

Efficacy of Alternative Dispute Resolution Mechanism with Respect to Matters Pertaining to Child Custody: An Overview

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Abstract

India is a sovereign, socialist, secular, and democratic republic country wherein the citizens are not governed by any single personal law. The citizens possess the freedom to practice and preach their own religious values and faith, and to also abide by their own personal norms and traditions. Given such a rich and diverse population with different geographical attributes, it becomes difficult at times to resolve the disputes arising out of the private sphere, i.e., within a family or between spouses especially when it relates to their child. It is observed that the decision-making process with respect to family laws including matters like divorce, maintenance, custody of children, etc., involves a plethora of self-adjudicatory mechanisms such as mediation, conciliation, and settlement which aid and facilitate the aggrieved parties and the adjudicators to reach a desired result. Over the past few years, the application of the rules of ADR and their applicability to such situations has raised a series of questions concerning the custody of children and their welfare. Based on the following approach, the research paper explores the nuances of the applicability of these alternate dispute resolution mechanisms in real-life cases related to child custody, and analyses the various struggles faced by the parties while undergoing such forms of alternate dispute resolution mechanisms for resolving their disputes. The research paper proposes the outlook of humans as change agents instead of sufferers, and to that end examines the alternate dispute resolution mechanism in contrast to the Indian legal provisions especially in India for the necessity of observance of peaceful settlement of disputes in matrimonial cases.

Keywords: Alternate dispute resolution, child custody, family matters, personal law

INTRODUCTION

"Discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time"

—Abraham Lincoln

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India is a country with people belonging to different cultures, ethnicities, races, and religious beliefs. In such a rich and diverse nation, resolving the disputes arising out of the private sphere, i.e., within a family or between spouses, is not at all an easy task. The reasons are twofold. Firstly, the people abide by and are governed by their personal laws to an extent, and secondly, the legal enactment also varies from person to person and place to place. However, in order to execute this complicated task, India has adopted the system of family courts to specifically deal with problems arising out of personal or family disputes such as dissolution of

marriage, maintenance, custody of children, etc. The structure of family courts also takes into account any means by which the parties to such disputes can freely express their will and come to an amicable settlement. This is where ADR or alternative dispute resolution comes into play with special emphasis on arbitration, mediation, conciliation, and counselling. The conciliation process is very valuable since it makes settlement easier. Reconciliation attempts are required by a number of personal law statutes in India. Section 34(2) and (3) of the Special Marriage Act 1954, is *pari materia* with Section 23(2) and (3) of the Hindu Marriage Act, 1955. The Preamble and Section 9 of the Family Court Act of 1984 casts a duty upon the court and make it a mandate for them to make attempts to reach a settlement. Section 89 and Order 32A Rule 3 CPC which were added in response to suggestions made by the law commission also provide for the peaceful settlement of disputes without protracted and contentious court proceedings.

However, due to various factors, which are discussed hereinafter in the paper, the working of family courts in our country and the ultimate dispute resolution mechanism dealing with matters pertaining to family law experience certain difficulties on a day-to-day basis.

LAWS GOVERNING CHILD CUSTODY IN INDIA

Indian laws are based on English statutes when it comes to matters related to matrimonial relationships. The equivalent provisions of the Matrimonial Causes Act, 1950, are practically verbatim copied in Section 26, Hindu Marriage Act, 1955, and Section 38, Special Marriage Act, 1954. The Parsi Marriage and Divorce Act, 1936, and the Divorce Act, 1869, both reflect the English law that was in effect at the time. The Indian courts, following English precedents, have tried to make the legislation more in line with social demands and situations in respect to matters concerning divorce, maintenance, child custody, etc.

Generally, an order pertaining to a child often expires when he reaches majority. Section 26 of the Hindu Marriage Act, 1955 vests the power in the court to issue interim orders and establish arrangements on the custody, maintenance, and education of young children according to their wishes upon application by the parties to the dispute. Upon application from either party to the proceedings, the court may also from time to time cancel, suspend, or modify any such orders previously made by it [1]. Section 38 of the Special Marriage Act is substantially identical to Section 26 of the Hindu Marriage Act, 1955.

Section 49 of the Parsi Marriage and Divorce Act, 1936, which deals with this matter, runs as “In any suit under this Act, the court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children under the age of (eighteen years), the marriage of whose parents is the subject of such suit, and may, after the final decree upon application, by petition for this purpose, make, revoke, suspend, or vary from time to time all such orders and provisions with respect to the custody, maintenance, and education of such children as might have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending [2].”

The Divorce Act deals with interim matters related to custody, etc. in Section 41 and matters related to permanent custody, etc. in Sections 42 and 44, respectively. The substance is substantially the same as that of the Parsi Marriage and Divorce Act, 1936. However, the Act does not deal with matters related to custody in the restitution of conjugal rights litigation.

