

FAMILY DISPUTES AND USE OF ARBITRATION¹

INTRODUCTION

India has one of the oldest legal systems, stretching back to thousands of years ago. India's jurisprudence formed a tradition which has evolved with the lives of its diverse population. People following different religions and faith are governed by different sets of personal laws in matters of family affairs. Due to the problem of having the second largest population in the world, it is manifested that the percentage of married people will also increase; resulting into increase in family disputes which further creates a menace for the already overburdened Indian Judiciary. The process of settlement of family or matrimonial disputes, which includes divorce, maintenance, settlement of matrimonial property and child custody, are very complex, expensive and time consuming. Pain and suffering of the parties already in agony are compounded, and by the time any relief comes from the court, the parties are emotionally and financially wrecked and past their age of resettling in life.

It is now realized practically all over the world that litigation in regard to any matter concerning family, whether divorce, maintenance and alimony, or custody, education and financial support for children or trial of juvenile offenders should not be viewed in terms of failure or success of legal actions but as a social therapeutic problem needing solution, it should be viewed as a litigation in which parties and their counsel are engaged in resolving family conflicts where humane considerations overweigh everything else. The resolution of family conflicts requires special procedures which mean that the traditional adversarial procedure has to be modified and replaced by less formal procedure. The approach of the court engaged in this task requires a less formal and more active investigational and inquisitional procedure. In other words, it is not a litigation in which parties and their counsel are engaged in winning or defeating a legal action, but an inquisition in which the parties, social workers, lawyers, welfare officers, psychiatrists are

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engaged in finding out a solution to familial problems. All these sensitive issues led to the establishment of family courts in India. The movement to establish a family court in India was initiated by the late Durgabhai Deshmukh, renowned social worker from Maharashtra. On her tour to China in 1953, she got the chance to study the working of family courts, the idea was discussed with certain judges² and legal experts and then decided to make a proposal for establishments of family courts in India to Prime Minister Jawaharlal Lal Nehru³. After almost 3 decades, in the year 1984, the bill was passed and led to the formation of family Courts in the country.

The current situation of Family Courts is compounded. However, there is no precise data on pendency of matrimonial disputes for the year 2019. The Central Government for the first time released the data on pendency of matrimonial disputes in the year 2016.

The number of pending cases in the family courts functional in the various States/UTs in India as of May 2016 was 6,72,075. Uttar Pradesh, Kerala, Bihar, Madhya Pradesh, Maharashtra, Gujarat, Delhi, Karnataka, Rajasthan and Odisha were the top 10 states in the list of highest pendency ratio for family disputes as of May 2016.

The number of pending cases in the family courts in Uttar Pradesh was 2,71,708 as of May 2016. It accounted for 40.43% of the number of pending cases in the family courts in India as of May 2016. The number of pending cases in the family courts in Kerala was 55,050 as of May 2016. It accounted for 8.19% of the number of pending cases in the family courts in India as of May 2016. The number of pending cases in the family courts in Bihar was 42,980 as of May 2016. It accounted for 6.4% of the number of pending cases in the family courts in India as of May 2016. The number of pending cases in the family courts in Madhya Pradesh was 34,165 as of May 2016. It accounted for 5.08% of the number of pending cases in the family courts in India as of May 2016. The number of pending cases in the family courts in Maharashtra was 32,361 as of May 2016. It accounted for 4.82% of the number of pending cases in the family courts in India as of May 2016. These top 5 states accounted for 64.92% of the total number of pending cases in the family courts in India as a whole as of May 2016. The number of pending cases in the family

² Justice Chagla and Justice Gagendragadkar.

