceedings then the award passed on this settlement will have same status and affect as any other arbitral award as per sec 30 of the arbitration and conciliation Act⁵.

The Lok Adalat is presided over by a sitting or retired Judicial Officer as the Chairman with two other members, usually lawyers are social workers. There is no court fee it is to help the weaker sections of the society. If fee has been collected they refund the fee after the settlement of the dispute at Lok Adalat. Lok Adalat process can be easily understood by the educated and uneducated. The parties to a dispute can interact with the presiding officer which is not possible in ordinary court.

⁵ ADR Mechanizm in Modern Indian Society by Mahboob Ali – Director, Judicial Training and Research Institute, U.P. Lucknow, uploaded on 7th Jan, 2016.

Lok Adalat will try to settle a dispute after the dispute is resolved, and then the same will be referred to the concerned court, which will pass necessary decree. The decree passed will be final and the parties have to bind over it, no appeal will be against that decree.

Lok Adalat is not an alternative to the existing court but is a supplementary to the court⁶. There can be no third hybrid order by the Lok Adalat containing directions to the parties. No award when there is no settlement, nor can there be any directions by Lok Adalat determining the rights, obligations or title of parties, when there is no settlement. The settlement should precede the award and not vice versa.

Advantage of ADR system in settlement down disputes.

- 1) In ADR methods the reliable information regarding the case can be gathered to arrive at a settlement but where as in judicial system it is not possible.
- 2) 2) ADR methods such as mediation and conciliation the disputants themselves come to conclusion or decision.
- 3) In traditional judicial system there is a long procedure. But in ADR methods no long procedure. For example: A divorce case will take 7 to 8 years in judicial system, but in ADR it will take less time.
- 4) ADR methods are less time taking and the procedure is flexible.
- 5) The procedure is conducted in an informal, cordial and conducive environment.
- 6) The family matters have to be dealt confidentially within the four walls not in the court hall.

⁶ B.P. Moideen, Sevamandir A.M Kutty Hassan, AIR 2008 (SC (Supp) 1123, State of Punjab Vs Jalour Singh (2998) 2 SCC 660).

- 7) Mediation improves relationship and preserves reputations.
- 8) Mutually beneficial settlement is seen.
- 9) ADR systems bring about a win-win situation where court system brings about win-lose.
- 10) In ADR system multiparty disputes can be cleared or settle. In court it is not possible. For example: In a matrimonial dispute couple and their either side parents can sit down and talk which is not possible in court.
- 11) In ADR methods the communication is very effective.

Pointing out the advantage of mediation, the Supreme Court observed that there is always a difference between winning a case and seeking a solution. In via meditation, the parties will become partners in the solution rather than partners in problems. The beauty of settlement through meditation is that it ensures a just solution to the satisfaction of parties and acceptable to all the parties to dispute, there by achieving a win-win situation⁷.

Conclusion :

Justice delayed is justice denied. Court procedure is a long process, where evidence can be changed or can be vanished. According to Honorable chief justice Bhagwati said in speech on law day. "I am pained to observe that the judicial system in the country is on the verge of collapse. These strong words I am using but it is with considerable anguish that I say so our judicial system is creaking under the weight of errors." The parties go around innumerable times to the court and the lawyer's chamber can turn any person insane.

Litigation in courts presents a considerable numbers of disadvantages. Litigation in court leads to win on one side but in Alternative system win can balance on both sides "win and win".

⁷ Vikram Bakshi V Sonia Khosla; 2014 (6) SCALE 514.

Even a minor case may take more than one year to meet a conclusion]. In the court the litigation processes is open to the general public and at time it may be subjected to media coverage. This will not be desired by the parties; parties choose privacy over public exposure. Another negative aspect is they see the courtroom as a place of conflict, rather than a place to solve or settle the disputes. Mover over in a court room parties occupy opposite position. They get the feeling that one wins other loses. This sort of feeling itself creates negative thought about court and its procedure. The ill feeling further does not promote a cooperative resolution of differences nor does it foster the interpersonal relationship, which is fundamental for the outcome of the process.

There is general notion that alternative methods are cheaper and they are flexible allowing to adapt to the needs of the parties. The ADR systems tend to be private processes, taking place only in the presence of the third party (mediator). The mediator being impartial commits to maintain secrecy. Alternative methods focus on improving communication and the relationship on acquiring for mutual satisfaction and solution. There are many advantages in alternative methods. John F. Kennedy in this respect says “Let us never negotiate out of fear but let us never fear to negotiate”.
