

# LEGALFOXES LAW TIMES

## DOMESTIC VIOLENCE AND ADR

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### ABSTRACT

There are thousands of men and women around the world who are victims of domestic violence. In their day to day life, they seem happy, but behind closed doors, at their so-called 'home' they are exposed to one of the most pathetic and dangerous forms of abuse, that is domestic abuse. Globally 85% of domestic violence victims are women. On an average two women, a week die in the hands of an intimate partner. India is not exempt from this global trend. Women are too afraid to break the silence or we can say they are thinking things will get better. But in many cases, things only get worse until sometimes, unfortunately, the end of life is the outcome. It could take years for a victim to gain enough courage to speak up. Some of them never get out at all.

The situation has become even worse with the outbreak of COVID-19. As some of us are lucky enough to stay at home with comfort, given the impact of this pandemic, not everyone is safe at their own homes. On a typical day, over 20,000 phone calls are made to the domestic violence helpline. Everyone deserves to be in a safe, loving and healthy relationship.

In India Domestic Violence Act, 2005 protects the victims of domestic violence. The real question before us is whether all the cases filed under this act are actually abusive ones. Filing divorce cases even for minor issues is a common trend nowadays. The Domestic Violence Act has provisions like the right to residence regardless of legal right on the property. These provisions are highly vulnerable to misuse. Among all the cases filed nearly half of them are deemed to be fake. There is no provision in this act to punish the women who lodge fake cases. Also, our judiciary is already burdened with the increasing number of pending cases. Depending upon the judiciary to solve minor cases of domestic violence induced divorce is

clearly a waste of time and money. So, we must find an alternate remedy to solve such issues. This article examines the phenomenon of divorce disputes involving violence through the prism of alternate dispute resolution. Mediation not only helps people save their time or money but sometimes it saves relationships. It is not that physically abused men or women must never file a case against the perpetrators. People with a noxious personality must be punished. The effectiveness of mediation definitely depends on the depth of the abuse.

**Keywords:** Domestic Violence, Abuser, Victim, Child-victim, COVID-19, Judiciary, Alternate Dispute Resolution, Mediation.

## I. INTRODUCTION

“Discourage litigation. Persuade your neighbours to compromise where you can. Point out them how the nominal winner is often the real loser- in fees, expenses and waste of time.”-

Abraham Lincoln

In India, Alternative Dispute Resolution (ADR) procedures are governed by the Arbitration and Conciliation Act of 1996. The arbitral tribunal to settle a dispute by use of mediation, conciliation, or other procedures mentioned in the act. In addition to this Act, Section 89 of the Civil Procedure Code also provided for ADR mechanisms to resolve disputes between the parties. In general, disputes with civil nature can be mediated. In the majority of jurisdictions, criminal disputes, especially those which are non-compoundable, cannot be mediated. But in a few judgments, Indian courts have taken a view that pre-litigation mediation should be preferred for matrimonial disputes which are civil in nature.

The mediator is a trained third party who carries on an informal dispute settlement process. Two parties clear up misunderstandings, find out concerns, and reach a resolution through this settlement process. The process is voluntary, each side will present its view of the issue, and the mediator will work out a settlement. By the end of the procedure, the mediator presents his or her findings and suggests a solution to the issue.

In the mediation process, the mediator presents an acceptable solution to both parties. He cannot impose the decision on parties, all he can do is suggest.

## II.DOMESTIC VIOLENCE

Domestic violence is a serious crime that causes decades of physical, mental and even financial harm to people in every walk of society. If we explore the term domestic violence deeply, we can understand that it also involves violence against a spouse, parents, children, or elderly. But mostly women tend to experience it in severe form and they are not able to stand up for themselves because of societal pressure. Simply said, domestic violence is the situation in which someone you live with attacks you and tries to hurt you. The term 'attack' does not stick just to physical ones, but it also involves mental and financial ones. In most cases, women are the victims and men are the perpetrators. But there are other domestic violence cases where men and children are also affected. Research points out that controlling behavior developed by a person is the main cause of domestic violence. This involves depriving another person of their independence in an effort to exhibit domination. Such a controlling partner might get irrationally upset when they don't get their way. Fear and embarrassment are often the main factors that get in the way of victims seeking help. Nobody is over domestic violence. Every case is different and domestic violence can happen to anyone. Anyone can be an abuser and anyone can be a victim. It is more common than you might think.

