FAMILY COURTS – EVIDENCE, PROCEDURES AND ROLE OF LAWYERS

A.K.A. RAHMAAN, B.A., B.L., M.A., LL.M., P.G.D.F.D.R.,

PRINCIPAL JUDGE, PRINCIPAL FAMILY COURT, CHENNAI

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The matrimonial disputes have grown too large that it drew the special attention of the Legislators. Prior to 1984, the matrimonial disputes were tried by Civil Courts having original jurisdiction. The Civil Courts are usually very much burdened with multi-various cases. The litigants to the matrimonial disputes are loaded with much of emotions and mental pressure. With such a stressful mind, when they enter the Court, seeking some remedy, they were made to wait for a long time. The Judicial Officers could pay least attention. The intervention of the Lawyers by flanking the litigants lead, to some unpleasant decisions, as the opportunity for conciliation was not even offered. Hence, in order to provide an opportunity to conciliate the disputes in a fair manner, it was considered fit, that the litigants should be given chance to have direct interaction. It was also emphasized for speedy disposals of matrimonial disputes.

When a case is filed for a relief, such as divorce, or nullity of marriage or for restitution of conjugal rights, the summons, are ordered to be issued on the other party. Prior to the enactment of the Family Courts Act 1984, the respondent would engage a pleader of his/her choice and the appearance of the party before the Court was not mandatory. The proceedings would be

taken care by the pleaders in the absence of the parties. This in fact would not enable the Court to arrange for conciliation.

The importance of conciliation was felt very much. The prime reason was that of the reporting of the frequent dissolution of the marriages which are considered to be sacramental. The apprehension that the society is moving towards a wrong direction of dissolving the bond so lightly was the main concern. The relationship between the spouses would be the mixture of emotions, sentiments, feelings etc. The core issue could not be dealt with. The pleadings of the parties and the evidence alone were to be taken into account to decide a case. In simple words, the mere reading of case papers was the criteria to decide the case.

The scenario prior to the Family Courts Act 1984, was that the respondent on his/her appearance through the pleader would be required to file the written statement/counter within the stipulated time. Thereafter, the trial/enquiry would commence. The adversarial procedure would be adopted and the parties were examined in chief and cross examination was done. The arguments would be made either in the presence or absence of the parties. The pick of lacuna from the evidences of the parties alone would help the Court to arrive at a decision. Thus, the case concludes leading to the second round of litigation by way of appeal.

The above mentioned procedure was to be done amidst pressure by the Courts, where they had to deal with Civil Suits as well as Sessions Cases. The change in mindset due to modernization also lead to the inflow of more number of matrimonial cases. Hence the necessity for a separate frame work

where the matrimonial issues could be dealt with was felt. Thus came in to existence the Family Courts Act 1984. (In short The Act)

The constitution of the Family Courts is dealt with in section 3 of the Act, which states that the Family Courts shall be constituted in every City/town where the population exceeds one million. However the drawback of the Act is that in many large towns, the Family Courts are still not constituted for the reasons of lesser population than that of the required population of one million. The mofussil/Taluk Head Quarters do not have Family Courts due to the lesser number of population as stipulated in the above provision. Thus, the matrimonial disputes in respect of Taluk Head Quarters of a District would have Subordinate Judge(s) Court to try the cases, who would not be governed by the Act. A general study reveals that the Subordinate Courts both in the District Head Quarters as well as Taluk Head Quarters have very heavy pendency of cases of almost all categories.

The main object of the Family Courts Act 1984 was to provide the opportunity of conciliation to the litigants and to pave way for speedy disposal. The Courts are provided with Special Powers under section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement.

The prime salient feature of the Act is that of section 13, which declines the rights of the parties to be represented by a legal practitioner as a matter of right. The object of the legislators was not to take away the rights of the parties in total. Instead the provisio to the above section empowers the Court to seek the assistance of a legal practitioner as amicus curiae. The section is

also silent about engagement of a pleader as amicus curiae by the parties themselves.