³ Archi Agnihotri & Medha Srivastava, 'Family Courts in India: an Overview', Legal Service India, <http://www.legalserviceindia.com/article/1356-Family-Courts-in-India.html>.

courts in Gujarat were 29,445 as of May 2016 (4.38% of All India). The number of pending cases in the family courts in Delhi was 29,122 as of May 2016 (4.33% of All India). The number of pending cases in the family courts in Karnataka was 24,612 as of May 2016 (3.66% of All India). The number of pending cases in the family courts in Rajasthan was 21,974 as of May 2016 (3.27% of All India). The number of pending cases in the family courts in Odisha was 21,856 as of May 2016 (3.25% of All India).⁴

Justice is the first virtue of Social institutions. With India's independence, system of adversarial adjudications of various types of disputes, which is still in vogue, has been inherited. The Law Commission of India observed that the appropriate ways and means to ensure that justice is dispensed should be simple, speedy, cheap, effective and substantial. With the passage of time, the inadequacies of the system have been increasingly felt inherent in the system. The docket explosion and heavy pendency of cases, both at the trial and the appellate stages, have been a matter of global concern for all associated with administration of justice.

Establishment of a number of courts, raising the strength of the judges, and so on, by itself may not solve the problem unless some alternatives are found. Time has come to recognize an alternative in the form of ADR procedures.⁵

⁴ <https://data.gov.in/catalog/answers-data-rajya-sabha-questions-session-239>.

⁵ Shashank Garg, *Alternative Dispute Resolution*, p.9 (1st ed.2018).

FAMILY DISPUTES

- **MEANING OF FAMILY**

Family is “a group defined by a sex relationship sufficiently precise and enduring to provide for the procreation and upbringing of children⁶. Family is “socially recognized unit of people related to each other by kinship, marital and legal ties.”⁷ The family is considered to encourage intimacy, love and trust where individuals may escape the competition of dehumanizing forces in modern society from the rough industrialized world. The family now supplies what is “vitaly needed but missing from other social arrangements”, that is social security.⁸

- **FAMILY DISPUTES**

Family conflict refers to active opposition between family members. Because of the complex nature of family relationships, family disputes can take a wide variety of forms, including verbal, physical, sexual, financial, or psychological. Conflicts may involve different combinations of family members: it can be conflict within the couple or between parents and children or, again, between siblings.⁹Such a conflict may include a matter like:

1. Disputes between husband and wife.
2. Children’s education, health and welfare.
3. Children behavior.
4. Lack of trust.
5. Money/debt.
6. Financial support for children in case of separated couples.
7. Property Disputes.
8. Relationship breakdown.

The Family Courts Act explains family disputes as:

⁶ Maclver, *Society*, p.230.

⁷ Anderson and Parker, ‘Society’, p.160.

⁸ Volume 2 issue 9, *The Indian Arbitrator*, p.2 (2010).

⁹ https://link.springer.com/referenceworkentry/10.1007%2F978-94-007-0753-5_997.

1. a suit or proceeding between the parties to a marriage for decree of a nullity marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
2. A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
3. A suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
4. A suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
5. A suit or proceeding for a declaration as to the legitimacy of any person;
6. A suit or proceeding for maintenance;
7. A suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.¹⁰

GLIMMER OF HOPE: VARIOUS FORMS OF ALTERNATIVE DISPUTE MECHANISMS

The Supreme Court in the *Gaurav Nagpal vs. Sumedha Nagpal*¹¹ case emphasized that efforts should be made to bring about conciliation to bridge communication gaps to prevent people from rushing to courts. Notwithstanding this recommendation by the Supreme Court of India, for conciliation, which is another form of ADR, we are constrained to litigate to resolve family disputes. Let us analyze the best mode of settlement in the light of words of the most influential persons of the world,

Mahatma Gandhi said, *“I realized that the true function of a lawyer was to unite the parties riven asunder. The lesson was so indelibly burnt into that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about*

¹⁰ See, Section 7 of The Family Courts Act, 1984.

¹¹ AIR 2009 SC 557.

private compromises of hundreds of cases. I lost nothing thereby. [Not] even money, certainly not my soul.”

