

MEDIATION: MARITAL CONFLICT RESOLUTION THERAPY

N Bhagya Lakshmi*

Abstract

Marriage and family are the two pillars of the Indian Society. Marriage constitutes the fundamental building block of the society. The institution of marriage occupies an important place and role to play in the society, in general and Marriage has always been the foundation of peace. Indian family as an institution is a web of complex, relationships, feelings and sentiments. The family as the smallest unit of the larger society is often under frequent attacks of dissolution, separation and all forms of conflict. The fast changing and social and family environment has thrown up new challenges, particularly young generation like growing instability, changing roles of husband and wife and tensions of fast life. All these have resulted in the lack of harmony among married couples. A heated discussion may develop into a conflict. Litigation in respect of family disputes requires a special approach. All relationship problems stem from poor communication.

The rate of divorce in the world is becoming alarming and geometrical in calculation. Marriages on crutches need aid and attention. They limp and need intensive care treatment. Family or matrimonial issues were considered too sensitive an area to be left to the mercy or adversarial jurisprudence of the present legal system which by its very nature involves a lot of mudslinging on either side. To resolve the matrimonial disputes alternative methods are important to save the family system especially mediation and it will save time, money.

Mediation is the effective alternative remedy since it focuses on the non-coercive and consensual process. This method of dispute resolution not only save time but also diminish the acrimony and estranged relationships resulting from litigation. Mediation has found rising popularity in India, especially in case of marital disputes. Reframing is a communication technique that goes to the very crux of mediation, that of shifting the focus of the parties from their positions to their interests. He will assist the parties in identifying the relevant facts and issues. This mediation and

* Teaching Associate, Damodaram Sanjivayya National Law University, Visakhapatnam, Andhra Pradesh

conciliation processes recognised under various Legislations and Statutes also. Judiciary also plays an important role in settling the disputes between the married couple.

Introduction

Marriage is a socially supported union between individuals in what is intended to be a stable, enduring relationship. It is the basis for the family and the institution, defined by six social functions: regulation of sexual behaviour, reproduction, nurturance and protection of children, socialization, production, consumption, and the passing on of ascribed statuses such as race. Marriage and the family rest on many beliefs, the most important of which is kinship¹. Marriage is not only a social event but also legal commitment². The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage³.

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreements unresolved become dispute. Unresolved disputes become conflicts⁴. Dispute which is arise between the couple of the institution of the marriage known as matrimonial dispute. A dispute may develop into a conflict. The family as the smallest unit of the larger society is often under a recurrent attacks of dissolution, separation and all forms of conflict.

The fast changing and social and family environment has thrown up new challenges, particularly young generation like growing instability, changing roles of husband and wife and tensions of fast life. All these have resulted in the lack of harmony among married couples. The rate of divorce in the world is becoming alarming and geometrical in calculation⁵. Marriages on crutches

¹ Hemendranath Reddy & Manohar Gogia, Marriage & Divorce Law, ALT publications, Pg.8.

² V. Hemalatha Devi, Rural Women-Legal Awareness, Supreme Court Journal - 1990, Vol-3(sep-Dec).

³ Govt. of India 18th Law Commission 217 Report pg.9 Para 1.2.

⁴<http://supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%200F%20INDIA.pdf> accessed on 9/5/2016.

⁵ Vijendra kumar, Expanding Horizons of Divorce under the Hindu Marriage Act, 1955, A L T 2013 (5) 21-29

need aid and attention. They limp and need intensive care treatment⁶. Family or matrimonial issues were considered too sensitive an area to be left to the mercy or adversarial jurisprudence of the present legal system which by its very nature involves a lot of mudslinging on either side⁷. Litigation in respect of family disputes requires a special approach.

Role of Mediator

All relationship problems stem from poor communication. Mediation is a forum in which a neutral mediator facilitates communication between parties to promote reconciliation, understanding, and settlement. Mediation is particularly suited to divorces and other family law proceedings because there is likely to be a continuing relationship between the parties, especially if minor children are involved. Many divorcing couples find mediation allows them to avoid the high financial and emotional costs of a litigated divorce. Because settlement is generally quicker, costs are reduced. Mediation also allows couples to avoid the risks of trial, protects confidentiality, and decreases stressful conflict. Mediation may also protect the children of a marriage from the pain of parental conflict. Because the parties work to create their own agreements, couples who mediate their divorce settlement often find greater satisfaction than those who go to trial. Moreover, the couples learn skills to help them resolve future conflicts⁸.