Every litigant cannot be expected to have exposure to Law, practice and procedure. Certainly they require the assistance of a legal practitioner. The exact phrase employed in section 13 of the Act is that ***"as of right, to be represented by a legal practitioner".*** This does not take away the right of the Lawyer in total. In short, the object of the legislators was that the litigants shouldn't stay away from Court proceedings so as to be represented by their Lawyers and such exercise shall not be taken up as a matter of right. This in a way helps the Court to have a direct interaction with the litigants.

The Family Courts constituted under the Act, shall have to avail the services of the Counselors. In simple words, when the respondent receives summons from Court, he/she shall have to make the appearance mandatory before the Judge of the Family Court. The Judge without insisting them to file their counter/written statement would refer them to the counselor for undergoing the process of counseling. This is because at times, when the respondent/defendant is compelled to file the written statement/counter, it may lead to aggravation of circumstances.

The Judge of a Family Court shall prepare a list of counselors who are well versed in counseling and such list shall be submitted to the Honourable High Court. On receipt of the list, the Honourable High Court would approve the panel of counselors for the year. The commencement of an year means the 1st day of January of that year and the year end means the 31st day of December of that year. Such counselors shall be attached with the respective Family Courts. The number of Counselors shall be determined by the State

Government in consultation with the High Court. The provision of section 6 of the Act deals with the above subject.

Presently, the sanctioned strength is two counselors per Family Court. However this strength is inadequate due to more number of inflow of fresh cases. The roles and responsibilities of a counselor are not defined under the Act. Rather the provision of section 23 of the Act empowers the High Court to frame rules to govern such issues. In Tamil Nadu, the Family Court Procedure Rules 1996 is in force. It envisages the responsibilities of the counselors and their powers to handle the matrimonial disputes and to what extent they could help the Courts in settling a matrimonial dispute. The prime requisite quality of a counselor is to have the quick understanding ability of the issue and to act unbiased and to provide necessary advise to the litigating spouses so as to enable them to arrive at a settlement.

The counselors are not bound to disclose the minutes of the discussion between the spouses who are before them for counseling. The counselor shall send a report indicating whether the settlement could be arrived or not. In certain cases the counselor could indicate as to the necessity of consulting a psychologist or a psychiatrist. This would help the Court to take a further decision without entering into the adversarial procedure.

The Mediation Centers attached with Family Courts are also constituted so as to conduct mediation in family disputes. The mediator attached with the mediation center would preferably be an advocate who would be well trained in the field of mediation. The role of mediator is to bring down the emotions of the litigating spouses and neutralize them and place

them on the pan of equity. Thereafter, the discussion would go on in a joint session and thereafter in a private session which is also termed as Caucus.

The process of mediation is purely voluntary. The litigating spouses should be explained with the importance of mediation. Once reference is made, the mediation would go on for a maximum of 60 days which is extendable till 90 days. When the parties arrive at a settlement, the mediator sends the report to the Court along with the memorandum of understanding entered by the parties. Thus, the case concludes amicably by virtue of inquisitorial process without adversarial adjudication.

In case where the case is not settled at the Mediation Center, the case is referred back to the Court. Now again the Judge of the Family Court has ample powers under Section 10(3) of the Act to have a conciliation with the parties. The ethics prevent the Judge from hearing to the facts of the case during conciliation. The apprehension is that the Judge having heard the facts of the case during conciliation and discussion, might get prejudiced. Such apprehension should not be in the minds of the litigants. Hence, the Judge has to motivate the parties to arrive at a settlement by explaining them the importance of the Family and it’s bondage and shall also encourage them with the ground reality of adversarial procedures and it’s consequences and to explain about the win-win situation in case of arriving at a settlement.

Even after this attempt if the Judge is not able make the parties arrive at a settlement, then the adversarial procedure commences. Thereafter the Judge shall have to direct the defendant/respondent to file the written statement/counter within the time frame fixed by the Court. The provisions of

section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed.

