ALTERNATIVE DISPUTE RESOLUTION IN INDIAN FAMILY LAW – REALITIES, PRACTICALITIES AND NECESSITIES

By
Anil Malhotra and Ranjit Malhotra*

INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on the 26th day of November 1949 resolved to constitute India as a union of states and a sovereign, socialist, secular, democratic republic. Today, a population of about 1.1 billion Indians lives in twenty-eight states and seven union territories within India. In addition, about twenty five million Indians reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India spread over an area of 3.28 million sq. kms, the large Indian population comprises multicultural societies professing and practicing different religions and speaking different local languages, coexisting in harmony in one of the largest democracies in the world.

The Indian Parliament, at the helm of legislative affairs on central subjects in the union and concurrent lists, and state legislatures enacts law pertaining to state subjects as per the state and concurrent lists with regard to the subjects enumerated in the Constitution of India. Likewise, pertaining to the Judiciary, under article 214 of the Indian Constitution there shall be a High Court for each state and under Article 124

* Anil Malhotra and Ranjit Malhotra are partners in the firm of Malhotra & Malhotra Associates International Lawyers, Chandigarh, India. Anil Malhotra may be contacted at: anilmalhotra960@gmail.com. Ranjit Malhotra may be contacted at: malhotraanjitindia@rediffmail.com.

there shall be a Supreme Court of India. Under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. However, the Supreme Court is not bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures to its citizens “fundamental rights” which can be enforced directly in the respective high courts of the states or directly in the Supreme Court of India by issue of prerogative writs under Articles 226 and 32 respectively of the Constitution of India. Under the constitutional scheme, amongst others, freedom of religion and the right to freely profess, practice and propagate are sacrosanct and are thus enforceable by a prerogative writ issued by the superior courts.

Simultaneously Part IV of the Indian Constitution lays down “directive principles of state policy” which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making laws. Under Article 44 of the Constitution in this part, the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, realistically speaking, to this date a uniform civil code remains an aspiration which India has yet to achieve and enact.

It is seen that the Indian legal system has grown and evolved with the lives and aspirations of its people and its varied cultures, religious practices and personal laws.

The Indian legal system is founded and fortified by age-old concepts and precepts of justice, equity and good conscience, which are, indeed, the hallmarks of common law.

The Constitution of India is the fundamental authority of law in India. The Constitution gives due recognition to statutes, case-law and customary law consistent with its dispensations. A single unified judicial system is a unique feature of the Indian judiciary system. The Supreme Court at the apex of the entire judicial system is followed by high courts in each state or group of states. Under the high courts exists a hierarchy of civil and criminal subordinate courts. Panchayat courts also function in some states under various names like Nyaya Panchayat, Panchayat Adalat, and Gram Kachheri, to decide civil and criminal disputes of petty and local nature. These are grassroots level petty courts meant to decide small disputes at the lowest levels.

EXISTING FAMILY LAW LEGISLATIONS PREVALENT IN INDIA

India is a land of diversities with several religions. The oldest part of the Indian legal system is the personal laws governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislation in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations.

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given as hereunder.

•The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as The Hindu Marriage Act, 1955, which is an act to amend and codify the law relating to marriage among Hindus. Ceremonial marriage is essential under this act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The act also applies to Hindus resident outside the territory of India. Nothing contained in this act shall be deemed to affect any right recognized by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act, 1956, which is an act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act, 1956 is an act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act, 1956 is an act to amend and codify the law relating to adoptions and maintenance among Hindus.

It may be pertinent to point out that the Indian Succession Act, 1925, is an act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt out and choose to be governed by their respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and

Wards Act, 1890 applies to non-Hindus. Interestingly, Section 125 of the Code of Criminal Procedure 1973, provides that irrespective of religion, any person belonging to any religion can approach a magistrate to request maintenance. Therefore, apart from personal family law legislations, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this code.

•The Indian Parliament also enacted the Special Marriage Act, 1954, as an act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this act. This enactment for solemnizing marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be obtained by non-Hindus under this act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act, 1969, a person has only to be a citizen of India to have a marriage solemnized under this act outside the territorial limits of India.

•The Parsi Marriage and Divorce Act, 1936 as amended in 1988, is an act to amend the law relating to marriage and divorce among the Parsis in India.

•The Indian Christian Marriage Act, 1872, was enacted as an act to consolidate and amend the law relating to the solemnization of the marriages of Christians in India and

the Divorce Act, 1869 as amended in 2001, is an act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

•The Muslim Personal Law (Shariat) Application Act,1937, The Dissolution of Muslim Marriages Act,1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Muslim Women (Protection of Rights on Divorce) Rules, 1986, applies to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislations mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective enactments themselves. There is an organized system of designated civil and criminal judicial courts within every state in India which works under the overall jurisdiction of the respective high court in the state. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided. In addition, the Indian Parliament has enacted The Family Courts Act, 1984 to provide for the establishment of family courts with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organized, well regulated and established hierarchy of judicial courts in India, there are still unrecognized parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorized and unwarranted bodies work without the authority of law and are not parts of the judicial system.

