Lakshmikumaran & Sridharan corporate

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February 2016 / Issue – 54

An e-newsletter from
Lakshmikumaran & Sridharan, India

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February
2016

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Conciliation for settling family disputes

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Introduction

Globally, alternative dispute resolution is slowly, but steadily becoming the preferred mode for settling disputes. Many corporates including large business conglomerates are seriously evaluating the merits of mediation and conciliatory procedures to avoid lengthy, and expensive litigation given the state of courts in India and the multiple levels of appeal that tend to exhaust both parties. The Indian legislature, promoting the mediation route, has also been attempting to link the bridges so as to fall in line with the evolving global jurisprudence.

In India, the family unit continues to play a dominant role in the social structure. It has been often seen that law and religion merges and the Courts have to decide on questions which are rooted more on values and equity than the strict interpretation of law itself.

This article examines the scope of alternative dispute resolution mechanism in resolving family disputes in India and the viability of expanding the scope and functions of the family courts in India.

Law Commission Report

The Law Commission of India has endeavored to bridge the differences between the diverse personal laws in India at least in the matter of resolving family disputes. In its 129th Report, it has recommended that alternate modes of dispute redressal ought to be made obligatory on the Courts after the issues have been framed. The settlement can be reached by conducting any of the alternative dispute resolution mechanisms namely, arbitration, mediation, conciliation, judicial settlement or through a Lok Adalat (a settlement court). Accordingly, Section 89 of the Civil Procedure Code 1908 lays down the mechanisms, machinery and procedure for practicing alternative modes of dispute resolution in all matters of civil litigation in India.

Civil Procedure Code 1908

The substantive provision (Section 89) has been procedurally supported by Order X, Rules 1A, 1B and 1C. Rule 1A provides an option to the parties to a suit for settlement of the dispute outside court. If a party exercises this option, a date shall be fixed for appearance before the forum or authority which has been opted by the parties for settlement. Rule 1-B stipulates that, the parties have to appear before such forum or authority and Rule 1-C gives power to the Presiding Officer of the forum or authority to revert the same matter to the Court in the event the said Presiding Officer feels that the said forum or authority should not proceed with the matter in the interests of justice.

It may be pertinent to point out in this regard, that all the proceedings in India governed by the Hindu Marriage Act and the Special Marriage

Act are regulated by the provisions contained in the CPC. The Indian Legislature enacted Order XXXIIA in the Code of Civil Procedure by an amendment in 1976 to provide 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 the Indian legislature to ensure that family disputes can be settled by means of alternative dispute resolution mechanisms.

The relevant Order is reproduced here below:

"Order XXXIIA: Suits Relating to Matters Concerning the Family:

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."

Sub-clause (3) makes it a mandatory duty of the court to make efforts for a settlement to be reached between the parties. The relevant clause is reproduced here below:

"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."

A conjoint reading of the above sub-clauses clearly establish the statutory mandate laid down by the Civil Procedure Code in the first instance to assist the parties in arriving at a settlement in a matrimonial cause in any

matrimonial proceeding before a court of competent jurisdiction. Thus, for any suit or proceedings praying for matrimonial, ancillary or other relief in matters concerning the family, a separate and independent statutory obligation exists providing for mandatory settlement proceedings.

Hindu Personal Laws and Special Marriage Act

The Vedas and other Holy Scriptures makes reconciliation an essential tool to be followed by Hindus before a marriage irretrievably breaks down. When the Holy Scriptures was codified to unite the diverse laws of various sects of Hinduism, reconciliation is mandatory under The Hindu Marriage Act, 1955 (HMA) and The Special Marriage Act, 1954 (SMA). Section 23(2) of the HMA lays down 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 parties in all cases. This is in relation to any relief sought on most of the fault grounds for divorce specified in Section 13 of HMA. The provisions contained in Sections 34(2) and 34(3) of the SMA are *pari materia* to the provisions contained in Sections 23(2) and 23(3) of the HMA.

Muslim Personal Laws

Contrary to popular belief about the unilateral methodology of the Muslim form of divorce, the Quran lays down a specific four-step reconciliation procedure before the talaq is granted.

As a first step, when there is a marital discord, the Quran laws down that the husband should try and talk out the differences *(faizuhunna)* with his wife.

In the event the misunderstanding between the parties persists, as a second step, the Quran recommends that the parties should be asked to stay separately and keep any form of physical intimacy in abeyance *(wahjuruhunna)*. Such measure has been recommended so that temporary separation may help the parties to reunite.