Abraham Lincoln said, *“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a loser- in fees, expenses, and waste of time.”*

Owen Felltham said, *“To go to law is for two persons to kindle a fire, at their own cost, to warm others and single themselves to cinders.”*

The data on pendency of cases discussed at the starting of the paper reiterate the need for reforms not only in speeding up dispute resolution, but also having a strong in-country mechanism for out of court dispute resolution. Legally, this process is known and is practiced in the forms of arbitration, negotiation conciliation and mediation.

The difference between all these “alternate dispute resolution mechanisms” lies in the process and mode of resolving the dispute. Broadly, in arbitration, the arbitrator hears evidence and makes a decision. Arbitration is like general court process, where parties provide testimony and give evidence, as in trial procedures. However, it is usually less formal. In mediation, on the other hand, the process is a negotiation with the assistance of a neutral third party where mediators do not issue orders. Instead they try to create a win- win situation for both the parties and share opinion so they can reach settlement. Conciliation is another dispute resolution process that involves building a positive relationship between the parties to the dispute. As per the Merriam Legal Dictionary, conciliation is “the settlement of a dispute by mutual and friendly agreement with a view to avoid litigation”. Although Conciliation looks similar to mediation, the conciliator plays a relatively direct and active role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. The fourth mode of ADR, i.e. negotiation, is a process where parties (or their attorneys) can try to work out a solution that they are both satisfied with, often giving offers and counter-

offers without legal counsel.¹² This paper focuses on the first and internationally the largest mode of dispute resolution that is Arbitration.

■ HISTORY OF FAMILY DISPUTES AND ITS RELATION TO ARBITRATION

Alternative Dispute Resolution mechanisms is no way a modern technique, nevertheless it has been structured on more systematic and scientific shape, articulated in new lucid terms and providing more wide ranging resolution in recent years than before. The derivation of arbitration may be devised back to the element method of village Panchayats widespread in Primordial India.¹³ Primitive system and techniques of dispute resolution made a prominent contribution in resolution of disputes like family disputes, social group disputes and also other minor disputes connected to trade and property. Institutions at village level played the principal role, where disputes were resolved by elders, comprising council of village, popularly called Panchayats. The pronouncements of Panch while sitting together as Panchayat commanded immense approbation for the reason of the well – accepted faith that they were the quintessence of voice of God and for that reason had to be received and complied with unquestionably with time this style of marvelous dispensation of justice through Panch Parmeshwar (Five Gods).¹⁴ The glimpse of the dispute resolution system prevalent in ancient times reveals that the philosophy of amicable and speedy ADR based on the premise participatory justice in family entrenched in the legal history of India.

Ancient Hindu Jurists laid more importance on the determination of dispute by the arbitrators or tribunals not established by the king. Yajnavalkya and Narada state that village councils (Kulani) Corporation (sreni) and assemblies (Puga) used to decide law suits.¹⁵

¹² Strengthening Arbitration and its Enforcement in India – Resolve in India.

-Bibek Debroy and Suparna Jain

¹³ <http://hdl.handle.net/10603/190313>.

¹⁴ Dr. N.V. Pranjape “Arbitration Conciliation Act” (2nd ed. 2002).

¹⁵ P.V. Kane, History of Dharmshastra Volume-III page 42. Chanbasappa vs. Baslingyya AIR 1927 Bom.

It has been seen that the disputes which were referred to the Panchas and the courts have been duly recognized and have received credence to the awards passed by them. The same was observed by the Privy Council in the case of *Vytla Sitanna v. Marivada Viranna*¹⁶

FAMILY ARBITRATION

Family arbitration is a form of private dispute resolution in which the parties enter into an agreement under which they appoint a suitably qualified person (an “arbitrator”) to adjudicate a dispute and make an award. It can be used to resolve financial disputes and disputes concerning children. Family arbitration is thus akin to court proceedings in that a family arbitrator will produce a decision after hearing the evidence and each party’s case. In financial cases the decision is called an award and in children cases it is called a determination.

