



**Judicial process in Matrimonial Proceedings -
ADR methods - Arbitration - Conciliation - Mediation - Negotiation -
Judicial Settlement**

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NEED FOR ALTERNATIVE DISPUTE RESOLUTION (ADR) IN MATRIMONIAL PROCEEDINGS

- In India owing to its huge population and pendency of cases before the courts it was incumbent to explore the possibilities of ADR to provide easy access to judicial system and for speedy disposal of the cases. The ADR process is based on Article 14 and 21 of the Constitution of India. The right to speedy trial has been held to be a part of right to life or personal liberty by Supreme Court in *Hussainara Khatoon vs State of Bihar* (1980) 1 SCC 81
- In ancient India also the disputes between clan members were resolved by the heads of the family and clan. Also the village panchayats used to adjudicate the disputes/differences between the residents of the villages. Many changes took place during British rule which laid the foundation of ADR including the earlier Arbitration Act.
- The benefits of ADR include amicable settlement of disputes, speedy disposal of cases, economical settlement of disputes, time saved in courts, ADR has legal recognition and can be enforced.

Statutory Provisions for ADR in India

- Section 9 of The Family Courts Act 1984 cast a duty on family court to make efforts for settlement.
- Order XXXII- A Rule 3 of Code of Civil Procedure, 1908 (“CPC”) prescribes that it is duty of court to make efforts of settlement in proceedings relating to matters concerning the family.
- Section 89 of the Code of CPC provides that wherever it appears to court that the matter can be settled the same should be referred for possible settlement through arbitration, conciliation, judicial settlement including Lok Adalat or mediation.
- Order X Rules I-A, I-B, and I-C C.P.C. provides for procedure of Settlement of Disputes outside court.
- Order XXIII Rule 3 C.P.C. allows the court to pass a compromise decree when the matter is settled between the parties.
- The Arbitration and Conciliation Act, 1996 provides for Arbitration and Conciliation.
- The Establishment of Lok Adalat under The Legal Services Authority Act, 1987 prescribes mediation, conciliation and informal settlement of disputes in litigation.
- Sections 23 (2) and 23 (3) of the Hindu Marriage Act and Section 34 (3) of the Special Marriage Act provides for reconciliation of the disputes between the parties.

Duty of Court under Family Courts Act 1984

Section 9 provides that it is the 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.

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.

The family courts on a regular basis refer the family disputes to mediators so that the parties can attempt for an amicable settlement of the disputes. The statements and facts mentioned before the mediator can not be relied upon before the court while adjudicating the matter on merits so that the parties are free before the mediator to explore possibilities of an amicable settlement.

Section 89 CPC

- The provision under Section 89 CPC is an attempt to bring about resolution of disputes between parties, minimize costs and reduce the burden of the courts and aims at bringing the alternate dispute mechanism to the centre of the Indian Judicial System. The long-drawn process of litigation, the costs incurred by both parties for the same and limited number of adjudicators have made Alternate Dispute Resolution an important aspect of the Judicial system to ensure swifter and speedier justice. Section 89 of the Code of Civil procedure was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In countries all over the world, especially the developed few, most of the cases (over 90 per cent) are settled out of court. The case/ dispute between parties shall go to trial only when there is a failure to reach a resolution.
- Section 89 of the Code of Civil Procedure States that:
 - (1) Where it appears to the court that there exist elements of a 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 observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for (a) arbitration; (b) conciliation (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.
 - (2) Where a dispute had been referred- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act. (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat; (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (d) for mediation, the court shall affect a compromise between the parties and shall follow such procedure as may be prescribed.

Section 89 CPC

- Section 89 came into being in its current form w.e.f. 1st July 2002 on account of the enforcement of the CPC (Amendment) Act, 1999. At the commencement of the Code, a provision was provided for Alternate Dispute Resolution. However, the same was repealed by the enactment of the Arbitration Act (Act 10 of 1940) under Section 49 and Sch. 10. The old provision had reference only to arbitration and its procedure under the Second Schedule of the Code. It was believed after the enactment of the Arbitration Act, 1940, the law had been consolidated and there was no need of Sec 89. However, the Section was revived with new alternatives and not only restricted to arbitration. A new Section 89 came to be incorporated in the Code by Section 7 of the CPC Amendment Act, 1999 to resolve disputes without going to trial and pursuant to the recommendations of Law Commission of India and Malimath Committee report. Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-Section (1) refers to the different mediums for alternate resolution and subsection (2) refers to various Acts in relation to the mentioned alternate resolutions.
- The decision of the forums specified under Section 89 shall be as effective, having same binding effect, as court orders/decrees and arrived at a relatively cheaper cost and within a short span of time.
- The legal position with regard to ADR practices was cleared in the case of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. Arbitration was referred to as a means of ADR. Same is undertaken on account a prior agreement between parties to resolve disputes by arbitration or by filing an application/joint memo before the court. The latter occurs in the case of no arbitration agreement beforehand. The award of the Arbitrator, the presiding officer, is binding as a decree of the court or any settlement arrived at by parties during arbitration proceedings shall also have the same effect.
- The Code of Civil Procedure (Amendment) Act, 1999 also amended a new Section 16 in the Court Fees Act, 1870 which states the following:
 - Refund of fee: Where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908 the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