BACKGROUND NOTE TO ALTERNATIVE DISPUTE RESOLUTION IN INDIA

It is believed that the development of the country can be also understood by observing the capability of its legal system to render effective justice. The practice of amicable resolution of disputes can be traced back to historic times, when the villages' disputes were resolved between members of particular relations or occupations or between members of a particular locality. In rural India, the 'panchayats' (assembly of elders and respected inhabitants of the village) decided nearly all the disputes between the residents of the village, while disputes between the members of a clan continued to be decided by the elders of the clan. These methods of amicable dispute resolution were recognized methods of administration of justice and not just an "alternative" to the formal justice system formed by the sovereigns, feudal lords or the adalat systems initiated by the British and the formal court system. The two systems continued to function analogous to each other. The process followed by the traditional institutions was that of arbitration and conciliation, depending on the character of dispute.

In India, there is a massive legal system comprising nearly 15,000 courts across the country. It is the constitutional obligation of the judiciary to exercise its jurisdiction to reaffirm the faith of the people in the judicial set up. Therefore, evolution of new juristic principles for dispute resolution is not only important but imperative. In India the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution has been reiterated in reports of expert bodies[1]. Each of these reports saw the process of improving access to

[1] Report of the Committee on Legal Aid (1971), ***Report of the Expert Committee on Legal Aid: Processual***

justice through legal aid mechanisms and alternative dispute resolution (ADR) as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes.

EXISTING STATUTORY PROVISIONS FOR ADR IN LAW IN INDIA

The sensitivity of the legislature to providing speedy and efficacious justice in India is mainly reflected in several enactments which are enumerated as hereunder:

1 Arbitration under The Arbitration and Conciliation Act, 1996;

2 Settlement under Order XXXIIA of the Indian Code of Civil Procedure, 1908;

3 The incorporation[2] of section 89 in the traditional Civil Procedure Code (CPC) read with Order X Rules I-A, I-B, and I-C for Settlement of Disputes outside court.

4 The Establishment of Lok Adalat under The Legal Services Authority Act, 1987; looks to mediation, conciliation and informal settlement of disputes in litigation.

5 Reconciliation under Sections 23 (2) and 23 (3) of the Hindu Marriage Act, 1955 as also under Section 34 (3) of the Special Marriage Act, 1954;

6 Duty of family court to make efforts for settlement under Family Courts Act, 1984.

The Constitutional Mandate

Article 21 of the Constitution of India declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure

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Justice to the People, Government of India, Ministry of Law, Justice and Company Affairs (1973), ***Report on National Juridicare Equal Justice – Social Justice,*** Ministry of Law, Justice and Company Affairs (1977)

[2] With effect from 2002 amendment of the CPC

established by law. The words "life and liberty" are not to be read narrowly in the sense monotonously dictated by dictionaries; they are organic terms which are to be construed meaningfully.

The right to speedy trial has been held to be a part of right to life or personal liberty by the Supreme Court of India.[3] The Supreme Court has allowed Article 21 to stretch its arms as wide as it legitimately can.[4] The reason is very simple. This liberal interpretation of Article 21 is to redress that mental agony, expense and strain which a person proceeded against in litigation has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court has held the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. A speedy trial encompasses within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. In other words, everything commencing with an accusation and expiring with the final verdict falls within its ambit. The same has received recognition from the "legislature" as well in the form of introduction of "Alternative Dispute Resolution" (ADR) Mechanism (ADRM) through various statutes. [5]

The Indian Arbitration and Conciliation Act, 1996

The above is a generalized list of statutory enactments which govern the arena of Indian dispute resolution by finding expression in different words under separate laws.

[3] *Hussainara Khatoon (1) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.*

[4] Article 21 is a Fundamental Right that can be directly enforced in the Supreme Court under Article 32 of the Constitution of India. Fundamental Rights, as incorporated in Part III of the Constitution, are different from Constitutional Rights that cannot be directly enforced U/A 32. All Fundamental Rights are Constitutional Rights but not vice-versa.

[5] See –"The Culture of ADR in India-by Praveen Dalal" [http://www.odr.info/THE%20CULTURE%20OF%20ADR%20IN%20INDIA.doc]

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 never effective and led to further litigation as a result of rampant challenge of the awards rendered. The Indian Legislature thus enacted the existing current Arbitration & Conciliation Act, 1996 to make arbitration, domestic and international both, more 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 above 1996 Act, an arbitral award can be challenged only in the manner prescribed and on limited grounds. The 1996 Act also restricts court intervention in arbitration proceedings to minimal interference. India is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. As the name of the act suggests, it also covers conciliation, which is a form of mediation. Accordingly, arbitration is a popular mode of dispute resolution in civil disputes and commercial agreements invariably contain an arbitration clause.

Provisions for ADR Under the Code of Civil Procedure, 1908

The Code of Civil Procedure, 1908 (CPC for short), as amended from time to time is an act to consolidate and amend the laws relating to the procedure of the courts of civil judicature in India. All litigation of a civil nature in India is essentially governed by the substantive provisions of law, contained in the various Sections of the CPC and the

corresponding implementing provisions are contained in various Orders and Rules of the CPC. There are three substantive and procedural provisions contained in the CPC which provide for settlement of disputes outside the court. These can be identified briefly as the following before quoting the details of the respective provisions:

- **Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court**
- **ORDER X of the Code of Civil Procedure, 1908: Examination of Parties by the Court.**
- **ORDER XXXIIA [6] of the Code of Civil Procedure, 1908: Suits Relating to Matters Concerning the Family**

It may now be useful to quote the details of all the three provisions of the CPC mentioned above. They are extracted hereunder in the order given above:

Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court[7]

With a view to implementing the 129th Report of the Law Commission of India, it was made obligatory for courts to refer disputes after the issues were framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat (a settlement court). It was felt that only after the parties failed to get their disputes settled through one of the alternate dispute resolution methods,

[6] 1. Order XXXIIA Ins. by Sec. 80 by Act No. 104 of 1976 (w.e.f. 1-2-1977).