Nevertheless, orders in respect of children under all statutes can be made up to the age of eighteen years. No court has the authority to order custody in cases where the child has attained the age of majority. While the court has the authority to make decisions regarding the children of the parties to the proceedings under the Hindu Marriage Act and the Special Marriage Act because these statutes do not

qualify the word ‘children’ with the phrase ‘the marriage of whose parents is subject’ to the proceedings, these statutes do under the Divorce Act and the Parsi Marriage and Divorce Act, 1936.

JURISDICTION OF FAMILY COURTS IN CASES ARISING OUT OF MATRIMONIAL RELATIONSHIPS

The family courts are civil courts that exclusively deal with cases involving the dissolution of marriage, the determination of a person’s marital status, the ownership of the parties’ respective properties, interim orders of injunction arising from matrimonial relationships, the presentation of a person’s authenticity, the appointment of a guardian, the authority or custody of a minor, and suits for maintenance. The family courts entertain applications for the grant of a decree of divorce under various acts like the Dissolution of Muslim Marriage Act, 1939, the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Parsi Marriage and Divorce Act, 1936, the Divorce Act, 1869, the Special Marriage Act, 1954, Foreign Marriage Act, 1969, etc. The family courts have jurisdiction over any issue between spouses in a marriage, regardless of the parties’ caste, religion, or legality of the union. The family courts will exercise jurisdiction in matters relating to custody, etc. only if they have jurisdiction in the main petition. The family court is given a lot of discretion and authority in order to exercise this jurisdiction. It is empowered to make any decision regarding the well-being of children. Children’s welfare is the most important factor in any procedures involving them [3], while the court may also take into account things like the child’s wishes, age, and sexual orientation as well as the parent’s fitness for custody. The wishes of the youngster can be ignored only if it is in the child’s best interests [4].

ALTERNATE DISPUTE RESOLUTION IN INDIA

Family laws envisage arbitration in matrimonial disputes. Over the past three decades, its facilitation has gained significance and has contributed to lessening some of the hostility that surrounds divorce and child custody disputes. However, more could be done to promote the use of alternate dispute resolution (ADR) in family law processes. An effective way of incorporating ADR mechanism for resolving disputes related to child custody is to include a pre-litigation mediation/counselling at initial stage. Since at this point, the parties are not at extreme ends and may be willing to work on their relations. If guided properly, various vague allegations can be eliminated and issues that are merely ego-based can be resolved. Several positions could be filled by current family law practitioners, including those of mediator, advocate during mediation, collaborative negotiator, arbitrator, and advisor over which process to implement. It has become crucial to have knowledge of these various positions, as well as the talents and moral dilemmas that go along with them [5].

Arbitration

Arbitration is a process where a panel of arbitrators decides on a decision (an award) that will be binding on all parties to the dispute. It is a private, largely informal, non-judicial preliminary dispute resolution approach. The concept of arbitration has four requirements: an expression of comprehension, an inquiry, a referral to an outsider for assurance, and an act of courtesy by the outsider.

The fact that it is a discussion chosen by the parties with the intention that, it must act legally after taking into account the relevant evidence in front of it, and the parties’ accommodations are the embodiment. As a result, the process is not arbitration if the panel’s decision is not subject to judicial review or has no further legal consequences.

Mediation

Through the mediation process, the parties work together to find a resolution that is agreeable to all of them. The mediator is an impartial third party who is external to the conflict. The main goal of mediation is to give the parties a chance to negotiate, debate, and thoroughly assess all of their options with the assistance of an impartial third party before deciding whether or not a settlement is feasible. Mediation is an exchange done with the help of an outsider. The arbitrator, as opposed to the mediator or judge, has no capacity to force an outcome on disputing parties. The primary distinction between the

police, the judge, and the mediator is that the police are trained to lay out or support a charge, the judge is expected to concentrate on right or wrong behaviour, whereas the mediator's role is to restore equilibrium and maintain objectivity throughout [6].

The involvement of a mediator alters the dynamics of negotiations [7]. The idea of intercession is not unfamiliar to the Indian lawful framework, as there existed, various parts of mediation. The village panchayats and the Nyaya panchayats are genuine models for this. A concise examination of the laws relating to mediation shows that it has been to a great extent limited to business exchanges. The Arbitration and Conciliation Act, 1996, is encircled in such a way, that it is concerned for the most part with business exchanges that include the basic man instead of the normal man's advantage. When it comes to the government or other institutions, there is a lack of action to support and raise awareness among the general public.