Family arbitration is distinct from mediation in that a decision on the substance of the dispute between the parties may be imposed by the family arbitrator or arbitral tribunal. It is therefore binding upon the parties to the dispute. *Mediation can take place in parallel with an on-going family arbitration*: Sometimes a family arbitrator may consider mediation would benefit a couple and he may suggest this. Conversely, mediators may recommend family arbitration if it seems clear that a dispute, or one aspect of it, cannot settle in mediation.¹⁷

- **RELATION OF FAMILY LAWS TO ARBITRATION**

Generally, arbitration is used for the *right in personam*¹⁸. All disputes relating to rights in personam only are considered to be arbitrable, on the other hand, all the disputes relating to rights in rem¹⁹ are required to be adjudicated by courts and public tribunals, and hence they are considered unsuitable for private arbitration. However, there are some exceptions to this rule, Disputes relating to subordinate *rights in personam* arising out of rights in rem have always been considered to be arbitrable. Such is in the case of Family Dispute, being arbitrable but only within the latitude allowed in the law. Nevertheless an arbitrator cannot grant a decree for

¹⁶ AIR 1934 PC 105.

¹⁷ A Guide to the Family Law Arbitration Scheme, 3rd Edition.

¹⁸ Interest protected solely against specific individuals.

¹⁹ Interest protected against the society as a whole.

divorce or an annulment but can decide on certain things such as subjects like division of property. An arbitrator can only decide on the issues, the parties ask them to resolve.

- **LAW COMMISSION REPORT**

The Law Commission of India in its 129th Report on *Urban Litigation, Mediation as an alternative to adjudication*, has endeavored to bridge the differences between the diverse personal laws in India particularly in the matter of resolving family and matrimonial disputes. The Law Commission has recommended that alternative modes of dispute redressal need to be made obligatory in the Courts after the issues have been framed. The commission's view is that the settlement can be reached by conducting any of the alternative dispute resolutions, mechanisms through a Lok Adalat. Accordingly Section 89 of the Civil Procedure Code 1908²⁰ lays down the mechanism, machinery and procedure for practicing alternative modes of dispute resolution in all matters of civil litigation in India.

- **CODE OF CIVIL PROCEDURE 1908**

It may be apposite to point out in this regard, that all the proceedings in India governed by Hindu Marriage Act & the Special Marriage Act are regulated by the provisions contained in the

²⁰ 1[(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 observations 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 has been referred

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (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 effect a compromise between the parties and shall follow such procedure as may be prescribed.]

CPC. By an amendment in 1976 the Indian Legislature enacted Order XXXIIA in CPC²¹ for mandatory settlement procedures in all matrimonial proceedings. Thus, it may be specifically concluded that there has been a conscious effort on the part of legislature to ensure that family and matrimonial disputes can be settled by means of alternative dispute resolution mechanisms.

A joint reading of the above sub-clauses clearly indicates the statutory mandate laid down by the Civil Procedure Code in the first instance to assist the parties in arriving at a peaceful settlement in a matrimonial cause in any matrimonial proceedings before a competent court. A separate and independent statutory obligation exists providing for mandatory settlement proceedings in any suit praying for matrimonial, ancillary or other relief in matters concerning the family.

- **HINDU PERSONAL LAWS AND SPECIAL MARRIAGE ACT**

As discussed earlier in the paper, the ancient Vedas and the other Holy Scriptures makes reconciliation an essential tool to be followed before a marriage irretrievably breaks down. The Hindu Vedas and ancient texts consider a marital bond as a sacred bond that ties both the partners for seven successive births. This can be traced in the modern governing laws for Hindus,

²¹ 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 :-
 - (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 proceedings 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.

namely The Hindu Marriage Act, 1955 (HMA) and the Special Marriage Act, 1954(SMA). Section 23(2) of the HMA states that before proceeding to grant any relief under the HMA, it shall be a duty of the Court in the first Instance, to make every endeavour to bring about reconciliation between both the parties in all cases. The provisions contained in Sections 34(2)²² and 34(3)²³ of the SMA are *pari materia to the provisions contained in Sections 23(2) and 23(3) of the HMA*.

