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Dr. Mukund Sarda
Prof., Principal & Dean,
Bharati Vidya Peeth
University, New Law College,
Pune, India.

Role of counsellors in family court practice – A study

Dr. Mukund Sarda

1. The form and method of marriages have undergone many drastic changes. Marriages are either arranged or based on 'love' and other consideration need a strong foundation to subsist over the entire period of married life. One expects the continued marital bliss to subsist in the larger interests of the welfare of the family as a whole, such as interests of children and their welfare and the need for supporting aged parents and other members which have become the crying needs of society. Unfortunately minor differences and gross misunderstanding between spouses have been so alarming that one finds the solution lies up in the breakup of the parties relationship and as a ground for divorce or separation. In such an eventually the ultimate suffers are children and the aged parents, apart from suffering and agony to the spouses. The common ground of difference between the spouses is a charge of 'cruelty – either mental or physical' by acts of one against the other. At the very initial stage, if someone intervenes and makes the parties to see reasons, state of things might not reach such a stage, when a divorce becomes the only remedy. Fault does not lie with one party only, but may be equally attributable to both sides.
2. The common instance of cruelty on the part of either party or both becomes a frequent case of separation and even of divorce.
In *Samon Gosh Vs. Jaya Gosh* ^[1], the Supreme Court dealt with the issue of cruelty at length and observed thus:-
 - i) No uniform standard can even be laid down for guidance, yet we have deem it necessary and appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of mental cruelty;
 - a) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other within the broad parameters of mental cruelty;
 - b) On comprehensive appraisal of the entire married life of the parties, it becomes absolutely clear that situation is such that the wrongful party cannot reasonably asked to put with such conduct and continue to live with other party;
 - c) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse cannot by the conduct of other for a long time may lead to mental cruelty;
 - d) A sustained course of abusive and humiliating treatment, calculated to torture, renders miserable the life of the spouse;
 - e) Sustained unjustifiable conduct and behaviour of a spouse actually affecting physical and mental health of the other spouse, the treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty;
 - f) The married life should be reviewed as a whole and a few violated instances over a period of years will not amount to cruelty.
The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds its extremely difficult to live with the other party any longer, may amount to cruelty;
 - g) Where there is a long period of continuous separation, it may fairly be concluded that the matrimonial life is beyond repair;

Correspondence
Dr. Mukund Sarda
Prof., Principal & Dean,
Bharati Vidya Peeth
University, New Law College,
Pune, India.

The marriage becomes a fiction though separated by a legal tie.

By refusing to sever that tie the law in such cases, does not sever the sanctity of marriage. On the contrary, it shows scant regard for the feeling and emotions of the parties. In such like situations, it may lead to mental cruelty.

Instance of cases like K.Srinivas Rao ^[2] where the parties lived separately for more than 6½ years and the matrimonial bond ruptured beyond repair because of mental cruelty caused by wife. Yet in another case ^[3], the wife accusing the husband as one suffering from mental hallucination and as a morbid mind requiring expert psychiatric treatment and his whole family as lunatics, was held to constitute ‘mental cruelty’ of such a nature and the husband cannot be asked to live with her.

In Vijaya Kumar Bhat’s case ^[4], where the husband made allegations of unchastely and indecent familiarity of a neighbour, it was considered “as of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband”.

In Naveen Kohli’s case ^[5], the wife filed several complaints and cases against the husband and also published advertisement that the husband was her employee and cautioning the business associates to avoid dealing with him. Such acts were viewed as causing mental cruelty. The motivation for wife’s conduct rested “out of frustration and anger and was a reaction of Husband’s refusal to live with her”. This is a case for counselling, at an early stage, if the wife was counselled not to indulge in such acts but create ample room of cordiality by suitable steps in that direction, probably the marital tie would have remained intact.

Staying together is not a pre-condition for causing cruelty ^[6] and it can be caused by acts such as vulgar notices published, defamatory letters, filing complaints and indecent allegations which could make the life of the other party miserable. In such cases ‘refusal to sever the marital tie, it may lead to mental cruelty’ ^[7]

In Naveen Kohli ^[8], the wife lived separately for more than 10 years and involved her husband in large number of criminal proceedings the Supreme Court observed: “that the marriage has been wrecked beyond the hope of salvage and public interest of all concerned lies in the recognition of the fact and to declare defunct ‘dejure’ what is already defacto’. Marriage dead cannot be revived by courts, if parties are not willing ^[9]. It was further observed ‘that marriage involved human sentiments and emotions and if they are dried up, there is hardly any chance of their springing back to life on account of artificial re-union created by court orders or decree. In cases like this, parties spend a greater part of their life in litigation instead of matrimonial happiness, with no end in sight ruling out any question of re-union.

3. As mentioned earlier, if someone counselled in the beginning or at a very early stage by an independent and sensible elder or if the parties were sent at that stage to a mediation centre or if they had access to a pre-litigation clinic, perhaps the bitterness would not have escalated. Even in a case where the wife was desperate to save the marriage, the bitterness created by her acts made any such attempt impossible to retain the marriage tie, as a result of her conduct.