Confucius, a Chinese philosopher said, "It is the law of nature for women to be held under the dominance of men". And some people still believe in these kinds of absurd thoughts. Why should anyone ever be held under the dominance of anybody? Dominance is something that is insidious and it tears away from your self-esteem and your "soul". A person is worthy of everything he/she deserve or desire. No one can take control over other's life. Abusive relationships often lurk upon us. That is, it usually starts in a subtle manner and then escalates over time. Women often stick to these relationships in the hope that their abusive partner will change someday and things will get better. But, the behavior is so deep-rooted that it takes getting outside help to actually change it.

### A. Children – invisible victims of domestic violence

Domestic violence in all forms is not invisible. Verbal abuse, mental abuse, and emotional abuse does leave scars just like physical abuse. Most often the abused person is not the only victim of domestic violence. It may have a deep impact on children who witness this abuse. Children do

not need to see things to know what is going on. They are highly perspective and intuitive than adults sometimes. They get highly influenced by the environment they are exposed to. The psychological effects of family violence on children are shocking. They may get long term damaging effects such as depression, anxiety, and externalizing behaviour problems. Violence in families may lead to severe injuries, marital rapes, or may even result in death. Controlling behaviour of some toxic people may permanently shut our children's door to the future. Children exposed to this should be evaluated and given mental health support. It is also important to help the non-abusive parent as well.

### **III.IMPACT OF DOMESTIC VIOLENCE ON INDIAN SOCIETY**

Violence, abuse, abuser and victims are some common terms that we come across, in fact, on a daily basis, especially in India where patriarchy is deep rooted. We live in a society where women are taught to meekly tolerate and that men are always right, no matter what. Now some of you may think "We live in the 21st century where equality has prime importance and women are nothing less than men." Yes, we have come a long way from the ancient culture of inequality and ill-treatment of women. But the National Commission for Women (NCW) has registered nearly 600 domestic violence cases during this pandemic of 2020. And there may be thousands of cases that are not even reported. So, it's clear that something is holding us back.

Protection of Women from Domestic Violence Act, 2005 was brought into force by the Indian government from 26 October 2006 with an intention to reduce the rate of domestic violence. But still, every third woman in India suffers physical and mental torture at home. If we consider some recent facts and ratios about this, in 2019 there were 1.32 million domestic abuse and crimes reported to police, of which 7,46,219 were deemed by police to be domestic abuse-related criminal offense as per Protection of Women from Domestic Violence Act 2005. So, we have to realize that domestic violence is not something that exists just in some typical Bollywood movies.

Under section 2(a) of the Domestic Violence Act "aggrieved person" includes a wider meaning. That is, not just married women, but women in live-in relationships are also protected under this act. But such a relationship must come under the five ingredients

enumerated by the court. This decision was made by the Supreme Court in D. Veluswamy v. D. Patchaiammal<sup>1</sup>.

It is interesting and at the same time important to note that there are male victims of domestic violence too. Mohd. Zakir v. Shabana & Ors<sup>2</sup>. is a case of 2018 in which Karnataka High Court held that a petition under the Domestic Violence Act by the husband or an adult male can be entertained. Men who are victimized are less likely than women to report their situation to the police. In India, unlike many other western countries violence against men is less frequent than against women. But it may take a deadly shape if left unnoticed. This reflects the need for a special law for dealing with domestic violence against men. A happy family is the basic unit of a happy society. The negative impact of domestic violence on society is so strong that it tears away family bonds. This consequence is long-lasting, especially in the minds of children. Being a woman in India, it is hard to speak against their own husband due to society and culture. In order to control this toxic cycle, there is a need to strengthen the panel laws and to empower women to raise their voices against violence. It is a sad truth that pending cases on domestic violence are increasing day by day. So, a highly recommended alternative remedy is 'mediation'. But the effectiveness of mediation depends highly on the depth of abuse.