During mediation, the parties can either decide to Part Company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If however they chose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, it will be beneficial to those who

⁶ www.lawsenate.com/./courts-to-settle-matrimonial-disputes accessed on 6/1/16.

⁷ Nagasila, Family courts- Anti women accessed through manupatra on 6/11/2016.

⁸ <http://family.findlaw.com/divorce/divorce-mediation-overview.html#sthash.KzIKVRbt.dpuf> accessed on 17/11/2016

genuinely want to accord a quietus to their matrimonial disputes. Courts also recognize 'mediation' as an effective method of alternative dispute resolution in matrimonial matters and that is the reason why courts want the parties to explore the possibility of settlement through mediation in matrimonial disputes.

Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. Courts also referred several matrimonial disputes to mediation centres⁹. Therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. The Law Commission of India in its reports¹⁰ had emphasized that while dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. Further it is also the constitutional mandate for speedy disposal of such disputes and to grant quick justice to the litigants and also strongly recommended the need for special handling of matters pertaining to marriage and divorce. Being trained in the skill of mediation, they produce good results¹¹. The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation.

Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres¹² have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.

Court as a Mediator

The Judiciary is currently inclining more towards mediation as the most viable option for dispute settlement. Recently Apex

⁹ Lok adalats, outside court settlement by neutral party.

¹⁰ Govt. Of India Law Commission 45 and 59th Reports.

¹¹ *Sushil Kumar Sharma v. Union of India*, AIR 2005 SC 3100 Para 18.

¹² Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre.

court¹³ feel that though offence punishable under Section 498- A of the IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A of the IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law.

The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fibre of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under 498a Indian Penal Code as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fibre, peace and tranquillity of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases¹⁴.

Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualized by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, accused and his close relations¹⁵. The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a Herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in

¹³ *Ram Gopal v. State of M.P.*, 2010 SCALE 711.

¹⁴ *Preethi Gupta v. State of Jharkhand*, AIR 2010 SC 3363.

¹⁵ *Satish Sahni & Others v. State of Punjab & Another* dt 31/05/2012.

different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful. There is a growing need of mediation for matrimonial disputes in India.

"There has been an outburst of matrimonial disputes in recent times. The marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a Court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different Courts."

The aim of law is to reconcile or ameliorate the misery as much as possible. According to Bentham the aim of law, like life itself, is to promote the greatest good of the greatest numbers¹⁶. It is a crying need that there should be redressal of family law problems in a proper legal framework. Arrest brings humiliation, curtails freedom and casts scars forever. There is a need to develop a dispute resolution mechanism, which can protect relationship¹⁷. The forums for settlement of matrimonial disputes can be conventional or modern, judicial or non-judicial, governmental or non- governmental¹⁸.

¹⁶ A.V. Dicey, *Law & Public Opinion In England*, 414 (Universal Law Publishing Co. Delhi, 3rd Indian Reprint, 2003).

¹⁷ Madabhushi Sridhar *Alternative Dispute Resolution*, Lexis Nexis pg.79

¹⁸ Prof. Kusum *Family Law Lectures Family Law 1* third edition Lexis Nexis Pg.425

The Court¹⁹ is a vital and an extra-ordinary effective instrument to maintain and control social order. The Courts play role of paramount importance in achieving peace, harmony and everlasting congeniality in society and resolution of a dispute by way of a compromise between two warring groups, therefore, should attract the immediate and prompt attention of a Court which should endeavour to give full effect to the same, unless such compromise is abhorrent to lawful composition of the society or would promote savagery if the statement is fair being free from under pressure. Meaning thereby, the High Court has unlimited power to quash the criminal proceedings, relating to such cross-fights, on the basis of lawful settlement. The law laid down in the aforesaid judgments "mutatis mutandis" is fully applicable in the present case and is the complete answer to the problem in hand.

In *Pepsi Food Ltd. & Another v. Special Judicial Magistrate & Ors*²⁰ where the court will exercise jurisdiction under Section 482 of the Criminal Procedure Code could not be inflexible or laying rigid formulae to be followed by the courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.

The circular²¹ further mentions that the new provision was welcomed by the social order, but it was also found that it was being misrepresented. Criminal prosecution under this provision were used for settling personal agendas which arose out of momentary disputes between spouses, without looking to the long term consequences. Entire families including minor school going brother and sisters, grandchildren, unmarried and married sisters-in law were roped in and faced prospect of arrests. In the eventuality of an arrest, the possibility of future reconciliation between the parties was diminished and family life was disturbed. Therefore, the Apex Court, the High Courts and the Government of India had been issuing directions from time to time for checking the misuse of section 498a²². In case of arrest of the accused

¹⁹ *Sanjeev Kumar & Others v. State of U.P & Others* Dt. 29/03/2011.

