

**CHOOSING THE RIGHT SOLUTION - ALTERNATE DISPUTE RESOLUTION
IN DOMESTIC VIOLENCE CASES IN INDIA**

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ABSTRACT

The cases of domestic violence are increasing at a rampant manner. A longitudinal research study conducted by BMC Women's Health came out with shocking statistical analysis which reported that between the year 2001 and 2018, the cases of domestic violence cases in Indian Courts have increased by 53%. Such huge elevation tends to raise the question that How are Indian Courts dealing with such soaring cases. The answer to be found is that most of these cases are sent for pre litigation counselling using the methodology of Alternate Dispute Resolution Mechanism (ADR) where a neutral third party helps bring forward an amicable settlement between the parties. But for far are this counselling session sensitized to needs of victim woman who has faced the wrath of her husband or his relatives. Can she be said to be at an equal bargaining power so that a settlement is reached with equal say of both parties? Is ADR like mediation the right way to resolve the cases of Domestic Violence? Is it really mediation or in fact a brief compromise, with obvious fear of facing the same situation as a retaliatory act for her previously shown bravery of raising a complaint? What is the judicial response of Indian Courts towards the same? This paper attempts to answer some of these questions and suggest some ways, which if introduced can provide a safe haven to the battered victims, much required of help from the society.

Keywords: ADR; Mediation; Cruelty; Counselling; Feminist Organisation

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INTRODUCTION

Alternate Dispute Resolution Mechanism (ADR) can be defined as a procedure by which the disputants involved can reach a resolution of their disputes through mediation, arbitration, negotiation, conciliation etc, without a trial. These processes are often headed by a neutral third party and is confidential, flexible and less stressful with defined time frame than traditional court procedures.

With more disputants preferring ADR to avoid the more exhaustive court process, Section 89 of CPC, 1908 (The Civil Procedure Code, 1908) enables the civil courts of India where they can refer the dispute for ADR for quick resolution of civil cases. In landmark judgement *Afcons Infrastructure Ltd. And Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors*¹, the Supreme Court of India, listed out various cases, though not an exhaustive list, which can be referred for ADR which comprised of civil matters, cases relating to commerce, trade and contracts, consumer disputes, cases arising from strained relationships etc.

Though ADR is very popular among above mentioned civil cases, recently some processes like mediation, are used for some cases of criminal nature. Mediation, either court appointed or private, is often preferred by Indian Courts for resolution of disputes which are criminal in nature, like Delhi High Court in a landmark judgement, *Dayawati v. Yogesh Kumar Gosain*² paved way for disputes involving Section 138 of Negotiation Instrument Act which deals with cheque bouncing cases, compoundable in nature be resolved through mediation between the parties.

The Supreme Court of India, in *Gian Singh v. State of Punjab and Anr*³, held that High Courts of the Country can practice their inalienable right under Section 482 of Criminal Procedure Code, 1973 to suppress the criminal charge if the victim and the Accused have sorted out their differences through ADR mechanisms.

Again, reiterating the Gian Kaur judgement, Supreme Court in *Parabat Bhai Aahir @ Parbatbhai Bhaimsinhabhai Karmur v. State of Gujarat*⁴, Justice D.Y. Chandrachud held that 'out of court settlement' in criminal cases can only be permitted if they are of nature of private matters like partnership, mercantile, financial, commercial containing essentially civil flavour but not in crimes of heinous nature that affects the conscious of the society.

¹ *Afcons Infrastructure Ltd. And Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors* (2010) 8 SCC 24

² *Dayawati v. Yogesh Kumar Gosain* 2017 SCC OnLine Del 110032

³ *Gian Singh v. State of Punjab and Anr* 1996 AIR 946

⁴ *Parabat Bhai Aahir @ Parbatbhai Bhaimsinhabhai Karmur v. State of Gujarat* (2017) 9 SCC 641

In *Yashpal Chaudhary v. State*⁵, the Delhi High Court laid out guidelines in case of quashing of the cases of serious nature on the basis of settlement of dispute which comprised of ascertaining if there even exists element of settlement between the parties, whether such settlement, if reached between the parties, would be acceptable to the court of law bearing in mind the law governing the compounding of offences or exercise of inherent powers by High Court under Section 482 of The Code of Criminal Procedure, 1973 and ultimately institutionalisation of the process of mediation so that the settlement can be legally executed between the parties.