#### **A. Domestic violence - a more serious pandemic than covid-19**

During lockdown we are staying home with our loved ones, enjoying, and making memories. For a lot of people stay at home isn't safe. India sees a surge in domestic violence in the lockdown period. National Legal Services Authority (NALSA) released a recent report on the huge spike in domestic violence cases throughout the country during this lockdown. Just like coronavirus, domestic violence is also a chain that needs to be broken. According to NCW, India reported double the usual number of domestic violence cases in the first week of lockdown. The list by NALSA reveals that Uttarakhand recorded the highest number of cases followed by Haryana and Delhi. The cases reported in small statutory bodies like NALSA and NCW are limited. Also, the rates of reporting will be largely suppressed because it is nearly impossible to contact a helpline with the abuser in the same space with the victim. So just imagine how bad the situation is. This

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<sup>1</sup> (2010) 10 SCC 469

<sup>2</sup> CrI. P 2351 of 2018

situation is not restricted just to India. People worldwide are facing this issue. The increase in violence against women, is a very worrying trend.

All the reports and facts show that the coronavirus -induced lockdown led to an increase in cases of domestic violence against women. But, Union Minister Smriti Irani has debunked this assertion. While addressing a virtual TED talk event, she said that that rescue and rehabilitation facilities have been provided for women and children. She further added that it's not like every man is beating a woman in his house in India. But the fact is that for some women across the country, this lockdown leaves them helpless in a place called their 'home'. Some of the most emotional and traumatic crimes can take place behind closed doors. Such victims may need help to step out of an emotionally abusive relationship. This is so important, not just during the lockdown, but also in the future.

#### **IV. A REVIEW ON MEDIATION**

The term mediation refers to the method of settling or resolving conflict through an Alternative Dispute Resolution process. ADR mainly points towards Mediation and Arbitration which is an alternative to the traditional route of resolving legal disputes in court. Mediation undergoes through five stages. Stage one is convening the mediation, stage two is the opening session, the third stage is communication, the fourth stage is the negotiation and final stage is closure. A simple definition for mediation is that it is the process of negotiation in a relationship to resolve differences that are when a couple is heading towards divorce, a neutral third party helps them to resolve divorce issues and divides up assets and property.

An ADR mechanism mainly focuses on delivering justice through mutual consent of the parties in the minimum time without delay that we see in litigation. An ADR mainly uses four methods to resolve any dispute such as arbitration, conciliation, mediation and negotiation. It works on mutual consensus and tries to settle without any delay as early as possible. It is a very effective method for those who want to resolve their matter without court interference. But like any other process has this method it is also having its own advantages as well as flaws.

### **A. Mediation in India- historical analysis**

In India, from Vedic times arbitration or mediation acts as an alternative to dispute resolution. So Mediation in India is not something new. India had utilized a system called Panchayat system where the respected village elders work as a mediator in resolving community disputes. Such traditional mediation continues to exist even today in villages. Arbitration was used by the rulers to settle territorial disputes and also for commercial disputes. Historical references prove that arbitration has been in use even before the times of Christ.

Mediation is of two types. Court referred to mediation and private mediation. In court-referred mediation, the court may refer a pending case for mediation in India under section 89 of the Code of Civil Procedure, 1908. And this type of Mediation is frequently used in Matrimonial disputes particularly divorce cases. Whereas in private mediation qualified personnel works as mediators on a fixed fee basis. Such mediators are chosen by the parties. The Mediator helps them to reach a conclusion. As it is a voluntary process, any party can at any time withdraw from the process of Mediation at any phase without stating a reason.