4. In many cases ^[10], the cause of misunderstanding in a matrimonial dispute is trivial and can be sorted out through mediation methods. At the earliest stage the matter should be taken up by family court by referring to mediation centres the marriage tie would have been left unbroken. Matrimonial disputes relating to custody of children, maintenance and others are pre-eminently suitable cases for mediation.
5. The Family Courts Act, 1984 enjoins upon the family courts to make efforts to settle the matrimonial disputes and in their efforts the courts are assisted by counsellors and mediation centres where trained mediators exist to mediate between the parties ^[11].

Pre-litigation mediation concept is catching up, by giving wide publicity and setting up ‘help desks’ at prominent places at court complexes to conduct such mediation ^[12]. Such a measure could save many families from hardships, when the dispute gets settled. In order to encourage such settlement, the offence under Section 498A should be made compoundable, as it stands now is an impediment to settlement of matrimonial disputes. The Supreme Court has always adopted a positive approach and encouraged settlement of a matrimonial dispute and discouraged their escalation ^[13].

6. In G.V.Rao’s case ^[14], the Supreme Court observed thus:-
 - i) There has been an outburst of matrimonial disputes in recent times;
 - ii) Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully;
 - iii) Little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in the commission of heinous crimes in which the elders of the family are also involved with the result that those who could have counselled and brought rapprochement are rendered helpless on their being arrayed as accused in the criminal case;
 - iv) There are many other reasons for not encouraging matrimonial disputes, so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law when it takes years and years to conclude and in that process the parties lose their ‘young’ days in chasing the cases in different courts;
 - v) In the cases of parties settling their disputes, the High Courts, in the exercise of powers under Sec 482 of Criminal Procedure Code may quash the proceedings, pending in criminal cases filed under Sec 498A of the Indian Penal Code; ^[15]

However, the courts must ensure that the mediation should not lead to the erring couple to get out of clutches of the law. It must be open to the parties either to decide to part company on mutually agreed terms or decide to patch up to stay together.

In the event of settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts, which will be in the larger public interest.

‘Mediation’ as an effective method of alternative disputes resolution in matrimonial disputes has been recognised and therefore, the need for the parties to explore the possibility of settlement through mediator in matrimonial disputes.

7. The role of the family courts in settling disputes speedily and adopting simplified procedures cannot be under-estimated^[16]. Family court cannot be deemed to be effectively established unless the Judges are appointed^[17] and until then the civil courts jurisdiction is not taken away in matrimonial disputes. Establishment of family courts on population basis is not violative of Article 14 of the Constitution^[18]. The appointment of Judge is the main criteria for the establishment of a Family Court^[19]. As per Section 4 of the Family Courts Act, the persons appointed as Judges (preference being given to women) should have the commitment to the need to protect and preserve the institution of marriage and the promotion of the welfare of the children and qualified by reason of experience and expertise to promote the settlement of disputes by conciliation and counselling. The court held 'that association of social welfare agencies and professional experts is of prime importance for effective resolution of matrimonial disputes by conciliation through family courts'^[20]. Counsellors and experts are expected to discharge their duties in a team spirit and co-ordinate with the other members of the team to achieve aims and objectives of the Family Courts Act.

All the pending disputes in courts shall get transferred to Family Court^[21] and the procedure for 'in camera proceedings' are permissible if either party so desires^[22]. Family Courts are required to bring about reconciliation between parties and any failure on its part in this effort or duties renders the proceedings illegal^[23]. In the event of any reasonable possibility of settlement, at any stage, the Family Court should make attempt to effect such settlement. It has been held that Family Courts are expected to act as the well-wisher of the parties and endeavour to settle the disputes amicably with the assistance of counsellors and social welfare agencies and experts^[24]. In Komal Padukone^[25], parties arrived at settlement. Even in the absence of rules, the Family Courts have the implied authority to send parties to counselling centres^[26]. Though legal representations are not allowed in the Family Courts, assistance of legal experts as 'amicus curie' can be taken in the interests of justice^[27].

8. In most cases, it has been found that the inability of the parties to communicate to each other is an impediment to settle their matrimonial disputes. Couples counselling and 'talk therapy' can be used as effective guidance in order to improve communications and resolve issues within their intimate relationship.

The role of couple counsellor is to facilitate change and resolution of disputes by helping both the parties to communicate more effectively and reach their conclusion under the guidance of an expert professional counsellor.

The aims of a professional counsellor can be stated as follows:-

- i) Values, religion, life style and culture and other factors could be used to effect the relationship between the parties;
- ii) To assist the parties to effectively communicate in a constructive way;
- iii) Prevent the arguments being escalated and use the method of negotiation to resolve conflicts and

- iv) To give sufficient room for 'give and take' of what happened in the past and concentrate on their future life;
- v) To hold counselling programmes to find out various options available to parties.

