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DIVORCE DISPUTES - MEDIATION AND ARBITRATION

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Expenses, delay, mental and emotional draining are the negative effects of adversarial adjudication in divorce litigation. Mediation helps the couple to generate their own consensual settlement of divorce disputes. Mediation though not absolutely binding but withdrawal of consent may be impermissible. Arbitration in divorce disputes is having more legal teeth than mediation and the decree passed by the arbitrator based on agreement is mostly legally binding. Arbitration follows stricter consensual model and adopts adversarial system considerably but it is more confidential, flexible and less formal. When mediation and arbitration fail then only the permutation of both, med-arb comes into picture. It is a hybrid dispute resolution. Alternative Dispute Resolution processes like mediation/ arbitration/ med-arb in divorce cases are less adversarial, faster, cost-effective, informal, confidential, flexible and better result oriented than the traditional court setting.

INTRODUCTION

"Divorce has become the golden key to legal cage of marriage" quotes Prof Kusum in her Family Law Lectures[1]. The term divorce emanates from the Latin word '*divortium*' meaning "a severance of the marriage tie"[2]. It is a legal cessation of matrimonial togetherness. Letourneau, the eminent Anthropologist, has explained "divorce as an institution is the final milestone in the process of freeing the woman from slavery of man in marital relationship"[3].

A famous scholar Derrett in his critical analysis[4] of modern Hindu Law remarked that the provision for divorce was incorporated in the Hindu Law to save the ill-fated women from ill treatment. Parliamentarians have never intended to give husbands the privilege to enjoy matrimonial variety at their discretion as long as they could engage their lawyers.

However, in the postmodern highly developed societies of industrial era divorces dominate more than marriage. In this context it has also been stated that divorce should be stopped as it destroys families and "costs a great deal in human sufferings"[5]. A vacation Bench of the Supreme Court Justices Arijit Pasayat and G.S. Singhvi observed Hindu Marriage Act 1955 to be the very basis of the hike in marital breakdown. Expressing concern over the cornucopia of divorces the Bench sarcastically remarked – "when a marriage takes place the respective spouses keep the divorce petition ready anticipating breakdown"[6].

Since the time marriage has become more clement any volatility in it has drawn for extreme retribution of divorce. However, marital breakdown on flimsy grounds cause more trouble than rectifying any. According to Thomas E. Carbonneau, the adversarial adjudication process is based on "the limitations of semantics, the fallibility of memory, the will to prevaricate, all contribute to unpredictability and uncertainty"[7]. Expense and delay are the negative effects of litigation and this process can also be mentally and emotionally draining. As regards the emotional disturbances faced by the spouses during judicial proceedings, court can neither revert the damages caused nor can force the spouses to build up more affirmative attitude. Moreover, the after effect of divorce is highly disturbing for a child. A child facing such parental separation suffers from short term ramifications like depression, anxiety, uncertainty, impractical expectations as well as long term problems leading to personality disorders, poor academic conduct and complications with opposite sex[8]. Therefore, it must be understood that neither divorce is the panacea for all problems nor is it the only vehicle to dispense justice and should be resorted only when the conjugal bond is unbearable. In this context the spouses should be given opportunity to pursue them, to realise their emotional crisis squarely, to allow them to shoulder responsibility and thereby to achieve more sensible understanding about their earlier relationship rather than "a quest for emotional retribution, transforming marriage dissolution into a bittersweet means of prolonging a painful relationship"[9]. The researcher in this project argues that recourse to adversarial proceedings alternatives like mediation or arbitration should be tried first and even when coercive control is needed judges may act as arbitrators and thus the intense emotional substratum of this human dispute could be responded logically.

MEDIATION AS AN ATLERNATIVE TO LITIGATION

In order to make the highly turbulent marriage less disruptive and more free-flowing without resorting to divorce, the alternative dispute resolution (ADR) has become new vitality to the already decaying union. ADR is seen as a new perspective to conflict management intended to resolve familial upheavals peacefully and to make what Chief Justice Burger observed: "The obligation of our profession is... to serve as healers of human conflicts"[10]. It is this "human conflict" mediation intends to resolve without any long drawn legal verbose.

Thus two individuals contemplating divorce can seek advice from one or more others i.e. "mediators "to resolve the conjugal crisis. According to Webster law dictionary mediation is "intercession of one power between of powers at their invitation or consent to arrange amicably differences between them"[11]. The couple in divorce mediation may need a number of mediators specialized in specific fields. The reason why mediation has become this popular is because mediators effectively convert the "you or me" frame of mind to "you and me" or "we" frame of mind and putting forth solutions beneficial to both the parties without risking separation or leading to consensual separation[12]. Mediation helps the parties to engage with the knowledge of a neutral professional who can negotiate and push the couple towards generation of their own settlement[13]. Children suffering from familial breakdown may benefit from such mediation as the parents are drawn towards the needs and interest of children and also to the reason why the choice of divorce might be wrong[14].

Lincoln once said "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser— in fees, expenses and waste of time"[15]. Lincoln as a lawyer recognized it long ago that though rules of law is the foundation of civil society however it should be used as a last resort. That is exactly what we mean by mediation/arbitration and Med-Arb today.