[7] Inserted by CPC (Amendment) Act 1999 w.e.f. 01.07.2002. The earlier Section 89 CPC which was repealed by the Arbitration Act, 1940. There now be an independent Arbitration and Conciliation Act, 1996, the law has been consolidated in that Act and hence the present parallel amendment was necessitated in the CPC in 1999.

should the litigation proceed further in the court in which it was filed. Accordingly, Section 89 CPC reads in the following terms:

89. Settlement of disputes outside the Court. –

(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 (26 of1996) 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 (39 of 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 (39 of 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.

A perusal of Section 89 CPC quoted above clearly spells out the statutory modes, mechanisms, machinery and procedure provided and stipulated for alternative modes of dispute redressal in all matters of civil litigation in India. These substantive provisions are procedurally supported by Order X, Rules 1A, 1B and 1C as below:

ORDER X of the Code of Civil Procedure, 1908: Examination of Parties by the Court.

Rules 1A, 1B and 1C were inserted in Order X by the CPC (Amendment) Act, 1999. This was consequential to the insertion of Section 89 (1) CPC, making it obligatory upon the courts to refer the dispute for settlement by way of arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. A settlement can thus be made by adopting any of the said modes specified in the amended Section 89. Order X of the CPC along with Rules 1, 1A, 1B and 1C read in the following terms:

> Order X: Examination of Parties by the Court.
>
> 1. Ascertainment whether allegations in pleadings are admitted or denied. – At the first hearing of the suit of the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.
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> [8]1A. Direction of the Court to opt for any one mode of alternative dispute resolution.

[8] Added by Act No. 46 of 1999, Section 20 (w.e.f. 1 -7-2002).

After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority

Where a suit is referred under rule 1 A, the parties shall appear before such forum or authority for conciliation of the suit.

1C. Appearance before the court consequent to the failure of efforts of conciliation

Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the court on the date fixed by it.

As per the Rule 1A above, the parties to the suit are given an option for settlement of the dispute outside court. When the parties have exercised their option, it shall fix the date of appearance before such forum or authority as may be opted by the parties for settlement. As per the Rule 1-B, the parties are required to appear before such forum or authority opted by them. Rule 1C provides for the presiding officer of the forum or

authority to refer the matter again to the court in case it feels that in the interest of justice, the forum or authority should not proceed with the matter.

ORDER XXXIIA[9] of the Code of Civil Procedure, 1908:

It may be pertinent to point out, that all proceedings under the Hindu Marriage Act and the Special Marriage Act in India are regulated by the provisions contained in the CPC. Accordingly, in so far suits relating to matters concerning the family are concerned, by an amendment made in 1976, the Indian Parliament in its wisdom added Order XXXIIA to the Code of Civil Procedure to provide for mandatory settlement procedures in all matrimonial proceedings specifically. Order XXXIIA CPC which is relevant to the present context is quoted hereunder for purposes of ready reference:

> Order XXXIIA: Suits Relating to Matters Concerning the Family:
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> **1.** Application of the Order
>
> (1) The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.
>
> (2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:-

[9] 1. Order XXXIIA Ins. by Sec. 80 by Act No. 104 of 1976 (w.e.f. 1-2-1977).

(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;

(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.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. Proceedings to be held *in camera*

In every suit or proceeding to which this Order applies, the proceeding may be held *in camera* if the Court so desires and shall be so held if either party so desires.

3. Duty of Court to make efforts for settlement

(1) In every suit or proceeding to which this Order applies, 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.

(2) 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, the

Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

4. Assistance of welfare expert

In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 or this Order.

5. Duty to inquire into facts

In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

6. "Family"-meaning of

For the purposes of this Order, each of the following shall be treated as constituting a family, namely:-

(a) (i) a man and his wife living together,

(ii) any child or children being issue of theirs; or of such man or such wife,

(iii) any child or children being maintained by such man and wife;

(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him;

(c) a woman not having a husband or not living together with her husband any child or children being issue of hers, and any child or children being maintained by her;

(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her; and

(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c) or clause (d) of this rule.

Explanation-For the avoidance of doubts, it is hereby declared that the provisions of rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.

A reading of the above clearly establishes the statutory mandate laid down by the Civil Procedure Code to make an endeavour in the first instance to assist the parties in arriving at a settlement in a matrimonial cause in any matrimonial proceeding before a court of competent jurisdiction. Hence, in any suit or proceeding for matrimonial, ancillary or other relief in matters concerning the family, there is a separate and independent statutory provision providing for mandatory settlement proceedings. This is over and above the other statutory provisions applicable.

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 opporutnities for securing justice are not denied to any citzen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a

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. Written compromises, settlements and negotiated conclusions drawn up in Lok Adalats are returned to the court of competent jurisdiction for passing an appropriate judicial award, decision, decree or compromise as the case may be. Even matrimonial matters are settled in Lok Adalats and thereafter such negotiated settlements are affirmed by the respective matrimonial courts by appropriate orders or consent decrees/judgments so drawn up.