### **B. Mediation in India –recent developments**

Mediation is used widely in business and commercial disputes, employment and workplace dispute, family dispute, technology and intellectual property disputes, company and shareholder disputes, disputes relating to sports and media laws. Online Dispute Resolution (ODR) is the modern and digitalized iteration of the traditional ADR with the major noticeable difference only being the use of machines and networking for communication. With the rapid development of the internet and electronic commerce, Online Dispute Resolution has been labeled a logical and natural step. The following are some of the important developments in the field of mediation.

- The 129<sup>th</sup> Law Commission of India Report recommends court to refer disputes for mediation compulsorily

- In the land mark case of Afcons Infrastructure Ltd V Cherian Varkey Construction Co (P) Ltd<sup>3</sup>. The Supreme Court observed that all the cases relating to trade, commerce, contracts, consumer disputes and even tortious liability could normally be mediated.
- The 2018 amendment to the commercial courts ACT 2015(Section 12A) made it mandatory for parties to exhausts the remedies of pre-constitution mediation under the Act before instituting a suit. Effective implementation of this provision can be a major boost for economic growth.

In the matter of M.R Krishna Murthi V New India Assurance Co Ltd<sup>4</sup>, the Supreme Court asked the government to consider the feasibility of enacting an Indian Mediation Act to deal with various aspects of mediation. The court further directed the government to examine further feasibility of setting up a Motor Accident Mediation Authority (MAMA) by making necessary amendments in the Motor Vehicles Act.

## **V. MEDIATION- A PREFERRED METHOD TO DISSOLVE DISPUTES**

Mediation is considered as an alternative method to deal with conflicts. Some critics are of the opinion that mediation is not an effective remedy to settle disputes. But, if the mediators are appropriately trained in both political and legal manners, mediation is one of the best ways to settle domestic violence. It is a known fact that the court does not offer both legal and physiological services to families that have domestic issues. The court proceedings in India are usually complicated. As the courts are totally overburdened with the issues and cases, so it will take a lot of time to settle the dispute. Mediation provides the spouse, an opportunity to settle the dispute and compromise with their partner. Thus the court mediation is the better option to resolve the disputes

Moreover, in a family dispute or domestic violence case, the life of children will be a huge risk. If the dispute is taken to the court, the child will be asked to choose between mother or father. If the dispute is settled through mediation, there is no such situation. The child

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<sup>3</sup> 2010 (8) SCC 24

<sup>4</sup> 2019 SCC 0231 SC



can live happily with their parents if the dispute is settled. If not, the mediator settles the dispute with regard to the custody of the child. Mediation aims at protecting individual rights and ensuring some kinds of substantive fairness to both parties. It is clearly noted that the agreements made by mediators have a greater term compared to the divorce settlements made by the judiciary. Mediation helps to sort the issues as early as possible.

In Zulaikha Begum v. Abdul Rahim<sup>5</sup>, the Madras High court said that under the Quran the marriage status should be maintained as far as possible, and there should be conciliation before the divorce. Quran discourages divorce and the divorce is permitted only after the pre-divorce conference, which is mediation. Literally, separation is no more a solution. Also, our judiciary is overburdened with the increasing number of pending cases, it is a better way to choose mediation which is more relevant and faster than the judiciary. Justice MarkandyKatju made his opinion in the case B.S. Krishna Murthy Anr. v. B.S. Nagaraj & Co<sup>6</sup>. It was held that the lawyer should advise their client to try mediation to settle the disputes especially were relationships like family, business is involved.

The courts cannot compel a party to mediate. One of the main reasons for this is that the court has no jurisdiction to order parties to mediate against their will. However, there is no doubt that the current judicial climate is that they cannot force the parties to choose mediation. But, mediation is mandatory only to the case in which the potential benefits should arrive at the parties through mediation. Though mediation is considered a negotiation facilitated by a neutral third party. It is more casual and simple than litigation. Also, mediation is most widely accepted in companies. It is to be noted that all the states have statutes or rules designed to protect mediation communication from disclosure in legal proceedings. The lawyers must follow the advice of Mahatma Gandhi, that is, to opt the method of mediation over litigation.