Divorce mediation is a simplistic non-therapeutic process whereby parties through a neutral resource try and isolate their points of agreement and disagreement. Explore alternatives and find a conclusive compromise to their divorce battle peacefully. Mediation is a process of consensual settlement of conflict that gives back the parties to drive their own lives either to hold the hull and sail the ship or to release the hull and let the ship drown. It is a highly private dispute resolution process generally conducted in the absence of attorneys. Mediation is more technical task specific and goal oriented activity. It intends to achieve peace among the warring couple. Mediation thrives in a middle space i.e. though not absolutely binding on the parties yet it cannot be changed at random.

The importance and exigency of divorce mediation was brought about in Supreme Court of India case K Srinivasa Rao v D.A. Deepa (2013)[16]. (Smt.) Ranjana Prakash Desai, J. encouraged parties to settle disputes 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 matrimonial cases can be nipped at the bud"[17]. The SC directed ''mediation must before divorce"[18].

In Vennangot Anuradha Samir v Vennangot Mohandas Samir case (2015)[19], the couple went to mediation centre in Supreme Court where the mediation came to a mutual consent divorce settlement whereby the husband had to pay some Rupees12,50,000 as alimony and on past, present, and future considerations. But when it came to light that the wife was suffering from breast cancer and required Rupees 5,00,000 for her treatment question arose whether her consent on mutual separation was devoid of undue influence under Section 16 of Contract Act or not. Section 23 of HMA bestows an obligation on court to only pass the decree for divorce if consent is "not been obtained by force, fraud or undue influence"[20]. The court here stayed the mutual separation settlement reached under mediation stating that the Hindu is not a contract rather a sacred pure bond of man and woman. They said that it is the man's duty to protect the wife at all times and this duty is inherent in Hindu marriages and can't be decimated at wish. In this context they referred to Colebrook in his book "Digest of Hindu Law Volume II" describing thus-

"A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts: - whether she ascend the pile after him or survive for the benefit of husbands, she is a faithful wife"[21].

They stated that the husband must pay Rupees 5,00,000 out of Rupees 12,50,000 for total recovery of the wife and then take-up mutual separation settlement. Prior to it such separation plea won't be allowed.

In Seemant Sinha & ors v state & anr. case (2015)[22] it was decreed that after having solved the conflict in mediation center and acting upon its terms partially the parties will not be allowed to renege from it now. Here acting upon its terms is crucial unlike in Vennangot Anuradha Samir v Vennangot Mohandas Samir case (supra)[23] where the parties had just decided upon the terms but never acted upon it so allowing them to decline or stay the consensual divorce was legal. But in this case where the parties have already started following its terms can't be allowed to decline from it as it would defeat the whole purpose of mediation then. Therefore, withdrawal of consent (one of the terms of mediation) was held "impermissible".

ARBITRATION AS AN ALTERNATIVE TO LITIGATION

It is only when the mediation fails that arbitration comes up as party's legal savour. Thus arbitration has a greater rank and file than mediation and unlike mediation a decree passed by an arbitrator is almost always legally binding on the parties. Arbitral rewards cannot be

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challenged under ordinary circumstances. It only fails to bind the parties if there was no valid arbitration agreement or if there was a public issue involved. Arbitration is essentially based on agreement. Some Model Law States have introduced modifications to the Model Law dealing with these issues, e.g. Singapore: International Arbitration Act s. 24[24]. Public policy is not an explicit ground for vacating an award under the Revised Uniform Arbitration Act (RUAA)[25] or its predecessor the Uniform Arbitration Act (UAA) 1955[26] (amended in 1956). The State legislation on arbitration in the USA is still based on it though it is nevertheless recognized in Federal case laws: W.R. Grace & Co. v Local Union (1983)[27]; United Paper workers International Union v Miso (1987)[28], requiring violation of 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents, and from general considerations of supposed public interests'[29].

The same issue was harped on by Sir James Munby J. president of family division. He stated in X vs. X (2016)[30] that if a formal agreement of arbitration is entered into by mutually consenting parties having full knowledge of its consequences such agreement should be upheld by the courts. Courts can only refuse such arbitral awards on "good and substantial grounds" of "injustice", "fraud", "misrepresentation", or "coercion"[31]. Thorpe LJ observed in Smith v McInerney case (1994)[32] that such arbitral dictate can only be put to an end on "overwhelmingly strong considerations" and "the most exceptional circumstance providing the legal understanding that arbitral verdict is almost always the default rule". Sir Peter Singer in the case S v S (2014)[33] points out that while talking about arbitration courts must take the "magnetic factor of determinative importance" to understand an IFLA order. He states that the arbitral award should be treated as a "lodestone" pointing the path towards "court approval"[34].

In effect, the parties settle their disputes by resorting to an arbitrator judge specialized in that area. Recognizing this courts and other law enforcement bodies give effect to the arbitrator's decision via a court order[35]. Arbitration is a little stricter consensual model where conflicting party goes to a neutral third party (adjudicator) for private adjudication. After listening to the primary reasons for friction in the family the arbitrator makes a final, binding decision.