Lok Adalat generally means "People's Court". India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where mock courts (called Lok Adalats) are held by the state authority, district authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically, for exercising such jurisdiction as they think fit. These are usually presided over by retired judges, social activists, or members of the legal profession. Lok Adalats do not have jurisdiction on matters pertaining to non-compoundable offences.

There are no court fees and no rigid procedural requirements (i.e. no need to follow mandatory process laid down by the Civil Procedure Code or Evidence Act), which makes the process very fast. Parties can directly interact with the Lok Adalat judges in vernacular language, which feature is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties consent to it. A case can also be transferred to a Lok Adalat if one party applies to the court in writing where matter is pending. If the court sees some chance of settlement after giving the opportunity of being heard to the other party, the matter can be transferred to the Lok Adalat for settlement.

The focus in Lok Adalats is on compromise and settlement. When no compromise is reached, the matter goes back to the regular court. However, if a compromise is reached, an award is made by consent and is binding on the parties. It is enforced as a decree of a civil court after it is affirmed as such by the regular court. An important aspect is that the award is final and cannot be appealed, not even under Article 226, because it is a judgement by consent and consent orders are not appealable.

All proceedings of a Lok Adalat are deemed to be a judicial proceedings and every Lok Adalat is deemed to be a civil court under the Legal Services Authorites Act, 1987.

The Law Commission of India in its 129th Report recommended that alternate modes of dispute redressal be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate dispute

resolution methods that the suit may proceed further in the court where it was filed and where the matter was pending before settlement was attempted.

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 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. Accordingly, Hindu law advocates rapprochement and reconciliation before dissolving a Hindu marriage. Sections 23 (2) and 23 (3) of the HMA, relevant for the present context are reproduced hereunder:

Section 23 of the Hindu Marriage Act, 1955:

23. Decree in Proceedings -

(1) xx xx xx xx

(2) 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 so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.

(3) for the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be

and has been, effected and the court shall in disposing of the proceeding have due regard to the report.][10]

Section 34 of the Special Marriage Act, 1954**.** –

The provisions of Sections 34 (2) and 34 (3) of the 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. The mandatory duty on the court is thus in similar terms. For purposes of ready reference, Sections 34 (2) and 34 (3) SMA are quoted hereunder:

34. Duty of Court in passing decrees –

(1) xx xx xx xx

(2) 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 so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds

[10] Inserted by Act 68 of 1976, Section 16 (w.e.f. 27-5-1976)

specified in clause (c), clause (e), clause (f), clause (g) or clause (h) of sub-section (1) of section 27 of the Special Marriage Act, 1954.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.][11]

It may be noticed that the provisions under both the statutes are almost identical and accordingly every endeavour to bring about reconciliation is mandatory.

Other Pre-emptive Measures under the Hindu Marriage Act, 1955

Section 14 of the Hindu Marriage Act, 1955 is another pre-emptive measure provided by the said Act, which was presumably designed with the object of preventing hasty recourse to legal proceedings by the spouses without making a real effort to reconcile and save their marriage from being dissolved. In this context, it may be useful to

[11] Inserted by Act 68 of 1976, Section 34, (w.e.f. 27-5-1976)

quote Section 14(1) HMA which states that "Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce, [12][unless at the date of presentation of the petition one year has elapsed since the date of marriage.]" Thus, Section 14 HMA provides a deterrent from initiating divorce proceedings in the first year of marriage. The logic again being to advocate settlement and reconciliation between parties and avoid hasty divorces.

However, under the proviso to Section 14 HMA**,** the court is conferred a discretionary power to entertain a petition before the expiry of one year, if it finds on the allegation in the affidavit filed in the support of the petition that *prima facie* there is exceptional hardship to the petitioner or depravity on the part of the respondent[13]. It presupposes an application for leave of court to present a petition for divorce before the expiry of one year from the date of marriage. Hence, the statute provides discretion to the court in entertaining a petition for divorce in the first year of marriage on the ground of exceptional hardship or exceptional depravity.

Section 14(2) HMA further states that "In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year][14] from the date of marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year][15]."

[12] Substituted by Act 68 of 1976, Section 9 for for certain words.
[13] *Gulzar Singh V/s.State of Punjab* 1998 (2) HLR 204 (P&H)
[14] Substituted by Act 68 of 1976, Section 9, for "expiration of three years" (w.e.f. 27-5-1976)
[15] Substituted by Act 68 of 1976, Section 9, for "said three years" (w.e.f. 27-5-1976)

Section 29 of the SMA contains similar provisions with similar bars.

Petition for Divorce by Mutual Consent. – Under Section 13 B HMA and Section 28 SMA, divorce by mutual consent is available. However, it is not granted instantly and a joint motion made by both parties in the first instance has to wait for 6 months but not longer than 18 months to be confirmed for granting a divorce by mutual consent in the second motion. It is evident that reconciliation may be out of question in a petition for divorce by mutual consent. But there is an inbuilt opportunity for reconciliation if parties wish to avail of it. When a joint petition is presented, it is adjourned for a minimum period of six months. This period is to enable them to think over the matter of divorce and if the parties want to prolong their consideration of reconciliation, they can do so for another year (total period is eighteen months, within which they can move the motion of a decree of divorce). Section 28 SMA contains similar provisions with similar bars. The logic in these enactments is again to provide for reconciliation in a thinking period between the first and the second motion.