Employing ADR for specifically domestic violence cases do raises a number of questions. Can she be said to be at an equal bargaining power so that a settlement is reached with equal say of both parties? Is the traditional way of mediation the right way to resolve the cases of Domestic Violence? Is it really mediation or in fact a brief compromise, with obvious fear of facing the same situation as a retaliatory act for her previously shown bravery of raising a complaint? What is the judicial response of Indian Courts towards the same? By way of doctrinal method, reviewing various research papers and articles that have dealt with the similar issue along with in depth analysis of the implications of judgements by various courts all over India, perhaps a number of issues can be said to be answered.

Judicial Court's approach towards domestic violence cases

The domestic violence cases are governed by The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred as 'the Act') coupled with Section 498A of the Indian Penal code defined the offence of cruelty against woman by her husband or relatives. Though the Act is civil in nature providing civil remedies to the victim but it is often coupled with the criminal charge of Section 498A of IPC, giving it affluence of its criminal nature.

Under the Act, Section 14 empowers the magistrate to direct the parties to undergo joint counselling which is very similar to the process of mediation. Furthermore, the Protection of women from domestic violence rules, 2006, specifically sub rules 7, 8 and 9 of Rule 14, make room for some initiatives to arrive at a settlement or compromise through such mediation/counselling.

In fact, Madras High Court in *Vijaya Baskar v. Suganya Devi*⁶, held that the main aim of the said Act is to enable the victim to amicably live in their matrimonial home. Thus, legislature's intent in domestic violence cases is to enable an amicable settlement between the parties through opting for ADR mechanisms such as mediation.

What is to be noted that Section 498A of Indian Penal Code is a non-compoundable case and hence any sort of settlement between the parties be permitted by law. In 2015, the Karnataka

⁵ *Yashpal Chaudhary v. State* Criminal Appeal no 1723 of 2017

⁶ *Vijaya Baskar v. Suganya Devi* (2010) SCC OnLine Mad 5446

High Court in Mohammed Mushtaq Ahmad v. State, a Section 498A complaint was filed by the victim. Though Section 498A is a non-compoundable offence, yet the court proceeded to direct the parties to mediate under section 89 of CPC to reach an amicable settlement.

In *K. Srinivas Rao v. D.A. Deepa*⁷, the Supreme Court in landmark judgement, highlighted the issue of misuse of Section 498A to harass the accused held that if there exist signs of any settlement and willingness from the parties exists, then courts, even in criminal cases, should refer the parties to mediation. However, the courts should ensure that ‘exercise, rigour, purport and efficacy’ of Section 498A is not diluted in such process. But doesn’t mediation do exactly that when the complaints later on get quashed by the courts?

In May 2019, Supreme Court in *Praveen Singh Ramakant Bhadauriya v. Neelam Praveen Singh Bhadauriya*⁸, consented to the quashing of proceedings emerging from Section 498A after the divorce was granted to the parties and in *Ramgopal and Anr. v. M.P. Government and Anr*⁹, the Court urged the Union Government and Law Commission of India to include more offences like Section 498A under Section 320 of The Code of Criminal Procedure, 1973 which includes the list of compoundable cases.

The question arises is that, how acceptable is the notion that a woman who is perhaps brutally beaten or tortured in her matrimonial home has equal power to bargain the terms of settlement so reached which is acceptable to her or is she just acting under the dominant position of her husband or the unaccountable pressure of the society? Can it be evidently said that mediation was a fair process or a compromise by the victim? It is sad state of affairs that the traditional way of mediation doesn’t open any channel of communication for the victim to check back in if the settlement so held is being upheld by both the parties or not. The very possible repercussions of the mere act of going to mediation on the victim is unchecked and often ignored¹⁰.