Separation counselling must impart inputs relating to harmful effects of separation and to see that the parties replace their anger and blame by honesty and openness to avoid breaking up and proceed towards 'living together'. Specific counselling organisation to take up cases of individual hardship cases. Privacy dispute resolution is also needed to protect confidentiality, non-threatening, flexible and affordable are also required.

9. In conclusion, it may be suggested as follows:-

- i) To have a new law like Indian Matrimonial Disputes (Conciliation & Mediation) Act legalising and providing a legal structure for conciliation, media centre, which provide trained experts according to the nature of disputes and dealing exhaustively with all aspects;
- ii) Communication skills to be imparted to the couples in order to enable them to speak effectively so that solution may emerge to resolve their disputes; Counsellors specialised in this skill can take up this task.
- iii) Avoidance of court litigation by pre-litigation counselling to serve cost, time and delay in the settlement of disputes;
- iv) Parties should be trained to avoid anger and substitute by patience in their best interest and of their family;
- v) Family Courts should invent new mechanism of counselling for speedy settlement, so that counselling enhances the process of negotiation and also the negotiating powers of the parties;
- vi) Creation of an Indian Institute of Marriage Counselling on the analogy of the Indian Institute of Company Secretaries to provide a concrete legal base, procedure and methods at various levels in the area of conciliation;
- vii) Conciliators be given wide powers to interview the parties and also frequent visit to the home of the parties to ascertain the exact nature of difference and to find out the commonest measure of agreement;
- viii) Conciliator to act as a bridge or link between the court and the litigating spouses;
- ix) To take up the study of home environment within the purview of conciliators to ascertain various facts relating to the dispute;
- x) Counselling should be mandatory and should not be within the discretionary power of the Family Court;
- xi) In terms of Sec 9 of the Family Courts Act, family courts shall make all efforts to settle the matrimonial disputes. Reference to mediation centres setting a time-limit is absolutely necessary;
- xii) All mediation centres shall set pre-litigation desks / clinics giving them wide publicity to settle the matrimonial disputes;
- xiii) Appropriate legal regulations are required to be framed for the following purposes:-
 - a) to have legally qualified persons, such as a degree or diploma in counselling in matrimonial disputes;
 - b) to introduce a compulsory subject on matrimonial counselling to be studied along with family law at LLB degree level
 - c) to develop the skill of counselling

- d) to provide for continuous research in causes and resolution of matrimonial conflicts through counselling and mediation like the Indian Institute of Counselling and mediation in Family Disputes etc.
- e) To provide for continuous training to counsellors and provide the same at different levels.
- xiv) To consider marriage counselling and dispute resolution as a professional job like doctors, lawyers and engineers;
- xv) Marriage dispute counselling should be treated as an active practice like lawyers and they must be suitable substitute for 'lawyers' with a different approach, not to argue for the success of their client but in the interest of both parties to amicable settlement of their disputes;
- xvi) Counsellors should move from one camp to another to find out the commonest measure of agreement and to reduce complex issues to simpler ones;
- xvii) Conciliators should be innovative of new dynamic counselling jurisprudence;
- xviii) Counselling is an inter-disciplinary subject and therefore, association of societies, psychologist and other persons in different segments may be useful and rewarding.

References

1. (2007) 4 SCC P.511.
2. K.Srinivas Rao Vs. D.A.Deepa, AIR 2013 SC P.2176. See also Naveen Kohli, AIR 2006 SC P.1675.
3. V.Bhagat AIR 1994 SC P.710.
4. AIR 2003 SC P.2462
5. See Foot Note 2.
6. Ibid Para 15.
7. Supra Note 1.
8. See Note 2.
9. Foot Note 1 Para 26.
10. Ibid.
11. See Section 9 of the Act for details.
12. For Illustration the Delhi Government Mediation and Conciliation Centre can be cited as an example.
13. Ramgopal & another Vs. State of M.P. and another, 2001 AIR SCW P.1193
14. G.V.Rao Vs. L.H.V.Prasad & others, AIR 2000 SC P.2474.
15. See for details B.S.Joshi & others Vs. State of Haryana, AIR 2003 Sc P.1386. See also Gian Singh Vs. State of Punjab AIR 2012 SC (Cri) P.1796.
16. Family Courts setting up is based on the recommendations of 59th Report of Indian Law Commission.
17. Shanker Karojia Vs. M.S.Karojia, AIR 1990 M.P. P.246.
18. Late Pimple Vs. Union of India AIR 1993 Bom P.255.
19. Ali Haji's case (1997) DMC P.343.
20. Shymi Vs. Genge (1997) DMC P.676.
21. See Section 8 of the Family Courts Act.
22. See Section 10 and 11 of the Family Courts Act.
23. K.Sumantha Arya (1994) (2) Cr LJ P.411.
24. (1994) (1) DMC P.557.
25. (1990) DMC P.301.
26. Anita Laxmi s. Laxmi Narayan Singh, AIR 1992 SC P.1148.
27. See Section 13 of the Family Courts Act.