## VI. SNAG OF MEDIATION

Break up can be a very tough process in marriage as children are involved. So, the parents are obliged to take part in one or more sessions of mediation. Mediation may not always be the best

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<sup>5</sup> ILR 2000 KAR 743

<sup>6</sup> S.L.P (Civil) No. (S) 2896 of 2010

way to find solutions to certain issues. In a courtroom, lawyers may use many methods to find the truth by inquiring about the parties and producing the evidence, but in mediation, such kinds of methods are not available. The courtroom is designed in a way to maintain the procedure and keep things fair between the parties. Mediation, generally have no formal rules. This means that if one party is timid and the other is loud and aggressive, the timid person may have the chance of losing the case. However, mediators have some skills to restore between the parties, but there will always be a limit to what they can do.

Some experts believe that in abusive relationships' mediation is inappropriate. They also believe that mediation might just provide another way for the abuser to harm the victim. Depending on the nature of the victim's injuries, she may not be able to assert her position in mediation. Where one party has clearly dominated another, mediation may not be an appropriate means to resolve the disputes, especially if the victim is not supported by the advocate. Should the victim have to compromise his or her entitlements under the law when he or she has been wronged or cannot be fully compensated via a mediation approach to spousal conflict resolution?

The greatest criticism of using mediators in domestic violence cases is that there is a lack of trained mediators. Even though mediators are available they cannot recognize the existence of domestic violence. This is really true when the victims or abusers hide the abuse. Some jurisdiction requires some sort of proofs from the victims, but they might not possess this evidence to show that they have been abused. In domestic violence, the victim may not be able to convey anything about the seriousness of the problem, as she or he might be pushed to such a drastic situation by causing injury to them by the partner. There might not have any evidence to clear the side. This is really sad that the victim finds it difficult to come forward and speak about their abuse.

The partner in domestic violence commits abuse over the other, mainly to gain power or access over the other. Physical, psychological, sexual, and financial abuse are the tools used by the partners to achieve power and to control the relationship. Mediation is an alternative dispute resolution where the parties are made to appear before the mediator to resolve their problems. But due to psychological trauma caused by the partners, the victims are not

treated as equal participants before the mediators. And, the victims may not convey the problems caused by the other. Moreover, when victims live in a culture of battering, the mediator cannot place both the abuser and the victim in the same class since the main screening for such deep issues is a failure. The mediation will be successful only if the parties open their mind. Abused victims are also facing a great risk of physical violence when they leave their spouses. Additionally, the fear done by the batterer may prevent the victim from exposing the injuries caused by him.

Mediation involves a lot of privacy and unofficial proceedings. It lacks substantive rules and encourages compromise. In most domestic violence cases, victims usually opt for court proceedings. It is mainly because some people believe that the court is the only authority that can guarantee justice to the victims. In some cases, Mediation may not be successful and thus parties may not get an appropriate solution. In such cases, they are forced to move to the time-consuming and expensive process of trial, after wasting time and money in mediation.

## **VII. DIFFERENT PERSPECTIVES ON MEDIATING DOMESTIC VIOLENCE CASES**

There are many alternatives to the use of mediation in domestic violence cases. The use of mediation in domestic violence cases invites conflicting opinions. A set of people believe that it is okay to use mediation in domestic violence cases just like any other kind of dispute but another set of people believe that domestic violence cases cannot be settled through mediation. Use of mediation involves many advantages like confidentiality, informal procedures, flexibility, and its ability to save and sustain relationships. So mediation can be used to settle cases involving domestic violence. After all, it may protect the children from the emotional trauma that they might suffer after long-drawn court litigation. It also saves family relationships. Parties have all the right to accept or reject the outcome. So this is one way of dealing with domestic violence cases to satisfy the family interest. There are three general approaches to this preparation:

- 1) Education and training of family mediators.
- 2) Selecting appropriate cases for mediation
- 3) Using specialized techniques and procedures throughout the mediation sessions.

