AN ANALYSIS OF POTENTIALITY OF ADR IN MATRIMONIAL DISPUTES

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INTRODUCTION

Justice is often identified as an attitude of the human mind, willingness to be fair and a readiness to give recognition to the claims and concerns of others, which of course, can be attained only by practical measures and institutional means. For quite a few years, it has been realized that the formal justice delivery system is not in a position to keep pace with the growth of civil litigation at all adjudicatory fora. The number of cases having gone up due to high degree of formalisation, time consuming, complex, expensive and are more often procedure oriented.[1] The situation is so alarming that the cases which have the potential to tear away the social fabric are not tried for years and under trial prisoners keep on lingering in jails for years. This has resulted in gradually undermining people's confidence in the present legal system. It is quite rightly felt that the justice delivery system needs to be revamped sooner rather than later.

After Fifty- Nine years of the Constitution of India coming into force people have started thinking whether Constitution has failed us or we have failed the Constitution. Time has come and really we are thinking aloud today- whether the justice delivery system failed us or we have failed the justice delivery system- Who is to be held responsible for it. But these questions are of little importance to the litigants; they are not interested in this. They are only interested in getting their disputes resolved as early as possible and perhaps within a reasonable time through a process which is cheap, flexible and not based on rigid formula of legal principles or technicalities. Therefore, it is imperative to examine the issues by the jurists to evolve new perception of an Alternative Disputes Resolution (ADR) System, which is less formal, more effective and speedy for resolution of disputes to avoid procedural claptrap.[2] In this background the present paper attempts to examine the legislative potentiality in matrimonial disputes with the framework of ADR system. To this end it also tries to find out if the ADR technique is a viable

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1 N. R. Madhava Menon, 'Towards Excellence in Justice New initiatives while Doing More with Less in 2005', Judicial Education News Letter of the NJA, Vol. No. 1, no. 11, 2005.

2 *Guru Nanak Foundation v. Rattan Singh & Sons*, AIR 1981 SC 2073 at 2076

alternative to the adversarial process for matrimonial dispute settlement through ordinary courts.

JURISPRUDENCE FOR THE NEED OF ADR TECHNIQUE IN MATRIMONIAL DISPUTES

Cessation of marital ties could be one of the most traumatic experiences in a person's life. It has enormous social, psychological, emotional and economic repercussions on the spouses, their children and the entire family in particular and the society in general. No wonder, the legal and social aspects of the divorce process and reform in the procedure have been a subject matter of concern for law makers, jurists, social, and legal activists and the society in general too. Recognising the fact that marital discord, broken marriages and limping marriages are on the rise, it goes without saying that the myth of permanence and inviolability of marriages is clearly a thing of the past.

Divorce laws in most of the countries are consequently heading towards a 'no fault' divorce, which dispenses with the requirement of allegations, counter allegations and proof of matrimonial guilt. The process of settlement of matrimonial disputes, however, which includes divorce, annulment, separation, maintenance, matrimonial property and child custody, is nerve- racking, expensive, agonising and time- consuming.[3]

As has been rightly remarked by Lord Hailsham:[4]"Though the law could not alter the facts of life, it need not unnecessarily exaggerate the hardships inevitably involved. There seems little doubt that the present law is guilty of just this."

Likewise, Judge Bowkers of the Edmonton Court Conciliation Project observed:[5]

"They [i.e. the party] may decide...to reconcile or they may choose to proceed with divorce. If their choice is divorce, they will be helped to prepare for the resulting changed life and new responsibilities, and to overcome feelings of bitterness, guilt and failure which inevitably accompany the breakdown of marriage... Certainly, healthy divorces will become as important to our society in future as healthy marriages."