²⁰ (1998) 5 SCC 749

²¹ *Ibid*

²² Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may

should only be affected when it was imperative and unavoidable as observed by the Hon'ble Supreme Court²³. The procedure for arrest should only be given effect to after efforts for bringing about mediation; counselling or conciliation between the parties had failed.

In such matters, before initiation of proceeding under cruelty, an effort should first be made for bringing about reconciliation between the parties by conciliation, counselling or mediation should be got done by professional educated advisors in the women's crime cells.

The Apex Court²⁴ after noticing the positive features and need for this provision for given protection to women who have been subjected to cruelty during marriage has also drawn attention to its potential for misuse, when for momentary disputes or for oblique reasons entire families are roped in. It has also called on the members of the Bar to check misuse of this provision and not to file exaggerated complaints and to first endeavour to bring about reconciliation between the parties so that families are saved and there is peace in society. Even a short stint in jail drastically reduces the chance of compromise. The legislature and law commission have also been called upon to consider bringing about pragmatic changes in the related provisions for furthering the aforesaid objectives.

In *Ramgopal v. State of M.P.*²⁵ the Apex Court has suggested to the Central Government and to the Law Commission to consider making offences under section 498 A IPC compoundable and bailable. Similar suggestions were given by a division bench of this Court in *Rajeev Verma v. State of U.P.*²⁶ that the said offence could be made compoundable with the permission of the Court²⁷.

extend to three years and shall also be liable to fine. For the purpose of this section, "cruelty" means

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand

²³ *D.K. Basu v. State of W.B.*, decided on 18.2.1996

²⁴ *B.S. Joshi v. State of Haryana* (2003)4 SCC

²⁵ 2010 (7) SCALE 711

²⁶ 2004 Cri.L.J 2956

²⁷ Section 320 of Criminal Procedure Code

Full Bench of Court²⁸ in *Amravati and another v. State of U.P.*²⁹ and a division bench of this Court in *Sheoraj Singh @ Chuttan v. State of U.P. and others*³⁰, thereafter the Magistrate concerned may try and bring about reconciliation between the parties either by himself, or in districts where some agency exists for bringing about mediation, conciliation or counselling, through the said agency.

In cases where the Magistrate is not himself engaged in trying to bring about reconciliation between the parties, where Mediation/ Conciliation or counselling of the couples and their family members has been undertaken by some other agency, the said agency must report the fact of failure or success of the mediation/ conciliation etc. within a week of the conclusion of the exercise.

Only when the Magistrate comes to the conclusion that the efforts for mediation or conciliation between the parties has failed, he may pass orders on the bail plea of the various accused persons on merit. By complying with these general directions the undue pressure on the High Court requiring filing of individual writ petitions, in cases where reports under section 498 A IPC are filed against husbands or other family members, causing a huge backlog of arrears, leaving little time for the High Court to deal with murder appeals and other major matters, would be considerably reduced.

It was also suggested at the bar that the police officer entitled to facilitate mediation or conciliation should be at least of the rank of a Circle Officer. The State government should also render all help even at stage when the complainant approaches the police station, on the lines suggested above. Police officials being the first point of contact when reports are lodged by the aggrieved wife or her family, if an attempt at reconciliation is made right from that stage and unnecessary arrests are initially avoided as suggested in the DGP's circular dated 13.10.10, it may succeed in nipping the problem in the bud, especially where there are no injuries on the victim and the crime complained about is not so grave, and it is not a repeated offence. It would also help the police officers in being sensitized to the philosophy that crimes arising from matrimonial disputes are of a different nature from regular crimes, and in such offences first an attempt needs to be made for bringing about reconciliation between the parties, and the

²⁸ Allahabad High Court

²⁹ 2005 Cri.L.J. 755

³⁰ 2009(65) ACC 781

accused are not to be arrested straight away unless the offence is of grave nature or there is likelihood of recurrence of violence.

When matrimonial disputes were settled amicably, as held by the Apex Court³¹ it is not in the interest of justice to continue the prosecution. The affidavit filed by the first respondent wife establishes that subsequently due to the intervention of mediators entire matrimonial disputes were settled amicably between the husband and wife and consequent to the settlement, she has no grievance against the petitioner and has no objection for quashing the proceedings. In such circumstances, it is not in the interest of justice to stand on technicalities and continue the prosecution.

The Courts³² in India are now normally taking the view that endeavour should be taken to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs such as, matrimonial disputes between the couple or/and between the wife and her in-laws. India being a vast country naturally has large number of married persons resulting into high numbers of matrimonial disputes due to differences in temperament, life-styles, opinions, thoughts etc. between such couples, due to which majority is coming to the Court to get redressal.

