



Alternative dispute resolution in family disputes: An analysis of Indian legislative provisions

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Abstract

Life is dynamic and everything is subject to change, whether they are norms, culture, tradition and rules. Ways of conflict resolution also changed with change of time. Though, alternative measures have taken a different name but all were available in India since time immemorial. No human society is immune from conflicts, but it needs to settle conflicts in a peaceful manner and the people of India always believed in resolving disputes and thus, the Panches in Panchayat system always supposed to be at God's level. Not only the land, property and criminal nature disputes but the family disputes have always been settled by the Panchayats. The underlying reason is to keep peace and harmony in society and family. Family has always been considered to be smallest but important unit for positive growth and development of a society and nation. Thus, it become essential to resolve the conflicts of a family in a peaceful manner.

Keywords: ADR, dispute resolution, family courts, mediation, reforms

Introduction

Late Smt. Durgabai Deshmukh, a true leader, warrior of women's emancipation and justice once had a chance to visit and examine the Family Courts in China in 1953. She discussed the working of these family courts with Justice Chagla and Justice Gajendragadkar and they all recommended the establishment of family courts in India too. The fifty ninth report of LCI also suggested the courts to take a sophisticated approach while dealing with family matters. Law Commission of India, further suggested the courts to take all reasonable efforts in resolving the disputes at every step of the case especially where family matters are involved. In 1976, some changes were also made in Civil Procedure Code in the matter relating to family, a special kind of procedure was desired to be adopted by the courts. After all these timeline developments, need to establish Family Courts was felt in public interest to settle the dispute in speedy and peaceful manner.

India, a country composed of different religions depicts-Unity in Diversity, as every religion follows their own personal laws. But over the years, the personal laws have also undergone changes. Family, a pious unit where disputes occur, litigation is no way providing adequate solution as it is costly and time-consuming process. The only remedy lays in alternative dispute resolution methods by the help of various ADR processes; we can maintain harmonious relations in a family. Further the cordial relations between disputant members can be encouraged only with the help of ADR methods.

ADR methods used different techniques for the resolution of disputes. The ideology that run behind ADR mechanism is peaceful settlement of dispute and mediation process is voluntary one allows disputant parties to sit together and deliberate on points at issue and search for the resolution of dispute by arriving at a settlement agreement, rather than think what they need to seek or what the law will let them fight for. Among ADR techniques, most advantageous techniques are- Conciliation and Mediation. Next to Negotiation, these are the techniques which are most acceptable in our India culture as these are deeply uprooted

in our society since immemorial. Traditionally, the eldest member of a family used to act as the mediator in a dispute with an intention to resolve the same.

Family dispute

A family can be defined as a set of people related with one another by consanguinity, affinity or co-residence. Family is a prime section where each member grows and develop to its maximum and attain its fulfilment. Family is a safe place for children, adults and old and provide them love, care, attention and keep all members away from dehumanizing forces. In other words, family provides 'social security' to each and every member.

The Family Courts Act explains family dispute as:

1. A suit or proceeding between the parties to a marriage for a nullity marriage decree (declaring the marriage null and invalid or, as the case may be, annulling the marriage), restitution of conjugal rights, judicial separation, or dissolution of marriage;
2. A suit or proceeding for declaration of the legitimacy of a marriage or the marital status of any individual.
3. A suit or proceeding between the parties to a marriage involving the parties or either of their property;
4. A suit or proceeding seeking an order or injunction in the context of a marital relationship;
5. A suit or proceeding for the declaration of a person's legitimacy;
6. A suit or proceeding for maintenance;
7. A suit or proceeding involving a person's guardianship, the custody of, or access to, a child.

ADR In family disputes

In law, we talk of maxim- Justice delayed is justice denied. Litigation is discouraged as it is not only time consuming but spoil the cordial relations beyond repair and results in acrimony between the disputant parties. When it comes to a family dispute, it is a failure at all points. Whereas, alternative methods not only promote harmony but also encourages communication and collaboration of disputant parties that ultimately results in resolution of a dispute.

As we all know, to maintain harmonious relations is the pre-requisite to be considered when dealing a family dispute. The process of mediation and conciliation can achieve the objective of amicable settlement of disputes.

Black's Law Dictionary defined mediation as "a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement." Mediation and conciliation are both interchangeable terms. Both are non-binding and informal procedure in which a neutral third party assists the disputant parties in mutually reaching at an agreement. Further, in both the procedures, a successful completion of the proceeding results in a mutually agreed settlement of dispute. As explained, though both are interchangeable expression however, they are distinct in the sense that mediation is a passive process in which mediator persuade the disputant parties to negotiate on their dispute but conciliation is an active process and conciliator can put forward the suggestions for the resolution of disputes.

Legislative provisions

Family Courts Act, 1984: According to law of interpretation, preamble is the key to understand the intention of the legislature. The preamble of every statute provides for aims and objectives for the enactment of a statute in question. The preamble of Family Courts Act provides that family courts are established with a view to promote conciliation proceeding in family related matters. Further, section 9 of the Act provides for duty of family courts to persuade disputant parties to reach at an amiable dispute settlement. Conciliation, a non-adversarial approach through speedy disposal, and simple procedure is the basis of family courts.

Hindu Marriage Act, 1955: Section 23 of the Act provides for Decree in Proceeding which states that before granting relief, court in first instance shall make efforts to bring about peaceful settlement agreement between the disputant parties. For the purpose of achieving this objective the court has the power to adjourn the proceeding. This adjournment can be extended up to 15 days.

Special Marriage Act, 1954: Section 34 of this Act is Pari Materia of section 23 of HMA. It means that the objective section 23 carries, section 34 of Special Marriage Act has the same objective. Thus, if any marriage is dissolved without any reconciliation efforts, it will be considered as legal infirmity on the part of the concerned court.