Some precedents settled by Indian courts may be cited in support. In *Hitesh Narendra Doshi V/s. Jesal Hitesh Doshi*[16], the minimum six month waiting period from the date of the presentation of the petition for severing the marital ties between the parties by mutual consent under section 13-B (2) of the Hindu Marriage Act was held to be mandatory and it was held that the Court has no power to relax the said compulsory time wait of six months and cannot pass a decree of divorce forthwith.

[16] 2000 (2) Hindu LR (A.P) (D.B) 45: AIR 2000 (A.P) 362

However, in *Mohinder Pal Kaur V/s. Gurmeet Singh*[17] it was held that the six months waiting period can be brought down in cases where an existing divorce petition is already pending for more than six months and efforts for reconciliation have been made earlier but without any success. Thus, the waiting period cannot be curtailed in a freshly instituted petition for divorce by mutual consent if in an earlier petition on fault or other grounds, the parties have already been litigating for more than six months and reconciliation between them has been of no avail.

Matters to which reconciliation does not apply: Petition on certain fault grounds.**-**
When a petition for divorce under the Hindu Marriage Act, 1955 is presented on the ground of change of religion [clause (ii) of section 13 (1)], unsoundness of mind [clause (iii) of section 13 (1)], leprosy [clause (iv) of section 13 (1)], venereal disease [clause (v) of section 13 (1)], renunciation of world [clause (vi) of section 13 (1)], or presumption of death [clause (vii) of section 13 (1)] reconciliation efforts need not be made, that is to say, the provisions of section 23 (2) do not apply. The proviso in Section 23(2) HMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in HMA above.

Similarly, when a petition for divorce is made under Special Marriage Act, 1954 on the ground of seven years sentence of imprisonment [clause (c) of section 27 (1)], unsoundness of mind [clause (e) of section 27 (1)], venereal disease [clause (f) of section 27 (1)], leprosy [clause (g) of section 27 (1)], or presumption of death [clause (h) of section 27 (1)], no efforts at reconciliation need be made. The proviso in Section

[17] 2002 (1) Hindu LR (Pb & Hry) 537.

34(2) SMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in SMA stipulated above.

However, it may be added out of abundant clarification that on all other grounds of divorce, both under HMA and SMA, the court has an obligation to make efforts at reconciliation[18]. This mandatory and statutory duty of the court cannot be waived.

Reconciliation by the Court**. –** Sub-section (2) of section 23 of the Hindu Marriage Act, 1955 and sub-section (2) of Section 34 of the Special Marriage Act, 1954 lay down that at first instance it is the duty of the court to make every effort to bring about reconciliation between the parties where it is possible to do so consistently with the nature and circumstances of the case. The words are "before proceeding to grant relief". At one time a view was propounded that the reconciliation endeavour should be made towards the end of the proceedings when the court comes to a conclusion that it is going to grant "relief". But then the provision has also the words "at the first instance" and these have been interpreted to mean that before the court takes up the case for hearing, it should make an effort at reconciliation. Presently, the latter is the prevalent view and hence reconciliation is to be attempted in the first instance.

Family Courts Act, 1984

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament states that it is "An Act to provide for the establishment of Family Courts with a view to

[18] *Pramila* V/s. *Ajit*, AIR 1989 Pat 163: (1989) 2 DMC 466.

promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith." In the Statement of Objects and Reasons of the Family Courts Act, five essential requirements were pinpointed in the context of providing reconciliatory efforts to litigating parties and these can be summarized in the following words stated in the statement of objects and reasons:

(a) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(b) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(c) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioners. However, the court may, in the interest of justice, seek assistance of a legal experts as *amicus curiae* in the case;

(d) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute, and

(e) provide for only one right of appeal which shall lie to the High Court.

In seeking to achieve the above objects, the endeavour of the Family Courts Act was to adopt a friendly, conciliatory and informal dispute resolution atmosphere

which would enable parties to amicably settled their differences without the shackles of the technical rules of the law of procedure and evidence. These objects find expression in the Constitution of the Family Courts Act, its jurisdiction and procedure. The necessary provisions for reconciliations in the Family Courts Act, 1984 are dealt with under section 9 of the act which reads as hereunder:

Section 9 of the Family Courts Act, 1984:

> 9. 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.

(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.

The Act also makes it open to the Family Courts under Section 12 "to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act." Clearly, the thought, logic and motive in the Act in making available services of professional experts is to provide counseling, expert help and assistance of trained mediators. Therefore, this enactment is a wholesome legislation on reconciliatory modes in family law disputes in the Indian matrimonial jurisdiction.

ANALYSIS OF THE STATUS OF ADR IN FAMILY LAW IN INDIA

The duty of making or amending laws is on the legislature but to develop it and to interpret it to suit the needs and circumstances of the society is the call of the judiciary. Hence, unless and until the beneficial provisions of the matrimonial legislation promoting and advocating reconciliation in matrimonial disputes in India is favourably interpreted and strictly implemented by the courts, the letter of law may be an illusory mirage which remains on the statute book only. It is therefore the solemn duty of the matrimonial courts in India to ensure that the mandatory settlement efforts are actually

put into practice and parties are encouraged to actually utilize them for out-of-court settlements. Thus, there is a heavy burden on the courts to discharge this solemn duty failing which it will neither be possible nor useful to enforce reconciliatory measure in matrimonial disputes in the Indian jurisdiction. Accordingly, it would be most useful to cite and quote some recent prominent verdicts of superior Indian courts which have stressed and highlighted the dire necessity of the beneficial provisions of Indian legislation which provide mandatory reconciliation procedures.