Order XXXII of CPC

- The proceedings under the Hindu Marriage Act and the Special Marriage Act in India are regulated by CPC. The proceedings of family matters are regulated by Order 32 of CPC which provides that it is duty of court to make efforts of settlement in proceedings relating to matters concerning the family.
- The provisions of Order 32 are akin to sections of Family Courts Act. It includes the following matters:
 - a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person;
 - (b) a suit or proceeding for a declaration as to legitimacy of any person;
 - (c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;
 - (d) a suit or proceeding for maintenance;
 - (e) a suit or proceeding as to the validity or effect of an adoption;
 - (f) a suit or proceeding, instituted by a member of the family relating to wills, intestacy and succession;
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 - (g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law .
- Further Order 32 Rule 3 provides that it is the Duty of Court to make efforts for settlement in every suit or proceeding to which this Order applies and 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 if in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties.

Lok Adalat system under the Legal Services Authority Act, 1987

- The Legal Services Authorities Act, 1987, as per its preamble, was enacted as “An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are made available to all citizens and not denied to anyone by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on basis of equal opportunity. Under Chapter VI of the Act, authorities may organise Lok Adalats (Settlement Courts) at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. Generally, the Lok Adalat consists of serving or retired judicial officers and other persons of eminence, specified by the respective government in consultation with the judiciary. Over the passage of time, such Lok Adalats have become a popular mode for informal settlement of civil disputes of all nature.
- A lot of cases are settled under the Lok Adalat camps organised by various courts. Many matrimonial disputes are also settled under lok Adalat mechanism. As the name suggests the Lok Adalat is meant for people’s court at large and is organised to settle the disputes including matrimonial disputes. The disputes settled under Lok Adalats have legal sanctity and being a consent decree the same is difficult to be challenged in higher courts.

Arbitration and Conciliation Act 1996

- Arbitration generally is now a prevalent practice in the Indian civil jurisdiction. Because of the significant backlog of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first enactment on arbitration was The Arbitration Act, 1940. Other supporting legislations were The Arbitration (Protocol and Convention) Act of 1937 and the Foreign Awards Act of 1961. Arbitration under these laws was effective and led to further litigation as a result of rampant challenge of the awards rendered. The Parliament thus enacted The Arbitration & Conciliation Act, 1996 to make arbitration effective in India. The act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation.
- Under the 1996 Act, an arbitral award can be challenged only in the manner prescribed and on few limited grounds thus restricting the intervention of appellate courts. India is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
- The 1996 Act also includes conciliation, which is a form of mediation. Many dispute resolution clauses includes conciliation as a step prior to initiating arbitration. Therefore few disputes are finally resolved at the conciliation stage. Therefore Arbitration and Conciliation is a popular mode of dispute resolution in civil disputes and commercial agreements invariably contain an clause including conciliation and arbitration which is an effective means of ADR in India.

Judicial Settlement under Indian Family Law Statutes

- Reconciliation is mandatory under The Hindu Marriage Act, 1955 (HMA) and The Special Marriage Act, 1954 (SMA). However, other Indian matrimonial statutes do not provide for it and there is therefore no statutory mandate to attempt settlement in other cases.
- Reconciliation is provided under Section 23(2) and section 23(3) of The Hindu Marriage Act. Section 23 (2) HMA states that before proceeding to grant any relief under it, there shall be a duty of the court in the first instance, in every case to make every endeavour to bring about reconciliation between parties where relief is sought on most of the fault grounds for divorce specified in Section 13 HMA. Section 23 (3) HMA makes a provision empowering the court on the request of parties or if the court thinks it just and proper to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation. It must be borne in mind that a Hindu Marriage is a sacrament and not a contract. Even if divorce is sought by mutual consent, it is the duty of the court to attempt reconciliation in the first instance.
- The provisions of Sections 34 (2) and 34 (3) of the Special Marriage Act (SMA) are *pari materia* to the provisions contained in Sections 23 (2) and 23 (3) of the HMA. Even though the marriage contracted under the SMA does not have the same sacramental sanctity as marriage solemnized under the HMA, the Indian Parliament in its wisdom has retained the provisions for reconciliation of marriages in the same terms in the SMA as they exist in the HMA.
- In the past there have been distinguishing judgments regarding the waiver of six months period between first motion and second motion for grant of divorce by mutual consent under the Hindu Marriage Act. It is clear that the courts are focusing on the settlement of matrimonial disputes by way of mutual settlement between the parties. The adjudication of matrimonial disputes on merits involves a considerable period of time running into many years which destroys the institution of marriage. The parties should not be forced to stay in a wedlock from which none of the parties derives peace and satisfaction.