Civil Procedure Code 1908: O 32A (R3) of CPC is standing on the same footing as that of HMA and SMA. Suits relating to family matters are dealt with under Order 32A and rule 3 bound a court with mandatory duty to make efforts for peaceful settlement in case the subject matter of the suit concern of family. For making settlement if chances of possible settlement appear to the court at any stage, the court may adjourn the proceeding and will make endeavours for settlement agreement.

Section 89 of Civil Procedure Code: Likewise, one more section of CPC which was added by amendment Act, 1999 that has taken effect only in the year of 2002 i.e. Section 89, that deals with settlement outside the court. Court after identifying the disputes where there are chances of peaceful

settlement, invites the parties and "shall affect a compromise between the parties".

"Section 89 lays down that where it appears to the Court that there exists an element of settlement, which may be acceptable to the parties; the Court shall formulate the terms of settlement and give time to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer to either (i) arbitration (ii) conciliation (iii) Judicial Settlement including the settlement through Lok Adalat (iv) Mediation. As per sub-section (2) of Section 89 as amended when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply. When the Court refers the dispute to Lok Adalat for settlement by an Institution or person, the Legal Services Authorities Act, 1987 alone shall apply. It is only in the case of mediation that the Court itself shall effect a compromise and shall follow such procedure as may be prescribed by Rules made by the High Court under Section 122 read with Section 130 of the Code of Civil Procedure."

Legal Services Authorities Act, 1987: This Act grants special status to Lok Adalats in India. Lok Adalats are not alternative to the existing court system but supplements the justice system. Lok Adalats is a 'forum in which volunteer efforts targets for amiable settlement and is generally reached through persuasive efforts like conciliation process. Lok Adalats proved itself expedient in resolving not only the MACT matters but also the family matters.

Analysis of role of ADR in family disputes

Indian legal system stands on three pillars- the legislature, that enacts the laws; the executive, that implement the laws; and judiciary, that develop and interpret the laws. Unless the liberal interpretation and mandatory application of reconciliation in matrimonial matters, the object of family courts will be illusory mirage merely exists on the statute book. Thus, it shall be a solemn duty of the Indian courts to encourage the parties to the dispute to make all possible efforts for making settlements outside the court system. ADR is quite energetic process that reflects the values of the society. The mediation process is of great importance and will definitely strengthen the system's capacity to deliver justice. The ADR techniques like mediation and conciliation improves the sociability and reduces the friction within the society due to their voluntaristic modus operandi as it allows the disputant parties to solve their problem by themselves and will also help to parties to keep their dispute private. Therefore, ADR which is more-speedier, less costly and fairer than adjudication also help the parties to remain stress free and is a helpful tool specifically in matrimonial disputes.

It would be valuable to find out the courts verdicts that have given importance to reconciliation in family matters.

Judicial decisions

In Baljinder Kaur Vs. Hardeep Singh, the parties filed a divorce petition and court before granting the same, attempted for reconciliation between the disputant spouse. Failing the reconciliation, the petition was accepted and divorce was granted. While granting the divorce decree, the court stated the importance of sanctity of institution of marriage and emphasised upon bringing mutually agreed settlement of disputant parties.

Again, in Love Kumar case, the high court set aside the decree of divorce on the ground that inferior court acted in hurry and passed the divorce decree when one of the party could not mark its presence in the court in reconciliation proceeding.

Further in Mohinder Pal Kaur case, the divorce petition remained pending for 6 months. Sufficient efforts were made to reconcile the disputant spouse but to no success. As per legal requirement, before granting divorce decree at least 6 months should have elapsed. Thus, it was held in this case pronouncement of divorce decree is not wrong as it fulfilled both conditions. Firstly, petition was pending for 6 months and secondly, efforts were made for reconciliation.

In Bini Vs. K.V. Sundaran, Kerala High Court decided on a question that after enactment of Family Courts Act in 1984, whether conciliation is an essential condition in cases of conversion, mental instability, leprosy and venereal illness. The high court of Kerala held it mandatory at the first instance and stated that "Though no attempt at reconciliation is required under The Hindu Marriage Act, 1955, in a petition for divorce on the grounds of conversion to another religion, or other grounds excepted under Section 13 (1) of the Hindu Marriage Act, 1955 or on similar or other grounds available under any other law, the Family Court is bound to make an endeavour for reconciliation and settlement after the introduction of the Family Courts Act, 1984. The requirement is mandatory. The Family Courts Act of 1984, which is a special statute, is responsible for this conceptual change".

Therefore, it is clear from different verdicts of the courts that the prime objective of the family courts is to make endeavours for reconciliation mentioned in preamble and section 9 of the statute.

Suggestions and reforms

In Indian context, marriages be considered as a holy institution wherein dispute needs to be settled down with endeavours of conciliation or other ADR methods to protect our family structure which is highly important for us. The use of mediation process in family disputes is promising in making peaceful settlement and it will definitely strengthen the system's capacity to deliver justice. Thus, reconciliation especially in family disputes is not only desired but shall be applied as a mandatory procedural condition at every stage. Also, number of family courts need to be enhanced so that burden on higher judiciary can be lessened. Further, there is an urgent need of constitution of a conciliation committee that should try to reconcile between the disputant parties. Only on failure of reconciliation efforts by conciliation committee, case shall be forwarded to Family Court for further action.

Conclusion

The change in society has also its impact on our legal system. The decision-making thought has now changed and stress is now upon making resolution and agreement between parties by ADR or other persuasive efforts available in our legal system. Further, Application of ADR methods in family disputes will definitely go a long way in preserving cordial relations between the parties.

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