Section 23 of the Hindu Marriage Act, 1955 and Order XXXII-A of the Code of Civil Procedure, 1908 and the duty enjoined upon the court came up for interpretation before the Supreme Court recently in the case: *Jagraj Singh V/s. Bir Pal Kaur*[19]. The Indian Apex Court, in its landmark judgment in that case, held as follows:

> 26 From the above case law in our judgment, it is clear hat that a court is expected, nay, bound, to make all attempts and section (2) of section 23 is a salutary provision exhibiting the intention of he parliament requiring the court 'in the first instance' to make every endeavor to bring about a reconciliation between the parties. If in the light of the above mentioned intention and paramount consideration of the legislature in enacting such provision, an order is passed by a Matrimonial Court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contented that the court has no

[19] JT 2007 (3) SC 389.

> such power and in case a party to a proceeding does not remain present, at most, the court can proceed to decide the case *ex parte* against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant therefore cannot be upheld.

Hence, the Order of the Apex Indian Court upholding the directions of the High Court summoning the respondent – husband in the above case through non-bailable warrants clearly reflects the legislative intent of attempting mandatory reconciliation procedures. This judgment of the Supreme Court clearly confirms that settlement efforts in matrimonial matters are not an empty meaningless ritual to be performed by the matrimonial court. The verdict clearly reflects the benevolent legislative purpose.

A novel question came up for decision before the High Court of Kerala in *Bini v K.V.Sundaran*[20] - i.e., whether conciliation is mandatory after the introduction of the Family Courts Act, 1984, even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy. Calling the Family Courts Act, 1984 a special statute, and its provisions to make attempt at reconciliation mandatory at the first instance, the High Court held:

[20] AIR 2008 Kerala 84.

> The parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955, no endeavor for reconciliation need 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 endeavor 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 object is to promote and preserve the sacred union of parties to marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement may be made by way of settlement."[21]

Hence, from a reading of the above judgment it is clear that the beholden duty cast upon the matrimonial courts to attempt mandatory reconciliation cannot be avoided and cannot be circumvented even when divorce is sought on certain exceptional grounds which under the HMA and SMA do not provide compulsory settlement action.

[21] Para 3 and para 7 of the judgment.

Still further, stressing the need to treat the cases pertaining to family matters in a humanitarian way, the Supreme Court of India in the case *Baljinder Kaur V/s. Hardeep Singh*[22] laid down that "stress should always be on the preserving the institution of marriage. That is the requirement of law. One may refer to the objects and reasons which lead to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence."[23]

The Supreme Court further held that "it is now obligatory on the part of the Family Court to endeavor, in the first instance to effect a reconciliation or settlement between the parties to a family dispute." "Even where the Family Courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the Civil Courts trying matrimonial causes."[24] The Supreme Court held that the objectives and principles of section 23 of the Hindu Marriage Act, 1955 govern all courts trying matrimonial matters.[25]

Deciding on the importance of making an attempt at reconciliation at the first instance, a Division Bench of the Calcutta High Court in *Shiv Kumar Gupta v Lakshmi Devi Gupta*[26] found that the compliance with section 23(2) of the Hindu Marriage Act, 1955 is a statutory duty of the judge trying matrimonial cases. The court in this case relied

[22] AIR 1998 SC 764
[23] Para 9 of the judgment.
[24] Para 10 and 11 of the judgment.
[25] Para 15 of the judgment.
[26] 2005 (1) HLR 483

upon the decision of the Supreme Court in *Balwinder Kaur v Hardeep Singh* and held that:

> on a reading of Section 23(2) of the Act and on the perusal of the judgment in Balwinder Kaur on the interpretation of Section 23(2) this Court held that the decree, which was passed without complying with Section 23(2) of the said Act, cannot be sustained.[27]

In another perspective, in *Love Kumar Vs. Sunita Puri* [28] it was held that the matrimonial court had acted in haste to pass a decree of divorce against the husband for his non-appearance at the time of reconciliation proceedings. The High Court accordingly set aside the divorce decree and remanded the matter back to the matrimonial court to be decided on merits. The object of Section 23(2) of the HMA was explained in the following terms in paras 19 and 21 of this judgment as follows:

> 19. Under S. 23(2) of the Act it is incumbent on the matrimonial Court, to endeavour to bring about reconciliation between the parties, a great responsibility is cast on the Court. A Hindu marriage is not contractual but sacrosanct, it is not easy to create such ties but more difficult to break them; once annulled, it cannot be restored. A Judge should actively stimulate rapprochement process. It is fundamental that reconciliation of a

[27] Para 8 of the judgment.
[28] AIR 1997 Punjab and Haryana 189: 1997(1) HLR 179.

ruptured marriage is the first duty of the Judge. The sanctity of marriage is the corner stone of civilization. The object and purpose of this provision is obvious. The State is interested in the security and preservation of the institution of marriage and for this the Court is required to make attempt to bring about a reconciliation between the parties. However, omission to make attempts at reconciliation will not take away the jurisdiction of the Court to pass any decree under the Act. This is not correct to say that in a divorce case reconciliation efforts have to be timed immediately preceding the grant of decree and not at any other stage of the proceedings of the trial. Such an attempt can be and should be made at any stage. The matrimonial Court is required to call parties and make a genuine effort for their reconciliation, there is not even a whisper in this provision that the matrimonial Court has the power to strike off the defence of that spouse, who after being given opportunities for reconciliation fails to appear.