- **MUSLIM PERSONAL LAWS**

It is claimed by many Islamic Jurist that the ADR processed like Negotiation, Mediation, Med-Arb, and arbitration are practiced in Islam from 1400 years and are mentioned in holy Quran. The recognition of arbitration or amicable composition in Islam is in practice since more than a thousand years, before the adoption of French Law or UNCITRAL model law²⁴. Islamic law allows resolving the disputes between its followers through arbitration if they are unable to reach an amicable solution of their private disputes.²⁵ The arbitration derived its textual basis from the Quran, “*and if we fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk.*”²⁶ This verse of Quran substantiates that arbitration is a recognized practice in Islam. In Islamic arbitration, any prior agreement or express written authorization is not required for initiation of amicable composition or arbitration.²⁷

²² 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: 2[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 (c), clause (e), clause (f), clause (g) and clause (h) of sub-section (1) of section 27.]

²³ 2[(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.

²⁴ Ahmed Moussali, from Islamic birthplace -Arabian Peninsula states that arbitration dates back centuries to the pre-Islamic societies.

²⁵ Md. Zahidul Islam, Provision of Alternative Dispute Resolution Process in Islam, 6 IOSR Journal of Business and Management 31(2012).

²⁶ Quran verse 4:35.

²⁷ Syed Khalid Rashid, Peculiarities Religious Underlining of ADR in Islamic Law, paper presented in Asia Pacific Mediation Forum, Australia, 16-18 June, 2009.

- **FAMILY COURTS ACT 1984**

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament lies down as follows:

“An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.”

Section 9²⁸ of the act makes it a duty of the Court to make efforts for a settlement. It shall be worthwhile to note that the legislature intent and thought behind enactment of the said act was to provide not only legal remedy for settlement of family disputes but ensure that estranged families avail of the services of professional and trained mediators who may provide counseling and easier settlement of disputes. Thus, the enactment can be termed as a wholesome legislature on reconciliatory modes in family law disputes in Indian matrimonial disputes.²⁹

ARBITRATOR’S AUTHORITY AND JURISDICTION

All the matters of disputes between parties relating to private rights or obligations which Civil Courts may take cognizance within the meaning of Section 9 of the Civil Procedure Code of 1908³⁰.

Arbitrators are competent to give awards in all cases of breaches of contracts including breaches of promise of marriage.³¹

²⁸ 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 thinks 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.

²⁹ ‘Conciliation for settling family disputes, -Barnik Ghosh.

³⁰ Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

In *Isribai v. Pevrbia*³², Parties may refer to arbitration whether a judgment has been properly obtained; whether it has been satisfied, or whether it is void or erroneous.

In *Umar v. Dadli*³³ the court said, “The main point argued before us in this application is that the learned sub-judge had no jurisdiction to refer the matters in dispute in the suit in question to arbitration: that such a reference amount to contract which was opposed to public policy and that is in against public policy and that is in against public policy and that suits which relate to the personal relations between the parties should be referred to arbitration the learned pleader who appears for the applicant has been unable to refer us to any authority directly on the point. He has referred, however to certain passages in the law of arbitration by Gopal Das to the effect that the matters covered by the divorce act or the insolvency act cannot be referred to arbitration we do not consider that there is any analogy whatever between proceedings covered by the aforesaid acts and suits cognizable by a civil court to which the provisions of the Civil Procedure Code (Section 26) states in perfectly wide terms that any suit may be referred to arbitration We do not think that, therefore, there is any substance in the point raised by the learned pleader³⁴”.

³¹ Heyman v. Darwin (1942) AC 356.

³² <http://www.lawyersclubindia.com/articles/Arbitration-and-its-relation-to-family-laws-7229.asp>.

³³ 1926 Sind 128:20 SLR 116:98 Ind Cas 500.