In its 59th report, the Law Commission of India had emphasized that while dealing with disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. Further it is also the constitutional mandate for speedy disposal of such disputes and to grant quick justice to the litigants. But, Courts are already over burdened due to pendency of large number of cases because of which it becomes difficult for speedy disposal of matrimonial disputes alone.

As the matrimonial disputes are mainly between the husband and the wife and personal matters are involved in such disputes, so, it requires conciliatory procedure to bring a settlement between them. Nowadays, mediation has played a very important role in settling the disputes, especially, matrimonial disputes and has yielded good results. The Court³³ must exercise its inherent power

³¹ *B.S. Joshi and others v. State of Haryana and another* (2003) 4 SCC 675)

³² Orissa High Court in *Anita Agrawala v. Santhosh Kumar Mohanty* 1997(1) OLR 487 & Karnataka High Court *H.S. Uma v. G.K. Samanth Arya* 1993(2) Kar LJ 529

³³ *Raghunath Prasad v. Urmila Devi & Another*, AIR 1973 All 203

under section 482 of Criminal Procedure Code³⁴ to put an end to the matrimonial litigations at the earliest so that the parties can live peacefully.

It is a well settled law that where the High Court³⁵ is convinced that the offences are entirely personal in nature and therefore do not affect public peace or tranquillity and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, pursuing prosecution would be waste of time and energy.

In *K. Srinivas Rao v. D. A. Deepa*³⁶ the Apex Court issued directions to all courts dealing with matrimonial disputes to settle all matrimonial disputes at first instance through the process of Mediation. The Supreme Court directed Family Courts and Criminal courts to refer parties to Mediation Centres to settle disputes through settlement under mediation. Mediation is an alternative process of resolution of disputes by trained mediators. The Supreme Court of India directed Family Courts in view of section 9³⁷ to make all possible efforts to settle matrimonial disputes especially in relation to maintenance, child custody etc. through the process of mediation and to refer parties to mediation centres with the consent of parties. The apex court observed that the family courts should endeavour settlement of disputes through the process of mediation even after the filing of failure reports by counsellors.

The Family Courts take the help of Counsellors in settling matrimonial disputes during the course of trial³⁸. The Court further observed that family court should set reasonable time-limit for the completion of the mediation process by the mediation centre so as to not cause any further delay in resolution of disputes by the family courts and observed that they may extend the time limit for mediation proceedings.

³⁴ Section 482 Of Criminal Procedure Code, 1973, Saving of inherent power of High Court-Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

³⁵ *Wasi Haider & Others v. State(Govt of NCT of Delhi) & Another* dt.08/04/2016

³⁶ (2013) 5 SCC 226

³⁷ Family Court Act, 1984

³⁸ Section 6 of Family Court Act, 1984

The Courts in India are now normally taking the view that endeavour should be taken to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs such as, matrimonial disputes between the couple or/and between the wife and her in-laws. India being a vast country naturally has large number of married persons resulting into high numbers of matrimonial disputes due to differences in temperament, life-styles, opinions, thoughts etc. between such couples, due to which majority is coming to the Court to get redressal. But, Courts are already over burdened due to pendency of large number of cases because of which it becomes difficult for speedy disposal of matrimonial disputes alone.

The inherent powers of the High Court ought to be exercised to prevent the abuse of process of law and to secure the ends of justice. The incorporation of inherent power under section 482 of Criminal Procedure Code, 1973 is meant to deal with the situation in the absence of express provision of law to secure the ends of justice such as, where the process is abused or misused; where the ends of justice cannot be secured; where the process of law is used for unjust or unlawful object; to avoid the causing of harassment to any person by using the provision of criminal procedure code, or to avoid the delay of the legal process in the delivery of justice.

Mediation under Legislations

Legislations and Legislative provisions related to settlement of matrimonial dispute are Hindu Marriage Act, 1955, Special Marriage Act, 1954, Family Court Act, 1984, Civil Procedure Code, 1908, Legal Service Authority Act, 1987. The concept of resolution of dispute through arbitration, mediation, conciliation and negotiation was institutionalized by Legal Services Authority Act. The said Act³⁹ provides for holding Lok Adalats where disputes are pending in courts of law.