21. But under S. 23(2) of the Act neither such a liability is cast on the one spouse nor such a right is given to the other spouse. Reconciliation is a mutual dialogue to bury their differences. A duty is cast on the Court to call the parties at the initial stage for reconciliation. Even before delivering judgment and decree, the Court can make effort for reconciliation. Thus, the stage of trial for

calling the parties for reconciliation is left to the discretion of the Court.

From a reading of the above judgments, it is clear that though reconciliation is a mandatory process, the timing and stage at which it is to be implemented may vary depending on the facts and circumstances of each case. At the same time causing prejudice to the rights of one party by striking off the defence or dismissing the petition may actually work injustice to the rights of such party. Therefore, the matrimonial court in its wisdom may fashion and design the stage of attempting matrimonial reconciliation depending on the facts of each case without causing prejudice to the substantive rights of the parties. However, at the same time, the matrimonial court ought not to give the mandatory settlement procedure a go by.

In another case, the High Court of Allahabad called it the bounded duty of the Family Court for making an attempt for conciliation before proceeding with the trial of the case.[29] In a very recent case titled *Aviral Bhatla v Bhavana Bhatla*[30], the Supreme Court has upheld the settlement of the case through the Delhi mediation centre, appreciating the effective manner in which the mediation centre of the Delhi High Court helped the parties to arrive at a settlement.

From a joint reading of the recent pronouncements of law discussed above, it can be apt to conclude that there is a growing emphasis on the need for attempting mandatory reconciliatory measures and wherever matrimonial courts have been

[29] *Rajesh Kumar Saxena v Nidhi Saxena.* 1995(1) HLR 472.
[30] 2009 SCC (3) 448.

lacking in their duties to do so, superior Indian courts have stepped in, to set the records straight. Therefore, there is a growing jurisprudence to adapt to out of court settlement reconciliation rather than litigating in matrimonial courts. 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.

CONCLUSIONS: NEED FOR REFORM AND SOME SUGGESTIONS

The philosophy of alternate dispute resolution systems is well made out by Abraham Lincoln's famous words: "*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*." These words spell out grim realty and truth.

Litigation in respect of any matter concerning the family, whether divorce, maintenance and alimony or custody, trial of juvenile offenders or any other matrimonial cause should not be viewed in terms of failure or success of legal action but as a social therapeutic problem. It should not be viewed as a prestigious dispute in which parties and their counsels are engaged in winning or defeating, but as a societal problem needing resolution. The amicable settlement of family conflict requires special procedures designed to help people in conflict and in trouble, to reconcile their differences, and where necessary to obtain professional assistance. Family disputes need to be seen with a humanitarian approach and hence attempts should be made to reconcile the differences so as to not disrupt the family structure. Adjudication of family

disputes is an entirely different matter than conventional civil or criminal proceedings. It is a different culture and has a different jurisprudence altogether.[31] The whole society feels the reverberations of a family dispute in society outside the home.

Whereas there already exist some provisions for conduct of arbitration, conciliation and Lok Adalat in different statutes, the need for a framework to regulate the ADR process as a whole and mediation in particular has been sought to be fulfilled by the Supreme Court of India. It has done so by providing the final version of the Model Rules of ADR and the Model Rules of Mediation, both framed by the Law Commission of India, in its Orders passed in the case of Salem Bar Association Vs Union of India (2003 (1) SCC 49) with a direction that all high courts should adopt these with such modifications as they may consider necessary.

The Supreme Court has also made an observation regarding the disturbing phenomena of the large number of court case filings pertaining to divorce or judicial separation. Very recently, in 2009, in *Gaurav Nagpal v Sumedha Nagpal*[32], the Supreme Court observed:

> It is a very disturbing phenomenon that large numbers of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act, 1955 (in short the 'Marriage Act') have led to such a situation. In other words, the

[31] See Law of Marriage & Divorce; Paras Diwan, (preface to the 1st Edition) 5th Edition.
[32] AIR 2009 SC 557. [para 50]

> feeling is that the statute is facilitating breaking of homes rather than saving them, this may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the Section. The provisions relating to divorce categorise situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriages should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving of marriage and not breaking it. As noted above it is more important in cases where the children bear the brunt of dissolution of marriage.

However, we cannot remain oblivious to the fact that India with its population of 1.1 billion Indians has over 30 million non-resident Indians who live in 180 countries abroad. Some of these former Indian citizens are foreign nationals with overseas spouses. But, the fact remains that their personal family law still governs them due to extra territorial application. Resolution of marital disputes of such citizens of Indian origin creates conflicts since India does not have on its statute book irretrievable breakdown of marriage as a ground for divorce in India. Therefore, foreign divorce

decrees on the break down ground with no prior mandatory reconciliation procedures do not find favour either in Indian Courts or in the domestic societal set up. How does one resolve such emerging dimensions of family law disputes where marriages solemnized in India are sought to be dissolved abroad in countries of foreign residence. The authors have advocated a solution[33] penned down as follows:

> The answer therefore is that the existing three-tier divorce structure in India under the HMA 1955 and the SMA 1954, i.e. fault grounds, mutual consent principle and break down theory, seems to provide sufficient options in the existing societal structure. Therefore, no major changes are called for. However, a civilized parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the court for such relief. This, in the opinion of the authors, will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted time-consuming legal battle on 'trumped-up' grounds. Secondly, recourse to divorce in foreign jurisdictions may decline once a proper legal option of irretrievable break down is available on Indian soil. Irretrievable breakdown can thus serve as an

[33] See "Acting for Non-Resident Indian Clients" (Anil Malhotra & Ranjit Malhotra) (Jordans), London, 2004 at Chapter 3, Pages 76-77.