- Training and Education of Mediators and other Family Law Participants

Mediators must have special skills and resources. The need for training and education of all participants in the family law process-lawyers, judges, clerks of courts and mediators, has been argued by Judge Chance and Alison Gerencser (1996). The training requirements for family law participants do not necessarily reflect expertise or skills in recognizing or responding to signs of domestic violence or threats of violence. Emerging research shows that because of mediator's orientation and training, they do not know how to respond to the signs of violence or threats of violence thus they transform them into procedural issues with the consequences that victims right is delegitimized. Mediators, especially family mediators must know various aspects of domestic violence:

- a. How to recognize and identify domestic violence
- b. Understanding the woman's option or lack of them in choosing to stay or leave.
- c. Types of abuse including physical, emotional and sexual.
- d. Common characteristics of abusive partners and abused partners.
- e. Special techniques such as private caucusing and power balancing
- f. The safety issues for all involved.

Mediators who are dealing with conflicted couples need to be aware of their own feelings about gender roles, power and violence in order to perceive the issues objectively.

- Determining cases that are appropriate for mediation

Mediation can be used in divorce cases or any other cases to avoid taking a case to court. Mediation is available in most non-criminal matters. However, some non-violent criminal cases, like those involving only verbal harassment, can be successfully resolved with mediation. Mediation can also be used for claims that do not involve a legal issue. For instance, a dispute between two neighbours over the brightness of their outdoor lights is hardly the type of claim that merits a lawsuit. Mediation works at its best in these kinds of situations.

- In addition to the strictly economic arguments that Cindy has found for mediation, it's social and psychological costs are likely to be lower than that with litigation. Mediation is a negotiation process. Parties who go with the mediation process participate directly and with free consent to this process. Mediation can be done for any matter. But nowadays,

the concerned topic is divorce. Mediation for divorce is a must process and needs to be done before going to court. Through mediation, the burden of the court becomes less and parties can confidentially make their point clear to each other. Mediation centres do not pass the judgment but gives the couples solution to smoothly repair the cracks in their marriage. After the mediation process divorcing couples may give another chance to their relationship or file a petition for divorce in the court. After the mediation process, the divorce becomes a mutual divorce with the consent of both the spouses. Section 9 of the Family Court Act, 1984 also states that before approaching the court, partners need to go through the process of mediation. It is a must for all the divorcing couples to give their marriage one more chance.

### VIII. CONCLUSION

The best solution to resolve family issues in case of domestic violence is mediation in which both parties can convey everything in front of the mediator. The mediators always try to resolve the issue by convincing the parties, and they also collaborate to make a mutual recommendation to the victim. If a family is broken, not only the husband and wife will be affected but the life of the children will always be at risk. Mediation is a beneficial way to resolve family law cases due to the inevitable high emotional intensity of the parties. Mediation always focuses on communication and private resolutions which are always needed by the parties. This system is closer to the therapeutic model than the method of huge proceedings in courts. Thus, the party can solve the issue without moving to court. So it is more applicable to solve their problems. When judges and mediators recommend the victim to disclose everything, the victims should not deny it. There should be an equal opportunity for the parties to convey their issues. And in mediation, the mediator should only provide recommendations, and the decision should be always taken by the victim.

Domestic violence is a crime, so every victim should be provided with safety, justice and domestic tranquillity. The Government should not make an opinion on people's issues. And it is to be specially noted that mediation cannot be done in criminal abuse. In the cases of criminal abuse, court proceedings are the best way for the victims to claim their justice.

William E. Gladstone said that "Justice delayed is Justice denied". That is if the parties are not adhered then there is negation of Justice. This is relevant in the Indian Judicial

system which is already overburdened by nearly 27 million cases, of which, almost 55,000 are disputes relating to divorce and domestic violence. So, mediation is the best option to save time and safeguard family relationships.

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