The Law Commission, in its report as early as 1973,[6] strongly recommended the need

3 Kusum, *Family Law Lectures*, (2003) p 339

4 Quoted by SM Crentney and JM Masson in *Principles of Family Law*, 1990, p 165.

5 Quoted by MM Manchester and JM Wheton, 'Marital Conciliation in England and Wales', *International and Comparative Law Quaterly*, 1974, p 339, 343

6 Fifty- Fourth Report on the Code of Civil Procedure, 1973

for special handling of matters pertaining to marriage and divorce. It observed:[7]

In the administration of justice, in disputes relating to the family, one has to keep in mind the human relationships with which one is dealing. Object of family counselling as a method of achieving the ultimate object of preservation of the family, is to be kept in the forefront.

The Report further suggested that:[8]

a) as far as possible, an integrated broad- based service to families in trouble should become a part of the court system;

b) the existing court structure should be so organized that one single court should deal with the problems of preserving the families; and

c) the conventional procedure dominated by the adversary system may not be appropriate for disputes concerning the family.

Hence the need arises for alternate or special forums and procedures for resolution and settlement of matrimonial disputes.

SPECIAL METHODS: WHAT THEY ARE

Amongst the special methods, reference may be made to Counselling/ Conciliation, Mediation and Arbitration.

Counselling/ Conciliation

Counselling is a process to help couples to resolve out their differences or settle details of separation. Conciliation on the other hand, is the process mending of disagreements and the resolution of conflict between the partners. Generally speaking, the assumption until very recently was that an agreeable conciliation process is one where married parties agree to live together as husband and wife. Fortunately, there is a change in this thinking and conciliation has a broader ambit now. We are gradually shifting from the pre- conceived notion that after counselling, if the couple decides to stay together it is a 'success', and if they decide to part ways it is a 'failure'. It is true that, marital reconciliation is designed to keep the marriage legally and even emotionally intact, yet, failing that, a very significant role of this process is to assist the parties face the pending and post divorce situation.

7 *Ibid*

8 *Ibid*

To quote a judge of an American Conciliation Court:[9]

"Attorneys have reported to us that the counselling frequently has resulted in reducing tensions and hostilities to the point where satisfactory settlement of support payments, custody, visitation and other problems, have been accomplished prior to the final divorce hearing, and which results otherwise would not have occurred without a bitter court contest."

Thus, even if conciliatory proceedings are of little help in legally saving the marriage. But however it needs to be remembered that counselling should be provided before it is too late, and it serves the best interest if the process starts before entertaining any case in the court.

LEGISLATIVE POTENTIALITY

CONCILIATION

The settlement of dispute by way of Conciliation is inherent in some statutes dealing with matrimonial disputes. The first comprehensive legislation recognising conciliation as a potent weapon for solving matrimonial disputes is the **Hindu Marriage Act** (HMA) **1955.** Section 23 of the said Act encapsulates this provision. Section 23 of the HMA 1955 says, *inter alia,*

23(2) Decree in proceedings- Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire, or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with the directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

9 Judge Laurens L Henderson, 'Marriage Counselling in a Court of Conciliation', *Judicature*, 52, 1969, p 253, 256

It may be pointed out here that prior to 1976, it was the duty of the court to conduct reconciliation proceedings by itself. In pursuance of the mandate contained in s 23(2) the courts used to hold chamber meetings to try reconciliation. However, because of the time and other constraints, these sessions were often short, casual and perfunctory. Realising these difficulties, sub- cl (3) referred to above, was incorporated by an amendment in 1976, seeking the assistance of other persons.[10]

Sections 34(2) and (3) of the Special Marriage Act (SMA) 1954, is in *pari materia* with s 23(2) and (3) of the HMA. In fact, it is the duty of the court to attempt reconciliation, even if a joint petition for divorce under s 28 of the SMA is filed. In *Promila Bhagat v. Ajit Rai Singh*[11], where the trial court dissolved a marriage without reconciliatory efforts, on appeal by the wife, the order was set aside and the case remanded for fresh disposal. It was held that because of the non- compliance of the mandatory provisions of sub- cl (2) of s 34, the decree, of the trial court suffered from legal infirmity and so was not maintainable.

