Mediation of matrimonial disputes in India — Domestic Violence cases: To mediate or not to mediate

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OP. ED.  

Published on May 17, 2018

William E. Gladstone rightly said, *Justice delayed is justice denied.* This means that if the principle of timely justice is not adhered to, it is tantamount to a complete negation of justice. This problem is prevalent in the Indian judicial system where there is a backlog of nearly 27 million pending cases out of which, approximately 55,000 comprise of disputes relating to divorce.¹ This impediment in obtaining timely justice has resulted in alternate dispute resolution mechanisms such as negotiation, mediation, arbitration and conciliation gaining popularity due to their speedy nature of settling disputes. These forums provide a platform for parties to seek relief without involving litigation, thus literally “outside a courtroom”.

Mediation has emerged as the most widely accepted dispute resolution mechanism for settling matrimonial disputes. The problem arises when these include cases of domestic violence. While using mediation to resolve disputes of such nature, there are two opposing ideologies that exist in society. The advocates of mediation hold mediation to be a favourable mechanism as it safeguards family relationships; more specifically children from having to experience the severities of the traumatic process ordinarily attached to a typical divorce and also provide speedy justice. Whereas the critics of mediation hold mediation to be ineffective as the wrongdoer escapes without being punished through the State’s orderly penal apparatus.

There are several advantages attached to mediation of matrimonial affairs such as confidentiality, cost effectiveness, informal procedures, power of control, full freedom of parties to reject the outcome, mutuality, etc. The most attractive and indispensable feature is that it follows the principle of timely justice. With reference to domestic violence cases, Section 12 of the Protection of Women from Domestic Violence Act, 2005 clearly lays down that a magistrate must dispose of a case under this Act within 60 days. However, this provision is rarely complied with. An Advocate, Dinesh Sharma stated, “Cases of such nature are never wrapped up in the 60 days period unless parties reach a compromise.”
The main reason for this “delayed justice” is the judge-population ratio in India. As per the Law Commission Report, there are only 17 Judges per one million people in comparison to USA’s 107 per one million people. Justice V.V. Rao stated, “It would take 320 years for the Indian judiciary to clear millions of pending cases.” Looking at the current condition of the Indian courts, it would not be incorrect to assume that alternate dispute resolution forums like mediation might be a more viable option for parties to seek relief.

The use of mediation in India is promulgated under the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure, 1908 (CPC). Section 30 of the Arbitration and Conciliation Act states that an “Arbitral Tribunal may use mediation to encourage settlement of disputes”. Section 89 CPC states that “courts may refer the parties for mediation if it appears that there exists an element of settlement”. As it can be inferred from the title, this Code only deals with “civil” matters. Thus, criminal matters are removed from the purview of mediation. So where does domestic violence fit in mediation?

Section 498-A of the Penal Code, 1860 (IPC) deals with matters of domestic violence. Under Section 320 of the Code of Criminal Procedure (CrPC) this is a non-compoundable offence where no compromise is allowed to be made. Offences of this type are of such serious nature that even courts cannot compound them. However, in India courts have time and again referred parties to mediation in resolving matrimonial disputes regardless of the nature of the offence. The Supreme Court in 2013 sanctioned all criminal courts to adopt mediation, with specific regard to cases under Section 498?A IPC.

The judiciary has shown no reluctance in adopting mediation to settle matrimonial disputes, even in criminal cases:

In Mohd. Mushtaq Ahmad v. State[2], the wife filed a divorce petition alongside an FIR against the husband under Section 498?A IPC after disputes arose between the couple subsequent to birth of a girl child. The Karnataka High Court directed the parties to mediation under Section 89 CPC. The matter was settled amicably through mediation after which the wife decided to quash the FIR. The Court allowed this stating, “The court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice.”

In Gurudath K. v. State of Karnataka[3], the facts are identical to the case above. Here the court stated, “Even if the offences are non-compoundable, if they relate to matrimonial disputes and the Court is satisfied that the parties have settled the same amicably … Section 320 CrPC would not be a bar to the exercise of power of quashing of FIR or criminal complaint in respect of such offences.” Thus, the court allowed for the offences to be compounded on coming to the conclusion that the wife was under no threat or coercion for the same.

The court’s intention to settle matters as amicably as possible is clear. The intention of the court matches the ideology of the advocates of mediation, which is to safeguard family relationships and provide speedy justice. Due to this move of the Indian courts, the accused are less apprehensive of being convicted in cases of domestic violence. This is where critics of mediation come in, who hold mediation to be ineffective as the wrongdoer escapes without being punished. Even though the law clearly debars offences of such nature from being compounded, the judiciary has time and again ignored this provision in the “interest of justice”. Besides being a boon to the accused, this is also a corresponding threat to the society at large to have criminals roaming free on the streets.

As per India’s National Crime Records Bureau, the number of domestic violence cases filed increased from 50,703 in 2003 to 118,866 in 2013.[4] This is an increase of 134% within the span of 10 years. Jawaharlal Nehru once said “You can tell the condition of a nation by looking at the status of its women.” For many years, India has been a patriarchal society. Women have always been mistreated and looked upon as a liability. Section 498-A was enacted for the upliftment of women in this patriarchal society. The seriousness of this offence is denoted in the statute itself by making it a non-bailable and non-compoundable one punishable with up to 3 years imprisonment.
The critics of mediation believe that the seriousness of such crimes should not be undermined by simply pardoning the accused and settling matters amicably. The accused must be sentenced to imprisonment so they are reformed before entering the society again. In the cases we have seen above, the victims of domestic violence have agreed to forgive the accused and settle the matters amicably. But should the State acquit the accused merely because the victim’s approval has been affirmed?

In *K. Srinivas Rao v. D.A. Deepa*, the Court held:

44. … though offence punishable under Section 498-A IPC are not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation…. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law…. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest.

It is quite evident from this holding that courts have not tuned a blind eye toward the fact that this offence is non-compoundable. The Court’s actions are done in good faith to save parties from the hectic court procedures. The Court has used the word “appropriate cases” in the first line, which means that all cases of such nature will not be referred to mediation. It is only those ones that the court deems to be appropriate to be sent for mediation.

In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, the Supreme Court clarified that “even when a case is referred to a mediator the court retains its control and jurisdiction over the matter and the mediation settlement will have to be placed before the court for recording the settlement and disposal”. This shows the Court’s efforts in attempting to avoid mediation to be carried out arbitrarily.

There should be no strict guidelines for which cases are to be referred to mediation. Cases should not be divided into the category of compoundable and non-compoundable. What is really essential is to distinctly look at the facts of each case individually to see whether mediation would be a viable option for the parties or not. Domestic violence cases cannot be decided through precedents unless the facts appear to be identical. Each case is of different magnitude and must be judged by scrutinising the facts of the case and discomfort caused to the victim carefully. The Indian courts are headed in the right direction in dealing with cases of this nature.

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