In the event this procedure too fails, as a third step, the husband is instructed to discuss with his wife again *(wazribuhunna)* about the seriousness of the situation in order to try and bring about reconciliation. In pursuance of *wazribuhunna,* the husband shall try and explain to the wife that if the differences are not resolved by the parties shortly, the dispute shall be taken beyond the confines of the four walls of the home, which may be harmful to the interests of both the parties.

In the event the dispute still remains unresolved, as a fourth step, the Quran requires the dispute to be placed before two arbitrators, one from the family of each spouse, for resolution.

Family Courts Act 1984

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament laws 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 9 of the said Act makes it a duty of the Court to make efforts for a settlement. It shall be worthwhile to note that the legislative 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 counselling and easier settlement of disputes. Thus, this enactment can be termed as a wholesome legislation on reconciliatory modes in family law disputes in Indian matrimonial disputes.

Judicial Pronouncements

The Division Bench of the Calcutta High Court in *Shiv Kumar Gupta* v. *Lakshmi Devi Gupta, 2005 (1) HLR 483* observed that compliance with Section 23(2) of the Hindu Marriage Act, 1955 is a statutory duty of the judge trying matrimonial cases.

The Apex Court in the case of *Jagraj Singh* v. *Bir Pal Kaur, JT 2007 (3) SC 389*, observed as follows:

> *"The Act (Hindu Marriage Act, 1955) is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. Chapter V (Sections 19 to 28A) deals with jurisdiction and procedure of Court in petitions for restitution 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 proceeding to grant any relief, the Court, 'in the first instance', should make an endeavour to bring about reconciliation between the parties."*

The Apex Court, in the case of *Salem Bar Association* v. *Union of India (2003 (1) SCC 49)* 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.

Conclusion and recommendations

The family structure of India is extremely conservative and prefers not to take the disputes to unknown experts and/or mediators. It is recommended that in this context, greater awareness is generated about the usefulness of alternative dispute resolution mechanisms in the Indian society. The advantages of the procedures may be explained in detail even in the remotest villages so that a majority of the existing disputes are settled at the grassroot levels.

It is further recommended that the powers and scope of Family Courts be increased so that it reaches to the far corners of the society at large. More family courts should be opened across the length and breadth of the country in order to facilitate easier resolution in family disputes.

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Notifications & Circulars

Foreign investment in Indian companies - Amendments: The Reserve Bank of India (RBI) has amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 to insert the definition of "manufacture" and to amend the definition of "Ownership and Control" as stated under the Guidelines for calculation of total foreign investment in Indian companies, transfer of ownership and control of Indian companies and downstream investment by Indian companies. The amendment regulations further seeks to amend the sector specific policy for foreign investments and the guidelines for the establishment of Indian companies/ transfer of ownership or control of Indian companies, from resident Indian citizens to non-resident entities, in sectors under government approval route. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2016 has been issued through Notification No.FEMA.362/2016-R, dated February 15, 2016 in this regard. By another Notification No.FEMA.361/2016-RB of the same date, definition of NRI has also been amended for the purpose of said Regulations. NRI now means an individual resident outside India who is citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

Start-up India initiative - 'Start-up' defined: The Department of Industrial Policy and Promotion ("DIPP"), in order to bring uniformity in the implementation of the "*Start-up India*" initiative, has identified certain enterprises to be considered as "start-ups". According to DIPP Notification No. G.S.R. 180(E), dated 18-2-2016, an enterprise will be considered as 'start-up' (a) up to five years from the date of its incorporation/registration, (b) If its turnover for any of the financial years has not exceeded Rupees 25 crore, and (c) If it is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property. An entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'start-up'. In order to obtain tax benefits a startup so identified will be required to obtain a certificate from the Inter-Ministerial Board of Certification. The notification also lists some documents which need to be submitted in this regard. It is stated that the process of recognition as a 'start-up' will be through mobile app/portal of the DIPP.

Acquisition of shares or voting rights - Exemption to promoters or shareholders in control: The SEBI has amended the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 to create an exemption for promoters or shareholders in control of a listed company from the application of restrictions as specified under Regulation 3 of the said Regulations. The exemption is available if the said promoter or shareholder has acquired the shares or voting

rights in terms of provisions of Chapter VI-A of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. The said amendment has come into place on February 17, 2016 *vide* Notification No. SEBI/LAD-NRO/GN/2015-16/035.

Investments in debt instruments - Restrictions: By Notification No. SEBI/LAD-NRO/GN/2015-16/034 dated 12-2-2016, SEBI has amended Securities and Exchange Board of India (Mutual Funds) Regulations, 1996. Now a mutual fund scheme will not be able to invest more than 10% of its NAV in debt instruments issued by a specified single issuer. This investment limit however may be extended to 12% of the NAV with the prior approval of the Board of Trustees and the Board of Directors of the asset management company.