The Benefit of Hybrid System of ADR

The confusion regarding the implementation of ADR techniques is not just a national issue but rather internationally, CEDAW (The Convention on the Elimination of all forms of Discrimination against Women, responsible for establishing the definitive international human rights treaty regime guaranteeing the rights of women and gender equality globally. The committee of CEDAW holds periodically, GRs (General Recommendations) and in the year 2015, in GR-33 while discussing women’s access to justice, the committee held that, “*While such processes may provide greater flexibility and reduce costs and delays for women seeking justice,*

⁷ K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226

⁸ Praveen Singh Ramakant Bhadauriya v. Neelam Praveen Singh Bhadauriya Civil Appeal No. 4541 of 2019

⁹ Ramgopal and Anr. v. M.P. Government and Anr Criminal Appeal NO 1489 of 2012

¹⁰ Connie J.A. Beck Et At, Intimate Partner Abuse in Divorce Mediation: Outcomes from a Longterm Multi Cultural Study, 17-18 (2011)

they may also lead to further violations of their rights and impunity for perpetrators because they often operate on the basis of patriarchal values, thereby having a negative impact on women's access to judicial review and remedies."¹¹

The iconic judgement of *Dr. Jaya Sagade v. State of Maharashtra*¹², the Bombay High Court brought out the debate between the legal system and the uprising of Indian Feminism on forefront. In the abovementioned case, a petition was filed by women's rights activist Jaya Sagade along with many other in order to suggest various recommendations for effective implementation of the Act and challenged a circular issued in Maharashtra which prohibited any such pre litigation joint counselling between the parties in case of domestic violence cases without obtaining a court order. The Court set aside the circular but to protect the interests of the battered woman, stated that only with informed consent by the woman would any mediation be allowed in domestic violence cases specifically under Section 12 of the Act. The court accepted the fact that ADR might end up harming the woman victim in domestic violence cases, the counsellors of local groups are more sensitive to the issues of women and makes sure no settlement is forced on her by any way. This judgement became a landmark judgement because instead of re enforcing the value of nuclear heterosexual family, it sensitized the sentiments of the victim of domestic abuse, and hence it walked the fine line balancing the two opposing positions and ultimately favoured the interest of women.

While discussing the judgement in detail, one of the major questions was answered by the Court i.e. Why the need of counselling is only realised after a case is filed in Court? Police officers don't refer clients to POs under the Act and rather coerce the complainant for reconciliation was accepted by the Court. The court also accepted that it is an understandable that women victims do not prefer to take their complaints to police and rather would approach these local groups for help. The court directed that option of litigation must stay with the woman and any sort of failed settlement would have evidentiary value in such litigation.

The feminist groups in India, mainly consisting of activists, NGOs and other partisans who have dedicated their lives advocating women's rights. In 1980s, Forum against Oppression of Women (FAOW) was adhoc body whose work mainly consisted of publicising and fighting against sexual violence against women but later they also included issues such as domestic and sexual violence against women and minorities¹³. Similarly in 1987, Awaaz-e-Niswaan was formed in a Muslim

¹¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 33 on the women's access to justice, 3 August 2015, CEDAW/C/GC/33, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>

¹² *Dr. Jaya Sagade v. State of Maharashtra* SCC OnLine Bom 4777

¹³ Vibhuti, Sujata, and Padma, *The Anti-Rape Movement in India in Third World, Second Sex: Women's Struggle and National Liberation*, 180–190 (1983).

dominated area in Mumbai. There are thousands other to list like All Indian Federation of Women Lawyers, All ladies league, Anweshi Women's Counselling centre, Gulabi Gang etc¹⁴.