Conciliation

Conciliation is "a procedure where an impartial individual meets with the parties to a question which may be settled; a moderately unstructured strategy for debate goals wherein an outsider encourages correspondence between parties trying to help them settle their differences" [8]. This entails an effort by a third party, chosen by the parties in conflict, to sort their differences either before they resort to prosecution (in court or through mediation), or thereafter. Conciliation efforts frequently start by showing both sides the opposing sides of the conflict in an effort to bring them together and find a resolution [9].

The 1996 Act's Section 61 addresses the resolution of disputes arising out of legal relationships, whether contractual or not, as well as any connected procedures. There can be no argument against preventing the parties from reaching a conciliation agreement for the resolution of even future problems after it is enacted. Conciliation and mediation can be contrasted in a straightforward manner. While in contemplation, the outsider, unbiased middle person, named as the go-between assumes an increasingly dynamic job by giving autonomous trade-off equations in the wake of hearing both parties; in pacification, the third non-partisan delegate's job is to unite the gatherings in a temper to overlook their hatreds and be set up for a worthy trade off on terms halfway between the stands taken before the beginning of assuagement proceedings [10].

Negotiation

The most well-known strategy for opposing aims is negotiation with the intention of influencing. It has the advantage of letting the parties themselves manage the process and the arrangement, in contrast to forms that use an outside party to amicably settle the dispute. "The essentials of negotiation are:

- It is a communication process;
- It resolves conflicts;
- It is a voluntary exercise;
- It is a non-binding process;
- Parties retain control over outcome and procedure [11]."

By negotiation, it may be possible to maximise shared benefits and reach a broad range of resolutions. No legal recognition of negotiation exists in India. The parties decide on their own direction as to what they want to accomplish. It is a process that is guided by an anticipated example rather than having any set rules.

Lok Adalats

Lok Adalat was a memorable need in a nation, like India, where a lack of education overwhelmed different parts of the administration. When it was originally implemented in Gujarat in 1982, the Lok Adalat was officially launched. This ADR mechanism's development was a step towards reducing the

heavy burden that courts face from unresolved cases. It was the culmination of concepts related to social equality, practical equity, placated outcomes, and organising endeavours.

It is an appropriate elective instrument to determine questions instead of a suit. Lok Adalats have accepted legal acknowledgement under the Legal Services Authorities Act, 1987. The State Legal Aid and Advice Boards, with the support of the District Legal Aid and Advisory Committees, consistently take care of these settlements and resolve these matters [12].

CONCILIATION AND COUNSELING UNDER FAMILY COURTS ACT

The term “conciliation” intends to achieve a rapprochement or settlement between parties. It is a procedure where an outsider helps the gatherings determine their questions by agreement [13]. It is a trade-off settlement with the help of a conciliator. It is viewed as a more significant level undertaking, and requires capability and capacity of high request, including the ability to rehearse the circumstance accurately and afterwards persuade the parties for a settlement. Litigation does not generally prompt a palatable outcome. It is costly as far as time and money are concerned. [14]. Its antagonistic nature does not change the outlook of the parties, and it winds up being sharp. The upkeep of harmony and amicability is the foremost thought in settling custody questions [15].

Conciliation and counselling are the uncommon and novel highlights of the Family Courts Act, 1984. The Family Courts Act endorses conciliation with the prevailing reasons of ‘protecting the foundation of marriage’ and ‘advancing the government’s assistance to kids’. The announcement of articles and motivations to the Act peruses: “That family courts be set up for the settlement of family debates where accentuation ought to be laid on placation and accomplishing socially alluring outcomes”. In the arrangement of judges, the Act indicates that “each attempt will be made to guarantee that people focused on the need to safeguard and promote the establishment of marriage and to advance the government’s assistance to youngsters are selected” [16].

Family courts have a responsibility to encourage the parties to resolve their issue amicably in the first instance. Additionally, they have been given the authority to adjourn the case for any reasonable amount of time if there is a plausible chance of reaching a settlement [17]. A similar provision has been made under Section 2(3) of the Special Marriage Act, 1954.

The 129th report of the Law Commission of India also mentions the fact that all courts, after framing the issues in the case, should appertain the dispute to arbitration, conciliation, mediation, or negotiation for resolution before any proceedings can be continued. This is so because child welfare is of paramount consideration and a child needs the support of both parents to grow and establish himself as a responsible human. Even if custody is sought on the basis of divorce or otherwise, it is the duty of the court to attempt reconciliation in the first instance.