Ratio Decidendi

Continuance of MD who is over 70 years of age - Special Board resolution required: The Division Bench of the Bombay High Court has held that a special resolution of the shareholders is required for the MD, who has attained the age of 70 years, to continue, according to the provisions of Section 196(3) of the Companies Act, 2013 which are effective from 1-4-2014. The Court in this regard noted that the new Companies Act makes no distinction between the Managing Directors who have been appointed before 1-4-2014 and those after said date. The MD in the present case was appointed on 1-8-2012, i.e. prior to the said amendment. The single Judge in the case had earlier held that the MD was appointed before the Companies Act, 2013 came into force and the said section did not have retrospective effect, hence he could in effect continue as Managing Director even if a special resolution was not passed.

The Division Bench however held that since a new clause was added as further disqualification for appointment or continuation as MD of a Company, it would operate not only at the stage of appointment but also would operate in the case of a person who has already been appointed and attained an age of 70 years and such a person, therefore, by virtue of disqualification, had no right to continue as MD, unless a special resolution was passed by the Company. It further held that there was no question therefore of the retrospective application of the provision. Since Section 196(3)(a) would apply prospectively by virtue of the use of the word '*continue*', whoever attains the age of 70 years after the Companies Act, 2013 came into force would cease to function as MD. [*Sridhar Sundararajan v. Ultramarine and Pigments* - Appeal (L) No. 632 of 2015, decided on 8-2-2016, Bombay High Court]

De-merger and Income Tax: The High Court of Rajasthan has struck down the de-merger scheme petition and upheld the Regional Director's objection that the same

was a design to avoid capital gains tax and stamp duty. The Court in this regard rejected the contention that the Petitioner intended to commence real estate business, and held that mere intent could not bring de-merger within the scope of Section 2(19AA) of Income Tax Act, 1961. It was noted that company did not carry out any real estate activity as neither was such activity reflected in its books of accounts nor was the land of the company included in inventory under the head of Current Assets warranted under applicable Generally Acceptable Accounts Principles (GAAP) for real estate businesses.

It further held that while sanctioning a scheme the court in the exercise of its jurisdiction under Section 391(2) read with 394 of the Companies Act, 1956 cannot negate other laws as it would be plainly contrary to public policy to do so. It was finally held that though the Company Court cannot sit in judgment thereof on merits as per Sections 391-394, sanction "*is not to be mechanically granted on the mere askance as if the court were a mere rubber stamp. The company court has to wisely exercise its discretionary jurisdiction vested in it to sanction the scheme, having regard to various aspects such as considering the background and material.*" The petitioner here had submitted that the scheme of de-merger, including real estate business, will facilitate proper management, focus on core businesses to advance the interest of the shareholders by each of the resultant demerged companies. It was contended that the scheme of de-merger is in compliance of all laws and the Court on a second motion moved under Sections 391-394 of the Companies Act, 1956 having only supervisory jurisdiction confined to ensuring that the scheme is fair, reasonable, just and not contrary to public interest, should sanction the scheme. [*Uma Enterprises Private Limited* - S.B. Company Petition No. 14/2012, decided on 12-6-2012, Rajasthan High Court]

Competition law – Contradictory reports on market share show vibrant competitive landscape: Noticing glaring differences in the data and results depicted by the two research reports, casting a serious doubt on their authenticity and neutrality, Competition Commission of India (CCI) has held that fluctuating market share figures of the various players show that the competitive landscape in the relevant market is quite vibrant and dynamic. The dispute related to the market share of radio taxi aggregators in the relevant market of Delhi. While one report as submitted by the applicant alleged the opposite party to be dominant, the other report as considered by the Commission in another case, was of the view that another company (third party) held the major share. The report as submitted by the applicant was also doubted by the CCI here as the opposite party was not interviewed during the collection of data in the said report. Lastly, no case under Section 4 of the Competition Act was found by the Commission as both the research reports

had acknowledged the presence of other major players in the market.

The Commission also rejected allegations under Section 3 noticing that the opposite party had categorically denied to any exclusivity conditions being imposed by them on the taxi drivers on its network and the applicant had also failed to produce any evidence in this regard. Further, noting that the regulatory architecture in Delhi is different from that operating in the NCR, and that the aggregator's application also distinguishes between taxis available for booking within Delhi and those available for booking for commuting from Delhi to NCR, Commission was of the view that the relevant geographical market in the case would be market of radio taxi service in Delhi. [*Meru Travel Solutions Private Limited* v. *Uber Group* - Case No. 96 of 2015, decided on 10-2-2016, CCI]

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