The provisions of Order VIII Rule 1 of the Code of Civil Procedure 1908 envisages that the written statement shall be filed within 30 days from the date of receipt of summons and such time could be extended up to 90 days, as the case may be, by recording the reasons thereon. But as regards to the matrimonial disputes, the process of counseling, mediation and conciliation involve large span of time. At times it may go even up to a year. However, the practical application of Order VIII Rule 1 of the Code of Civil Procedure would come into play when the Judge decides that the matter could not be settled. Thus, the leniency of extension of time for written statement/counter could be availed by virtue of the powers conferred under section 10(3) of the Act.

The role of a Lawyer is also very vital during the counseling, mediation or the conciliation processes. They assist the parties out of Court. Thereafter when the matter is posted for written statement/counter, the entry of a Lawyer is made through section 13 of the Act. The litigating spouses could take the assistance of a Lawyer in preparation of written statement/counter. In support of the petition under section 13 of the Act, they shall have to file an affidavit narrating the reasons for taking the assistance of a pleader. The admission of such petition is purely the discretion of the Court, and the same could be withdrawn by the Court at anytime, when there is an apprehension of miscarriage of justice. After such petition is admitted, the role of a Lawyer assumes much significance here. The preparation of the counter or written statement would be the pleadings for the respondent in the case, which would be anchoring the stand of the respondent. Such written statement/counter

shall also have to contain the denial or admission as to the averments made in the plaint/petition.

Generally the matching of horoscope alone is done while arranging the marriages. The matching and resemblance of habits and conduct of the spouses are not assessed while the marriages are arranged. A model case is dealt with to quote as a practical example. A husband who is of short tempered in nature and the wife who is of soft nature are married. The wife was brought up in a soft atmosphere. She never felt hurt for any reason at her parental home. The husband's short temper is exposed in due course of time. The slightest of the indifference found in the attitude of the husband makes her to retaliate. In turn the anger of the husband raises up. The husband, shouts, abuses, throws away things and his behavior becomes unpleasant. The husband concludes that the wife is not submissive to him and considers that he is being ill-treated by his wife and finally he wants to get separated. Hence, the husband files a petition for divorce on the grounds of cruelty.

The wife confesses to her lawyer that it was her husband who committed cruelty on her and that her husband is highly short tempered. However, she still wants to live with her husband and ready to give up the issues and ready to condone the acts of the husband for the sake of either the love and affection on her husband or for the sake of saving the marriage. Now the practical approach of the lawyer is to identify the mindset of the spouse before him/her. The real issue has to be testified. The wife's aim is to rejoin her husband. In the instant case which is taken out as an example, the husband is short tempered. Now the short tempered attitude of the husband

alone has to be dealt with. The Lawyer has to very carefully draft his counter so that the husband is not agitated on reading it.

Instead, if the Lawyer in order to satisfy the litigant wife, focuses upon all the issues as if the husband committed cruelty, then the irretrievable break down starts. The averments in the counter generally should contain the denial, and certain facts which are very essential to the case. Not every wrong of the husband has to be exposed. The consequences of leveling rival allegation of cruelty, as considered by the respondent/wife would go fatal to her reunion with her husband and may not give the desired result. This factual situation has to be explained to her. At any event, in the event of leveling rival allegation of cruelty, that would tend the Court to conclude that the parties are not compatible so that they might not be able to live under one roof.

The preparation of counter in a safe way without much serious allegations may save a marriage. After the filing of counter also, there are possibilities to attempt for a settlement. The Judge may advice the parties to conciliate on their own. In case if the settlement is not possible thereafter also, the respondent may file a better counter statement under Order VIII Rule 9 of the Code of Civil Procedure before the commencement of trial.

After the pleadings on either side is complete, the enquiry is commenced with the petitioner. The chief examination of the petitioner is done by way of an affidavit. The provision of section 15 and 16 of the Act lays down the procedure for recording evidence. The provisions lays down that the evidence shall not be lengthy and shall contain the memorandum of substance alone. A careful perusal of the above provision would make us to

understand that there is no way made out for cross examination of a witness. The evidence shall have to be in formal character.