Similarly, O 32- A, Rule- 3[12] of the Code of Civil Procedure 1908, which relates to suits concerning family matters, enjoins upon the court a duty to make efforts for settlement.[13] But it is found that this provision was scarcely used in any family matters in the early stages and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails.[14]

Under the Family Courts Act, 1984, a duty is impelled upon the court to make efforts for settlements. In fact, the Preamble itself says:

10 Kusum, op. cit., p. 341- 342

11 AIR 1989 Pat 163

12 R 3. Duty of court to make efforts for settlement. (1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the court, in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

(2) If, in any such suit or proceedings at any stage it appears to the court that there is reasonable possibility of a settlement between the parties, the court may adjourn the proceedings for such a period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub- rule (2) shall be in addition to, and not in derogation of, any other power of the court to adjourn the proceedings.

13 Inserted by the Code of Civil Procedure (Amendment) Act 1976 (104 of 1976) Section 80 (w.e.f. 1. 2. 1977)

14 Anis Ahmad, 'Potentiality of ADR in Matrimonial Disputes: A Critical Analysis', *VIDHIGYA Journal of Legal Studies*, vol. 2, no. 1&2, Jan- Dec 2007, p 37

An Act to provide for the family courts with view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs, and for matters connected therewith.

Section 9 of the Act reads:

(1) In every suit or proceeding, endeavour shall be made by the family court in the first instance.....to assist and persuade the parties in arriving at a settlement in respect of the subject- matter of the suit or proceeding and for this purpose, a family court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the family court that there is reasonable possibility of a settlement between the parties, the family court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such settlement.

In order to assist the court in this matter, there are provisions for services of association of institutions or organizations, or other persons engaged in promoting family welfare.[15] There is also a provision for assistance of medical experts in case of need.[16]

MEDIATION

The concept of mediation is ancient and has always been enshrined in our Indian culture. It can be traced to ancient Indian texts such as "*Kautilya's Arthshashtra*", through the panchayat system and eventually given shape to, in legal disputes by none other than the Father of the Nation, Mohandas Karamchand Gandhi.[17]

Mediation is a structured, negotiation process, where a neutral uses specialized communication and negotiation techniques to assist the parties in resolving their disputes, whereby both sides are happy with the result and both rise in public estimation.[18] Mediation is more or less an informal process in which a neutral third party without the power to decide or usually to impose a solution helps the parties resolve a dispute or plan a transaction. Mediation is voluntary and non-binding,

15 Section 5, Family Courts Act

16 Section 12, Family Courts Act

17 DELHI MEDIATION CENTRE, ANNUAL REPORT, 2005- 2006, p. 9, taken from http://delhimediationcentre.gov.in/pages1-81.pdf. Last viewed 29- 03- 2009.

18 *Ibid*

although the parties may enter into a binding agreement as a result of mediation. It is not an adjudicative process. It is not as if one party wins and the other parties looses. Both the parties arrive at an equitable solution that is why mediation is said to be a win win situation.

Section 89 of Code of Civil Procedure[19] authorizes the courts to offer the party for ADR. It reads as follows:

Where it appears to the court that there exist elements of settlement, which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may formulate the terms of a possible settlement and refer the same for-

a) Arbitration,

b) Conciliation,

c) Judicial settlement including settlement through Lok Adalats and/ or

d) Mediation

The Supreme Court in *Salem Advocates Bar Association (I) v. Union of India*[20], not only upheld the constitutionality of the statute but also directed framing of appropriate rules. The rules so framed by the Chairman, Law Commission, Justice M. Jagannadha Rao has been accepted by this Court in *Salem Advocates Bar Association, TN. v. Union of India*[21]laying down that;

The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section 89 and if the parties do not agree, the court shall refer them to one or other of the said modes.