Unlike litigation arbitration though based on the same adversarial model of dispute resolution, it is an extremely confidential[36]. It saves both the parties from pointless hassles. In addition to that parties get to select their arbitrator and can have more than one arbitrator representing either side unlike litigation. It is like saying that they get to choose their own fate and shape it up accordingly. The ability to use arbitration within wider court proceedings is another bonus[37]. Although arbitration is less formal and more flexible than litigation yet some amount of co-operation is necessary to make it effective[38].

MED-ARB AS AN ALTERNATIVE TO LITIGATION

If mediation and arbitration both fails to take effect the permutation of these two non- therapeutic mechanisms is used in the name of "Med-Arb". Med-Arb is a consensual process with a hybridization of mediation and arbitration. The parties in a bloody divorce feud can move up to mediation first and then to arbitration to solve the disputes if mediation fails to solve them. The entire process can take place in a single session. It maximizes efficiency and minimizes costs. Although the case laws are still in an embryonic stage yet the US court got an occasion in Bowden v Weickert[39] to hold that ''informed consent'' is the cornerstone of med-arb. Without it a med-arb can't be considered valid. The court upheld that "such proceedings when properly executed innovative and creative ways to further alternative dispute resolution"[40]. In Gaskin vs. Gaskin case the court decreed that before a mediator is allowed to adorn the crown of an arbitrator prior "Express consent of the parties "must be taken[41]. A classic med-arb combines the consensual nature of mediation with the component of "finality of judgment" of arbitration[42].

If parties mutually consent and upon their own volition takes up Med-arb, he is estopped from withdrawing his consent subsequently. In other words any of the party cannot renege stating he never intended to go for arbitration after mediation comes to a conclusion. This same concept was reiterated in Marchese vs. Marchese case[43] where the parties who went to Med-arb upon mutual consent and an order of the court consequently declined to be a part of arbitration. He stated that he never intended to participate in arbitration and the med-arb agreement was ambiguous. The appeal court stated "we do not agree with the submission that there is an ambiguity of words" and dismissed the plea. The court held "Mediation/Arbitration is a well-recognized legal term of the art of hybrid dispute resolution process" in which parties failing to achieve success in mediation subsequently take up arbitration".

DIVORCE ARBITRATION/MEDIATION/MED-ARB AS OPPOSED TO TRADITIONAL LITIGATION [44]

The ADR has become new court frenzy and a new-fangled relief to the overburdened courts. The reason

why ADR is on the popularity roll is because it's a novel way to settle disputes outside the courts without much botheration. It works as a pain reliever for the judiciary in the following ways:

- Quicker: Mediation or arbitration takes typically 2 – 3 days to complete unlike litigation which takes months or even years. This is not only physically or emotionally draining but also economically and financially straining.
- Cost Effective: Mediation /arbitration or med-arb is much less expensive. It costs much less to appoint a mediator or an arbitrator than a personal attorney. Except for certain disputes many non- profits provide mediation or arbitration for free or at nominal charges.
- Informality: Informality is the fundament to ADR processes pertaining to divorce disputes. This allows the parties to be more engaged than the abundance of court driven rules that dictates the parties in litigation. So since the mediator/arbitrator judge converses on an informal setting he can focus more on individual disputes and attempt to solve them in an amicable manner. Unlike in litigation where the judge is primarily governed by the stated positions of respective parties.
- Confidential: Unlike litigation ADR processes do not believe in washing the dirty linen in public which means there are no records or transcripts or any information collected in such informal set up cannot be revealed later. Because it is collaborative rather than adversarial and because it isn't inherently based on win/lose situation important relations can often be saved.
- Greater flexibility and control: Unlike litigation parties have a greater control over the outcomes of these processes. This means the parties have a greater say thus leading to certainty. It is flexible in the sense that the parties can decide who their arbitrator / mediator will be. They can decide the schedule and the timing of each session unlike traditional adversarial adjudication (litigation).
- Better Results: Because of the above reasons parties report a greater result in ADR than in litigation. Also because there is no win/lose no admission of fault or guilt and the settlement is consensually agreed upon parties often feel more satisfied with the results.
- Greater Compliance: Finally because these processes provide greater results they are high on demand and are steadily becoming as one of the most satisfactory dispute resolution process.

CONCLUSIONS

Mediation/Arbitration or for that matter med-arb is perhaps the best panacea to marital discord so far. Though it has not yet been able to set a firm footing in a world reigned by litigation nonetheless because of its multi-faceted advantages it's a much demanded resolution process. Mediation/arbitration or med-arb has their pitfalls also like the parties might refuse to tell the truth or if one party is too timid and other party is more aggressive the timid party may lose out much of his legal rights in mediation and arbitral sessions. However, there are lesser shortcomings than adversarial adjudication. Hence this peaceful dispute resolution should be given more credit and let it solve the marital row in a quiet, serene, quick, cheap, and more effective way. This will not only reduce the burden on judiciary but also make access to justice much easier.

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