The provisions of section 15 and section 16 are extracted for a cursory glance;

15. Record of oral evidence

In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit

(1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

The above provisions though not lays down the right to cross examination of a witness, the procedure of cross examination is followed so as to cull out the truth. The Code of Civil Procedure is very well applicable to this Act as per the section 10(1) of the Act. According to the Code of Civil

Procedure, the right to cross examination is envisaged under Order XVIII Rule 4 (2) Thus the procedure of cross examination of a witness could be permitted at Family Courts.

As regards to the marking of documents, the application of Evidence Act cannot be invoked. The provisions of section 14 of the Act, lays down that any piece of paper could be received in evidence, whether or not it is relevant or admissible under the Indian Evidence Act 1872. The relevant provisions are extracted hereunder;

14. Application of Indian Evidence Act, 1872

A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

Thus, it is inferred that the objections to the marking of the documents cannot be raised while the documents are being marked. At the most the party can nullify the veracity or the evidential value of the document during cross examination only.

The right of a lawyer to cross examine the witness is yet another area to be addressed. The provision of section 13 of the Act emphasizes the parties to appear on their own. At the most, the Court could seek the assistance of a legal expert as amicus curiae to assist the parties. But very rarely such circumstances are dealt with. This issue has been addressed by few of the Honourable High Courts. The decisions would make us understand that the role of an **"Amicus Curiae"** and that of an **"advocate"** and how they are differentiated. It is also pertinent to point out that the above section empowers the Court to take the assistance of a legal expert as **"Amicus**

Curiae" and no where it is expressly mentioned that such assistance is for that of the litigants. This area has to be addressed and an interpretation is very much required which is the need of the hour.

The word **"assistance of a legal expert"** employed in the provisions of Section 13 of the Family Courts Act 1984 has to be given a clear interpretation. The word assistance takes different dimension from case to case, party to party, and at times even from Court to Court. There should be an uniform approach. The word **"assistance"** is literally taken up to the level of cross examination of a witness and also for making arguments on behalf of the parties as the parties would tend to represent to the Court that they are unable to understand the legal procedures.

The advocate assists the litigant out of Court in preparation of the Proof Affidavit in respect of the evidence in Chief. The party presents his chief affidavit at Court and he is examined as a witness. Now the question of defending the allegations arises, for which the respondent/defendant seeks the assistance of a Lawyer for cross examination of the witness. Admittedly the defending spouse lacks legal knowledge. Further the presence of mind is also very much essential and the cogency in bringing out a fact or truth could be very well done by the legal practitioner alone.

The above issue is dealt with by the Division Bench of Honourable High Court of Rajasthan in **Sarla Sharma Versus State of Rajasthan& Others[1].** It has been decided as follows;

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[1] **CDJ 2001 Raj HC 087**

“10. The Courts strongly leaves against a construction which reduces the Statute to a futility. The Court shall read the Statute so as to make it effective and operative unless the words used in the Statute cannot be given any other meaning. Statute is designed to be workable and the interpretation there of by the Courts should be to secure that object unless crucial omission or clear direction makes that end unattainable. This in view, if we read main part of Section 13 to include the Family Court’s authority to permit engagement of a Lawyer/Advocate of party in exceptional circumstances. Rule 22 of the Rules of 1994 shall be in conformity of Section 13 of the Act of 1984. To save the Statute from declaring illegal, it is permissible for the Court to reading down the provision.

Rule 22 of the Rules of 1994 reads thus :

“22. Permission for representation by a Lawyer—The Presiding Officer of a Family Court, in his discretion may permit a Lawyer/Advocate to appear in the Court, wherever, he feels that it is necessary in the interest of justice.”