³⁴ Muhammad Ibrahim v. Ahmad Said, 32 All 502: 7 ALJ 761: 7 Ind Cas 219. – In N.D Basu on Law of Arbitration and Conciliation-p. 328.

JUDICIAL PRONOUNCEMENTS

In *Shiv Kumar Gupta v. Lakshmi Devi Gupta*,³⁵ the Divisional Bench of the Calcutta High Court observed that compliance with Section 23(2) of the Hindu Marriage Act, 1955 is a statutory duty of the judge trying matrimonial cases.

In *Jagraj Singh v. Bir Pal Kaur*,³⁶ the Supreme Court observed as follows:

“The Act (HMA) is a special Act dealing with the provisions relating to marriages, restitutions of Conjugal rights and judicial separation as also nullity of marriage and divorce, Chapter V (Sections 19 to 28 A) deals with jurisdiction and procedure of Court in petitions for restitutions of Conjugal Rights, Judicial Separation or Divorce. Sub – section (1) of Section 23 expressly states that where a petition for divorce is filed under Section 13 of the Act on certain grounds, before proceedings to grant any relief, the court, ‘in the first Instance, should make an endeavor to bring about reconciliation between the parties.’”

In *Salem Bar Association v. Union of India*³⁷ has provided the final version of the Model Rules of ADR and the Model Rules of Mediation with a direction that all High Courts of the Country should adopt the said rules with necessary modifications.

ADVANTAGES OF FAMILY LAW ARBITRATION

Family law arbitration would save a greater harm in the families where there is a serious hardship in the relationships. The arbitral awards could direct them to approach the concerned court if necessary for divorce with a stipulated time period. This would also help to decrease the burden of the judiciary and to proceed further in a faster pace, using the learned arbitrator’s award.

- **Fairness:** Both parties agree to the arbitral tribunal, producing fair outcome. It is the parties who can also directly put their submissions in the way they desire to the person they agreed to appoint as an arbitrator, parties can also agree to choose an arbitrator that has experience in matrimonial or family disputes.

³⁵ 2005 (1) HLR 483.

³⁶ JT 2007 (3) SC 389.

³⁷ (2003) 1 SCC 49.

- **Confidentiality:** The most important advantage of Family Arbitration is Confidentiality and secrecy.
- **Timeliness:** A legal resolution through arbitration is much quicker than waiting for a trial date. Procedures of Arbitration are less formal and more of a flexible nature in terms of scheduling. With the help of the technological advancements, Arbitration can also be done using various modes of technology. It is not necessary to be physically present on the venue of Arbitration.
- **Cost:** Subject to some special cases, the requirement of expert witnesses is not necessary for the proceedings. And cost also is often split between the parties making the whole process cheaper.

CONCLUSION AND RECOMMENDATIONS

Family is the first and foremost institution. It is the oldest amongst the other institutions³⁸, it is the backbone of the society, and it channelizes every other institution of the society. Efforts should be made to take matters relating to family disputes in a very different manner, and using ADR mechanisms is one of the possible solutions in this 21st century.

There is also an urgent need of the day in the current social system where approximately, 30 million Indians now live outside India³⁹, is to create an efficient legal infrastructure for ADR mechanisms in resolving marriages solemnized in India but also which have been separated abroad.

It is recommended by the author to improve the participation of citizens in the ADR mechanisms. Without their participation Family Arbitration cannot be properly used, the citizen has to begin with restraining themselves using the tradition court litigation. Our Constitution gave us the Right to Speedy Trial as not merely a fiction; the right should be given its due respect. There is an urgent need for not only establishments of ADR mechanisms in urban areas but also in the rural areas. Spouses, parents and couples need to recognize the advantages of arbitration in the family disputes.

³⁸ Dr. S.R. Myneni Sociology p.240 (2nd ed. 2006).

³⁹ Population of Overseas Indians" (PDF). Ministry of External Affairs (India). 31 December 2018. Retrieved 18 April 2019.