While providing the services of counselling to the women in distress, these liberal feminist groups have adopted quite a different but effective approach while implementing ADR techniques to resolve the disputes. Majority of victims of domestic violence tend to return back to their married home but rather viewing this as sign of weakness or individual pathology or a compromise, these groups see this as a result of material contexts and social meanings of marriage. These groups acknowledge the act of bravery and autonomy that a woman comes forward to them with her complaint and hence they ensure that they provide a woman centric safe environment to her to be of most helpful support. They further aim to increase their normative competence by way of challenging the assumptions emerging from the patriarchy about marriage and family by way of counselling and enable the victim to be able to imagine her life without the existence of violence¹⁵. So, even if it were a compromise on her part, they enable such situation to turn into her favour.

While court directed mediations provide one time settlement and if reoccurrence of the same events takes place, the legal cycle is repeated yet again. These groups, considering the societal norms we live in, acknowledge that victim may go back and forth and will take numerous attempts of counselling before she can fully make up her mind. Taking such drastic steps have lot of pros and cons. For example, the victim can be free from the violence and thrash that she experiences on the daily by her husband or relatives, but leaving all that behind and living alone but that would then expose her to the lews and sexual attempts of men in society, considering she is now not 'protected by a man'¹⁶.

These groups acknowledge that imposing the feministic agendas on such victims would be almost similar to what she was experiencing before, just not violent as that. Hence, if the woman finally makes up her mind to return to her husband, these groups follow a certain procedure.

Firstly, they inform the victim that going back may make her more vulnerable to such attacks and if the victim still persists for going back, then she is informed of all her legal remedies and given important call numbers in case she ever needs their help again. These groups further put the victims in touch with local neighbouring women or any such local organisation working near her

¹⁴ Nivedita Menon, *Recovering Subversion: Feminist Politics beyond the Law* (2004).

¹⁵ Flavia Agnes and Audrey D'Mello, *Protection of Women from Domestic Violence*, *ECONOMIC & POLITICAL WEEKLY* 76 (2015).

¹⁶ Coker, D., *Domestic Violence and Social Justice: A Structural Intersectional Framework for Teaching About Domestic Violence*, *Violence Against Women* 22(12), 1426-1437 (2016)

that may be of any help to her. They, at the last, make home visits every now and then to check up on the victim and if all is well with her¹⁷.

Acts like these have long been in operation in India and the petition filed in Bombay High Court was such instance of feminist intervention which had become the need of the hour.

CONCLUSION

If any sort of ADR technique must be applied to a domestic violence case, it can safely be concluded that a hybrid system would work wonders. Combining the traditional ADR system with the feminist group would end up providing a safe haven to the victims of domestic abuse, like, for example at TISS, an academic institution, there exist a special cell for women and children with a hybrid system which houses the counsellors from the feminist organisations along with the local police, which enables them access to police resources and yet retain autonomy for its own procedures effective enough to provide actual needed help¹⁸.

Mahila Adalats, Mahila Mandal, Mahila Panchayat, Mahila Manch, Nari Nyay Samiti etc comprising of all local initiatives taken by the National and State Governments which boasts of such hybrid system.

India as a hub of different cultures where the common understanding as per the existing traditional practices and customs that continue to approves exclusion of women supported by the belief that woman is obligated to follow man's authority and obey him in all his dictated orders which might include even not wanting to participate in any gathering for resolving any community conflict or to play any role. Hence it is of paramount nature that such hybrid systems are also adopted by courts and other mediation institutions, which will combine two different systems into one way solution to victims and also ensure the anatomy and safety is well guarded.

¹⁷ Gopika Solanki and Geentanjali Gangoli, Defining Domestic Violence and Women's Autonomy in Law, Socio – legal review, Vol 12, (2016)

¹⁸ Gopika Solanki, A Fine Balance? Multilevel Governance and Women's Organising in India, in Federalism, Feminism and Multilevel Governance (2010).