Instead thereof if we read rule like—

“22. Permission for representation by a Lawyer—The Presiding Officer of a Family Court, in his discretion in exceptional circumstances may permit a Lawyer/Advocate to appear in the Court, wherever, he feels that it is necessary in the interest of justice.”

11. The Rule 22 as above would permit Family Court in its discretion to allow a party to engage Lawyer or Advocate in a suit or proceeding pending before Family Court, in exceptional circumstances if it feels that engagement of Lawyer or Advocate is necessary in the interest of justice. Discretion to be exercised by the Family Court is judicial

discretion and, therefore, it should reflect from the order permitting such engagement. Judicial discretion which shall be exercised by the Family Court shall be guided by reasons. It should not be vague, arbitrary and fanciful but should be exercised reasonably in good faith keeping in view that order will be passed only in exceptional circumstances to meet the ends of justice. While exercising such discretion of permitting Lawyer or Advocate to appear in the Court for a party, the Court must keep in mind that normal rule is no intervention of the Lawyer/Advocate in the proceeding before Family Court . It is only in the exceptional circumstances, which must appear from the order of the Court, a party can be permitted to engage a Lawyer/Advocate to appear on its behalf in the suit or proceedings pending before the Family Court."

Thus by virtue of the above decision, an advocate can be permitted to appear before the Family Courts with certain limitations. The provisions of Section 13 would give an understanding that an amicus curiae cannot be permitted to do all the acts as done by an advocate. In this context, The Honourable Orissa High Court has dealt this issue and has classified the difference between the role of an advocate and that of an amicus curiae.

In **Sadhana Patra Vs Subrat Pradhan[2],** it has been held as follows;

"Reliance was placed on a decision of this Court in the case of Manguli Dalei Vs Smt. Malini Dalei[3], wherein this Court held that representation by lawyer is not a matter of right, but permission to be represented by

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[2] **AIR 2006 Orissa 105**

[3] **(1997) 12 OCR 196**

lawyer should be liberally granted where facts are complicated. The relevant portion of the judgment is quoted below: In the present revision, the learned advocate appearing for the husband-petitioner has argued that since the present petitioner was not represented through a lawyer, the petitioner could not take effective steps for proving documents marked 'X' and 'X-V as the petitioner was not aware about the intricacies of law relating to proof of a document. Section 14 of the Act has liberalized the power of a Family Court in the matter of reception of evidence and in a given circumstance a Family Court may receive as evidence any report, statement, document, information which would facilitate the Family Court as effectively decide the dispute, even though such report, et certera may not be strictly admissible or relevant under the Indian Evidence Act, 1972. In other words, a Family Court need not be inordinately technical or strict regarding relevancy or admissibility of a document. Be that as it may, in the present case, the petitioner had failed to prove the execution of the document and had not laid the foundation for receiving secondary evidence, possibly because the petitioner was not represented through a lawyer in view of the provisions contained in Section 13 of the Act. In as much as it is ordinarily understood that parties are not allowed to be represented through lawyers before the Family Court. In view of Section 13 of the Act, a party cannot be represented by a lawyer as of right in a suit or proceeding before the Family Court, but that does not mean, in no circumstance a litigant in the Family Court is to be allowed to be represented through a lawyer. Though as of right no litigant is to be represented by a legal practitioner in the Family Court, if the litigant desires to be represented by a legal practitioner, ordinarily the same should be permitted by the Family Court especially in complicated cases

affecting the rights and liabilities of the parties before the Family Court. Apart from the provisions of Rules 27 and 30 of the Family Courts (Orissa) Rules, 1990, a Family Court should liberally grant permission to litigants to engage lawyers of their own choice depending upon facts and circumstances of a given case. If the facts of a particular case appear to be complicated and the parties so desire, it would be better on the part of the Family Court to permit a party to engage a lawyer so that all the relevant materials be brought on record. If a matter can be mutually settled through counseling and process of reconciliation, the question of engaging a lawyer may not arise, but when cases cannot be decided on the basis of reconciliation or amicable settlement, it may be desirable to permit an applicant to engage a lawyer. In this connection, it must be kept in mind that the branch of law relating to matrimonial disputes though may appear to be simple on the face, of it, in fact, quite complicated and it is always advisable to get the benefit of proper legal advice. The aforesaid view expressed by me get support from the Division Bench decision of the Bombay High Court, Leela Mahadeo Joshi v. Dr. Mahdevo Sitaram Joshi[4]"