Many cases of various kinds referred to mediation have been settled; that is- matrimonial cases relating to petitions for maintenance, execution of maintenance orders, cases under Section 498A/ 406 IPC, 1860, Partition Suits etc.

19 See the Code of Civil Procedure (Amendment) Act, 2002

20 (2003) 1 SCC 49

21 (2005) 6 SCC 344

ADVANTAGES OF MEDIATION

First, it is less costly than evidentiary process. Mediation is normally completed in a matter of hours through a series of one to three conferences. It may occur much earlier and with much less preparation in a dispute than in a trial or arbitration. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witness or demonstrative proof. Indeed, the process is most effectively accomplished without introduction of evidence or witnesses, relying instead on the parties to negotiate in good faith.[22]

Secondly, the procedure is more efficient than most evidentiary processes; one of the principle attractions of mediation is the speed with which parties can resolve their disputes. Because mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to carry out the conference.

Third, the process offers a range of settlement options limited only by the creativity of the parties and the mediator. Parties can create outcomes designed for their particular situation.

Fourth, the process does not rule out the use of further, more formal dispute resolution mechanisms such as arbitration or litigation. Where the parties fail to get their disputes settled through any of the ADR methods the suit would come back to proceed further in the court in which it was filed.[23]

Fifth, the parties control the outcome of the case. Mediation does not create the risk of outright loss associated with trial, because the parties do not transfer the power to decide the cases to someone else.

Furthermore, where a matter has been referred to mediation in terms of Section 89 of the CPC, then in terms of Section 16 of the Court Fees Act, 1870, the Court Fee paid on a lis is liable to be refunded to the plaintiff.[24]

DISADVANTAGES OF MEDIATION

Mediation is not without its disadvantages. Main among them is the absence of due process of protection for the participants. The formalized procedural and evidentiary

22 Hon'ble Mr. Justice S. B. Sinha, 'Mediation: Constituents, Process and Merit.' p 7, taken from http://gujcourts.guj.nic.in:8080/cisweb/mediation/views.php. Last viewed 29- 03- 2009

23 *Supra* note 11

24 *Supra* note 14

rules of due process intended to protect parties, related with the trial or arbitration of a lawsuit are missing in mediation. This lack of formality is a disadvantage in the eyes of those who consider it may permit mediator bias, coercion, or party bad faith. For others, it affirms the need for a well-trained mediator or an attorney to assist in preparation and participate during the process to ensure that the important legal rights not being waived without in-formed consent.

A second concern for some parties and attorneys is the absence of an appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed in some way. Because it is a highly confidential process, it is never performed on the record or recorded by a court reporter.[25]

ARBITRATION

Dispute resolution by arbitration is gaining ground these days, and it is one of the most important methods for settlement of disputes commercial in nature. In family proceedings, however, this is not very frequent. Issues which affect the status of marriage and children are not happily viewed as arbitrable issues on grounds of public policy. Parties might resist the idea of submitting their personal and critical decisions to a private adjudicator. They would prefer to resolve their conflicts and issues pertaining to children by agreement or through the judicial process, where judges can be expected to apply accepted standards and where a right of appeal exists.[26]

JUDICIAL PRONOUNCEMENTS

The juristic formulation has considerably strengthened the concept of ADR in family disputes by Indian Court in the various pronouncements. To realise the anxiety and passion of the court towards ADRM in matrimonial matters, an analysis of case law merits close analysis. Though there is no direct decision of Supreme Court on interpretation of Section 23 (2) of the Hindu Marriage Act, 1955, but various High Courts have interpreted the said provision. Before more than four decades, in *Jivubai v. Ningappa Adrishappa Yadwad*[27], the High Court of Mysore stated:

"There can be no doubt that a duty is laid on the court to make every endeavour to bring about a reconciliation between the parties whenever the nature and the circumstances

25 *Supra* note 22. p 8

26 Kusum, op. cit, p 344

27 AIR 1963 Mys 3, 4 & 5

of the case permit it to do so. The intention of the provision undoubtedly is to render all possible assistance in the maintenance of the marital bond and if at any stage of the case the circumstances are propitious for reconciliation it will be the courts duty to make use of such circumstance irrespective of the stage. If no endeavour had been made by the court, it will undoubtedly be a serious omission."