In the case of *Bini v. K.V. Sundaran*, the High Court of Kerala had to decide on a novel issue, namely whether conciliation is required after the Family Courts Act, 1984, has been implemented, even on the exempt grounds of leprosy, venereal illnesses, and conversion to a different faith. The Family Courts Act of 1984 was deemed a unique statute by the High Court, and its clauses requiring an initial attempt at reconciliation were upheld. The court observed:

“The parties can disagree on matters of faith and still lead a happy marital life if they can be convinced that matters of faith should not stand in the way of the union of hearts. Thus, though under the Hindu Marriage Act, 1955, no endeavour for reconciliation needs to be made in a petition for divorce on the ground 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 also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make an endeavour for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, 1984, which is a special statute.”

The court further said that “the primary objective is to promote and preserve the sacred union of parties to the marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement or disagreement may be made by way of settlement [18]”.

In *Gaurav Nagpal v. Sumedha Nagpal* [19], the Supreme Court noted that efforts should be made to mediate disputes and reduce communication gaps so that individuals do not hasten to the courts.

In another instance, the High Court of Allahabad ruled that the Family Court had a legal obligation to undertake conciliation before starting the case’s proceedings [20]. In the relatively recent case of *Aviral Bhatla v. Bhavana Bhatla* [21], the Supreme Court supported the case’s resolution through the Delhi Mediation Center, praising the efficient way in which the Delhi High Court’s mediation centre assisted the parties in reaching a settlement.

It is reasonable to infer from a combined reading of the given judgements that there is an increasing emphasis on the need to attempt mandatory reconciliatory measures, and the superior Indian courts have intervened where matrimonial courts have failed to uphold their obligations to do so. As a result, there is a developing body of law that is adapting to out-of-court settlement and reconciliation rather than divorce court litigation. However, the performance of this mandatory exercise ought not to be reduced to an empty ritual or a meaningless exercise. Otherwise, the utility of the beneficial provision will be lost.

ADVANTAGES OF ADR MECHANISMS IN CASES OF CHILD CUSTODY

Resolving a child custody dispute through an ADR mechanism has certain benefits over resolving disputes in court, such as that a child will feel more secure about his parents’ relations as mediation will assist them in working on their family problems. In an out-of-court settlement, parents are in the best position to decide the needs of their children, which can help parents develop trust in each other. It can assist in avoiding costly and lengthy court hearings. Lastly, a plan for the custody of the child and his wellbeing that is devised by the parents with the assistance of a mediator, will have better results than the one that is imposed by the courts, as the parents will be well aware of their circumstances [22].

In the case of *Sangeetha v. Suresh Kumar* [23], the Hon’ble Supreme Court noted the need for settlement in matrimonial disputes and urged the parties to work towards a conciliation procedure, put aside their differences, and begin anew in their marriage while bearing in mind the welfare and interests of their child. The Hon’ble Supreme Court has also stated that “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 gained legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this country through various mediation centres” [24].

One of the major reasons that parties tend to avoid mediation processes is their unawareness of the authority and efficiency of ADR mechanisms. When it comes to resolving disputes through an authority, it is believed that courts have the final and binding authority.

Since in matters related to child custody, the welfare of the child is the paramount consideration [25]; it is not considered who is right or wrong but who can look after the best interest of the child and whether the person claiming the guardianship of the child has the welfare of the child in mind. Thus, mediation and other ADR mechanisms in such matters can help resolve the dispute faster and save the parties and the child from the emotional trauma faced at regular court hearings.

CONCLUSION

The number of family courts around the nation has increased significantly. There is much to be done regarding the training, roles, and responsibilities of the counsellors working in the many family courts

across the nation for the Family Court Act to achieve the desired impact of resolving family issues in a peaceful manner. It is important to look into more ADR system facilitation options, some of which require additional legislation for success. A single law that alone governs the alternative dispute resolution system is desperately needed in India. In essence, parties choose the mediation courts, for which the specific high courts have their own norms and regulations. For this, the mediation procedure, be it private or court-associated, would require reasonable certification by the chamber and the legitimate authority. It is necessary to draft appropriate guidelines for the selection of the mediator and the mediation process. In addition to this, counselling should be encouraged to equip the couple to cope with the different stresses and situations that arise in the institution of marriage. Recourse to the judicial process should be the last resort. Lawyers may also make an effort to convince their clients to reach a settlement amicably, and ADR may be made more well-known so that litigants are aware of its availability. Instead of relying on traditional courts, social workers and NGOs can contribute by raising awareness about the need to create the appropriate forums and conduct ADR processes. Hence, the time has come to make people understand the effectiveness of alternate dispute settlement mechanisms.

One can only hope that by means of the ADR mechanism and keeping in mind the need for the urgent raptness of the steps and measures required in India towards the resolution of matters pertaining to child custody, the adjudicatory mechanism will become more transparent, approachable, and less cumbersome for the couples as well as the family members already grappling with adversity.

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