The concept of family Court implies an integrated broad based service to families in trouble, to preserve the family and to help stabilize the marriage. The family Court system visualizes laying down a less formal procedure, where legal technicalities and technical procedures are not to be followed, to do away with the traditional adversary or fault oriented approach. The aim should be to provide dignified means for parties to reconcile their differences and to reach amicable settlements without the need for

³⁹ The Legal Services Authority (Amendment) Act, 2002 provides for a radical change.

trial; help avoid frivolous litigation; encourage pre-trial negotiation and settlement.

The main object of the Act⁴⁰ to provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage & family affairs and for the matters there with. Though the Family Courts Act, 1984 was conceptualised within a simplistic premise of speedy settlement or reconciliation, currently in metropolitan cities, the litigation has become extremely contested and involves high economic stakes. Matrimonial litigation in metropolitan cities is becoming extremely complex and extends far beyond the premise of speedy settlement or reconciliation⁴¹.

Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are pre eminently fit for mediation. Section 9⁴² of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties.

The law is well-settled that question as to whether a statute is mandatory or directory depends upon intent of the Legislature and not on the language in which the intent is clothed. The meaning and the intention of the Legislature must govern and

⁴⁰ Family Court Act, 1984

⁴¹ Flavia Agnes, Family Law Vol. II, Marriage, Divorce, and Matrimonial Litigation, Oxford Publication Page.319

⁴² Duty of Family Court to make efforts for settlement. -

- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, 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. -(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, 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 a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.
- (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.

these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, design and the consequences which would follow from construing it the one way or the other

Where the family Court does not direct parties for reconciliation the ultimate decision of the Court either way is not rendered invalid for non-compliance of the provisions of Section 9 of the Family Court Act, 1984. Therefore, the provision is neither 'mandatory' nor directory but casts an onerous duty on the Court to make a sincere endeavour for settlement to save the estranged couple breaking away from the company of each other.

In the case of *S. Thankikodi v. Ramuthayee*⁴³, the Court while dealing with the matrimonial cases, according to section 23(2) of Hindu Marriage Act, 1955 casts a duty on the Court in the first instance to bring about reconciliation between the parties in the matrimonial cause. But according to the Court, it is only when the Court finds that there may be some chance of saving the marriage that the Court would try to make a rapprochement and not otherwise.

Hindu Marriage Act, 1955, Section 23(2) & (3) provides "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 to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties." In view of this provision⁴⁴ of law, it is the duty of the trial Court to make every endeavour to bring about reconciliation between the parties. This duty is to be performed consistently with the nature and circumstances of the case. The object behind this provision is to provide all help in the maintenance of marital ties and restoration of peace to the estranged couple. Emphasis is, however, laid that steps for bringing about reconciliation between the parties should be taken by the Court "in the first instance." In other words, the endeavour should be made right from the start of the case. This does not, however, mean that the attempt for bringing about reconciliation can be made only at the initial stage of the case and not at any later stage. The effort in that direction should be made by the court whenever the circumstances of the case warrant it to do so.

The Hon'ble Supreme Court of India has pronounced a landmark decision "*Salem Advocate Bar Association, Tamil Nadu v. Union of*

⁴³ AIR, 1986 Madras 263

⁴⁴ Section 23(2) of Hindu Marriage Act, 1955

*India*⁴⁵, where it held that reference to mediation, conciliation and arbitration are mandatory for court matters. This judgment of the Supreme Court of India will be the real turning point for the development of mediation in India. But the growth of mediation should be carefully moulded so that the system gains the faith and recognition of the litigants.

Conclusion

It is seen that in court-administered schemes, matrimonial disputes form a major portion of cases referred to mediation. Society, therefore, needs mediators in this field who can bring sensitivity and empathy to the handling of the dispute and help parties find solutions to the problem of breakdown of intensely personal relationships. Parties will come soon to realise that the mediation process far outweighs the other methods of dispute resolution and will take recourse to it earlier than later.

It is in the interest of the stability of the society that marriages are not to be easily broken and disrupted. It is in the interest of public policy to maintain the continuance of matrimonial relations and to prevent, as far as possible, disruption of the same, at the instance of any of the parties to a marriage. This method of dispute resolution not only save time but also diminish the acrimony and estranged relationships resulting from litigation. Mediation has found rising popularity in India, especially in case of marital disputes.

In the marital proceedings the entire purpose of relief is annulled if it is delayed physically and emotionally the parties are wrecked with little or no chances of remarriage . To preserve future relationships alternative dispute resolution mechanisms are preferred and it should be the solution for peace. It was so upset situation that the alarming rise in divorce cases in recent years, but mediation offers a glimmer of hope for many couples to resolve their disputes. It is our responsibility to protect marital relationships through advisory and conciliation services.



⁴⁵ (2003) 1 SCC 49