> additional ground for divorce in the HMA 1955 and the SMA 1954, and to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Keeping the Hindu ceremonial and sacramental concept of marriage intact is essential. Erosion of values in matrimonial life must be checked, and traditional marriage protected. The institutions of family, home and children of the marriage, as they exist today under Hindu law, need protection. Hindu law therefore does not need any major overhaul. It is self-sufficient, but does need some immediate amendment.

The above views of the authors clearly depict the inbuilt conciliatory settlement theory embedded in the Indian Family law to save the marriage by in-house settlement. But, marriages solemnized in India according to personal laws of non-resident Indians who have permanently migrated abroad need to find resolution in the existing statutory family laws either by suitable amendments or a brand new legislation which will incorporate corresponding mandatory conciliatory procedures. For this problem, the authors have advocated their suggestions in this regard in the following words:[34]

> A reading in totality of the matters in the overseas family law jurisdiction gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and

[34] See "India, NRIs and the Law" (Anil Malhotra) (Universal), New Delhi 2009 at Pages 271-72.

judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to avoid them from importing judgments from foreign Courts to India for implementation of their rights. The answer therefore, lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Till this is done, foreign Court judgments in domestic matters will keep cropping up and Courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear i.e. the Indian Courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law and the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and till such time when the

> Indian Legislature comes to rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary, which is rendering a yeoman service.

Therefore, the dire pressing need of the day in the current social milieu where 30 million Indians now live outside India, is to create a law and infrastructural machinery for ADR mechanisms in resolving marriages solemnized in India but which have been fractured or broken abroad. For the lack of resolution, they lead to inter-parental child removal custody conflicts, disputes of maintenance and differences over settlement of matrimonial property. It is these limping marriages which need reconciliatory formulas in India to prevent them from being split abroad on grounds and reasons which do not find favour with the personal family laws of the parties in India. These cross border marital conflicts should not stem into or branch out into other ancillary issues multiplying the problem. This, in the opinion of the authors ought to be the focus of the legislative intent today in creating, harmonizing and balancing the societal structure of Indians, non-resident Indians and all those who form relationships with them to build families abroad. ADR needs to be developed in a big way for resolving limping unions.

Suggestions:

Some suggestions can be mooted by the authors to improve the situation and to make ADR a reality in the structure of the current Indian family law.

Participation of citizens:

Alternative Dispute Resolution cannot see the light of the day unless citizens also "participate" in that movement. The citizens can help in the achievements of these

benign objectives by restraining themselves while invoking jurisdictions of the "traditional courts" where the matter in dispute can be conveniently and economically taken care of by ADR mechanisms. The right to speedy trial is not a fact or fiction but a "Constitutional reality" and it has to be given its due respect. The courts and the legislature have already accepted it as one of the medium of reducing the increasing workloads on the courts. The same is also gaining popularity among the masses due to its advantages. We need "private initiatives" for not only establishment of ADR facilities in India but equally a "liberal use" of the same by the citizens and netizens. This initiative needs awakening by self consciousness and not by implementation of laws. Spouses, parents and couples need to realise the advantages of reconcilation, mediation and alternative dispute resolution methods in the family structure. Matrimonial reliefs carved out by settlement will serve better than results obtained by adversary litigation involving time, efforts, financies and above all by breaking a family.

More authority should be given to the Family Courts:

Family matters should not be litigated in any court unless of an extraordinary grave nature; they should be amicably resolved. Family disputes such as divorce, matrimonial property division, custody of children and maintenance should not come into the higher courts and they should be resolved mutually and conclusively in the family court itself. It would save the time of the superior courts where other matters could be resolved in the time which would have been consumed for settling matrimonial disputes. Family disputes are such disputes that can be resolved even in the home itself by a unanimous consensus. Mandatory reconciliatory procedures should assume finality so that matters can be put to rest conclusively without any further challenge.

Creation of more Family Courts :

The necessity and urgency of creating more Family Courts under the Family Courts Act, 1984 in India is a very important factor which will contribute to the resolution of family law disputes by ADR. The current handling of matrimonial litigation by conventional courts in jurisdictions where there are no family Courts is a poignant reminder of the situation created by lack of family courts in such jurisdictions. The availability of trained counselors, mediators, professionally trained persons and above all specialist family law judges would all form part of a well organised team in a family court which in turn would itself create a mechanism and structure for alternative disputes resolution of family law disputes. This would therefore, give a new dimension to the existing matrimonial scenario in the Indian jurisdiction.

India has the laws to promote alternative dispute resolution modes in the existing litigative setup but the infrastructure, professional assistance and the medium through which these beneficial reconciliatory mediation procedures are to be implemented are lacking within India. Therefore, creating the via media by which the beneficial ADR laws can be implemented in family law disputes is what is required today. Additionally, legislative changes are required for providing reconciliatory methods of marriages of non-resident Indians. The package is wholesome. The need is dire. The numbers are huge. The sooner we begin, the sooner reform will start.