The High Court of Patna in *Chhote Lal v. Kamla Devi*[28], held that sub- section (2) of section 23 of the Act enjoins upon the court a duty to make a sincere effort at reconciliation before proceeding to deal with the case in the usual course. In *Raghunath Prasad v. Urmila Devi*[29], construing section 23 (2) of the Act, the Court held that the effort of reconciliation is to be made by the court right from the start of the case and not only after the closure of final hearing of the matter and before the court proceeds to grant relief under the Act. It is also observed that the court should not give up the effort for reconciliation merely on the ground that there is no change for reconciliation.

The Punjab and Haryana High Court in *Jaswinder Kaur v. Kulwant Singh*[30], adopted a similar view and was of the view that an attempt for reconciliation should be made between the parties in beginning and not at the end. It was indicated that the matrimonial court, besides being a court of law, has to decide matters and grant relief thereon in a very sensitive field. It is for the court to choose reconciliation, where possible and whenever consistently with the nature and circumstances of the case, should be attempted.

In *Manju Singh v. Ajay Bir Singh*[31], it was observed that the court try first for reconciliation. If an endeavour of reconciliation is not made, the order would be illegal.

In *Sushma Kumari v. Om Prakash*[32], it was held that the duty is cast on the court to take steps for reconciliation between the parties, through non- observance of endeavour for reconciliation would not make the order of the court without jurisdiction.

Recently the Supreme Court realized the scope of ADRM in procedural as well in family law in *Jagraj Singh v. Bripal Kaur*[33], the Court affirmed and observed that the approach of a court of law in matrimonial matters is much more constructive, affirmative

28 AIR 1967 Pat 269

29 AIR 1973 All 203

30 AIR 1980 P & H 220

31 AIR 1986 Del 420

32 AIR 1993 Pat 156

33 (2007) 2 SCC 564

and productive rather than abstract, theoretical or doctrinaire. The Court also observed that matrimonial matters must be considered by the courts with human angle and sensitivity and to make every endeavour to bring about reconciliation between the parties.

It is quite apt from the above case laws that both the Apex Court as well as different High Courts has always approached Familial Justice concerns with sensitivity.

ADR IN MATRIMONIAL DISPUTES OUTSIDE INDIA

In the USA, Canada and Australia, the past decade has seen the growth of family mediation as an approach to the resolution of conflicts between separating and divorced couples.[34] Australia, Japan and Canada have a well- developed system of family courts with conciliation proceedings with the help of trained counsellors and other welfare officers preceding court adjudication.[35] In Bangladesh by the Family Courts Ordinance 1985 the Family Courts get hold of exclusive jurisdiction for expeditious settlement and disposal of disputes in only suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children.

Section 5 of the Family Court Ordinance, 1985 speaks about the jurisdiction of the Family Courts which reads as: "Subject to the provisions of the Muslim Family Laws Ordinance, 1961 (VII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:-

(a) dissolution of marriage;
(b) restitution of conjugal rights'
(c) dower;
(d) maintenance;
(e) guardianship and custody of children."[36]

The take up of mediation has been relatively slow in the United Kingdom. A study of the mediation pilot at the Central London County Court indicated that in only five

34 Robyn Hooworth, 'Family Mediation', taken from *sunzi1.lib.hku.hk/hkjo/view/15/1500743.pdf. Last viewed 30-03-2009.*

35 Kusum, op. cit., p 347

36 Zahidul Islam Biswas, 'The confusions & uncertainties thwarting the Family Courts in Bangladesh', *Bangladesh Journal of Law*, vol- 10, no- 1&2, (2006), p 7, URL referred http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=zahIbid Last viewed 30-03-2009.

percent of cases did the parties agree to mediate. Lack of experience in mediation by lawyers, fear of showing weakness by accepting mediation, and resistance to the idea of compromise were cited as the main reasons for the low take up. Public awareness of ADR in the United Kingdom is also acknowledged to be low.[37]

The mediations in traditional way known as *Salish* which village elders have been doing from time immemorial, though can bring quick relief, do not have any legal force behind them and as such not binding upon either party. Therefore, a dispute settled through *Salish* remains dormant and can be revived at any time. There is no such problem in mediation in Family Courts. Disputes settled through mediation in Family Courts reach finality with the compromise decree. And unlike a trial or a *Salish* there is no possibility of a dispute, settled through mediation in Family Courts, being revived. Again, most of the family suits involve financial or property settlements for which mediation in Family Courts have proven to be the best solution.[38]

Mediation in Sri Lanka today is practised extensively on a community level. Between 1990 and 1999, 631, 831 mediations took place under Mediation Boards Act, 1988. Of those, 395, 268 resulted in a settlement at the rate of 62.6 percent. Essentially, the Act has institutionalised mediation at the community level in Sri Lanka.[39]

OTHER FORUMS

Though judicial adjudication is the most common method for matrimonial conflict resolution, there are also other methods of conflict resolution methods. Amongst the earlier dispute resolution agencies, and which are recognised and respected in village communities even today are the panchayats and village elders. The Parsi Marriage and Divorce Act (PMDA) 1936, provides for the setting up of special courts, and the appointment of special delegates to hear cases under the Act.[40]

The Lok Adalats, literally meaning the people's courts, is another forum for speedy disposal of cases. Though the success rate in accident claims and property cases is

37 Miryana Nesic, 'Mediation- On the rise in the United Kingdom?', *Bond Law Review*, Vol- 13, Issue- 2, Art. 10, 2001. p 3, URL referred http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1214& context= blr. Last viewed 30- 03- 2009.

38 *Supra* note 36, p 12

39 Nadja Alexander, 'From Communities to corporations: the growth of mediation in Sri Lanka', p 1, taken from http://www.uq.edu.au/acpacs/documents/elibrary/na_2000_from_com.pdf. Last viewed 30- 03- 2009

40 Sections 18- 27, PMDA

high, in matrimonial litigation, the degree of success has been pretty limited. Special police cells have also been established in many states in the country to look into cases of harassment and violence in the family. These cells have attained reasonable success in restoring *stridhana* to many women, and also by providing some security to women against harassment and torture. They deal mainly with cases relating to Section 498-A IPC. They have been established across every state.

CONCLUSION

Litigation concerning or involving family matters requires a special approach in view of the serious social, financial and emotional repercussions. For this sensitive area of personal relationship, the ordinary court procedure is ill- suited. The adversary procedure is too technical, expensive and time- consuming. The lawyers are engaged in a practical tug- of- war making the battle full of acrimony and insults. In fact, court procedure leads to such bitterness, that ancillary and other post- divorce issues also cannot be amicably settled. In such a situation there is an urgent demand to adopt Alternative Dispute Resolution mechanism to avoid the delays, reduce arrears and high cost of litigation. Though there are certain disadvantages of mediation, but when it is weighed with its benefits, the advantages far outweigh its disadvantages. Law is dynamic, not static. It needs to keep pace with the changing times, to meet the needs of the people. ADR mechanism would certainly go a long way in furthering the interest of justice by supplementing the existing adjudicatory machinery rather than frustrating it. It will also develop the confidence of the common man in the justice delivery system. In spite of all kind of legislative potentiality and judicial recognition to the ADR mechanism, little has been done and vast seem to be undone. We should make a concerted effort to have a robust ADR mechanism in place so as to best serve the interests of justice.