The above decisions would give us an understanding that the advocate assisting a spouse has a limited role in Family Courts. However, a Lawyer should be very careful in cross examination of a witness. His aim and objective is to shatter the crux of the evidence of the witness and not to shatter the character of the witness. Hence any amount of character assassination would have the direct impact on the litigant/client for whom the cross examining lawyer defends. However it depends on the facts and

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[4] **AIR 1991 Bom. 105**

circumstances of every case. In a case where there are possibilities to save the marriage, such questions could be very well avoided during cross examination.

The proceedings of the Family matters shall have to be mandatorily dealt in-camera. The party who sues or who is sued, flies abroad and he/she may not be in a position to attend the Court proceedings. The reasons may be genuine. The Honourable Apex Court, while dealing with **Santhini Vs Vijaya Venkatesh**[5], has in 2:1 majority held that the absence of a party shall not hamper the proceedings and that the evidence could be recorded through video conferencing. However the condition precedent is that the parties should agree for recording the evidence through video conferencing and shall file a joint memorandum or application to the Court. The operative portion of the Judgement is extracted hereunder;

"In view of the aforesaid analysis, we sum up our conclusion as follows:-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through video conferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

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[5] **CDJ 2017 SC 1137**

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that video conferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam(supra) is overruled to the aforesaid extent"

Thus the advancement of technology has a bit encroached upon the privacy of the litigants. This is because, there is no secured internet connection so as to believe that there are no intruders. Inevitably, the person handling the video conferencing gadget shall have to be permitted to be present in the in-camera proceedings. However the Governments shall have to respond to the request of the High Courts in providing the appropriate video conferencing gadgets with secured High Speed internet connection and adequate training to the Judges, Court staff and also to the advocates so that the video conferencing is carried out without affecting the objective of the in-camera proceedings.

The piece meal cross examination is yet another vital aspect which has to be avoided by the lawyers concerned. Time and again the Honourable Apex Court has come down heavily where the cross examinations are done in piece meal. The advocate shall be very much determined with his defense. Mostly, the practice of lengthy and piece meal cross examination is made so as to make an attempt to shatter the confidence of the witness. Further this

would lead to miscarriage of justice, which the Judges should not be silently witnessing and allowing the lengthy or piece meal cross examinations or both. This is not permissible as per the provisions of section 15 of the Act.

In **Vinoth Kumar Vs State of Punjab[6],** the Honourable Apex Court has laid down the dictum for Sessions Cases, where the witnesses have to be cross examined at a stretch on the same day itself. The Trial Court Judges who are handling the Sessions cases are given with strict guidelines to be followed while examining the witnesses and that the cross examination of the witness shall be completed on the same day. At the most the case could be adjourned to the next day. The key portion in paragraph 41 of the above Judgment alone is extracted hereunder which would speak in volumes.

"The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long

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[6] **CDJ 2015 SC 115**

shall we say, "Awake Arise". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defense counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

Though the above decision is in respect of the Sessions cases, the underlying message is very much alarming and the same is certainly applicable to the matrimonial cases also.

As regards to the matrimonial disputes, a series of decisions from the Honourable Apex Court would make us understand the sorry state affairs and the insensitivity of the Judge handling the Family Court, who allows the advocate or the litigant to dominate the Court process. In **Bhuwan Mohan Singh Vs Meena and others**[7]**,** the Honourable Apex Court has expressed the anguish for having kept the litigation for a long time on board. The objective of the Family Courts Act has been emphasized in para 12 of the above decision. The Honourable Apex Court has again reiterated the above position in **Shamima Farooqui Vs Shahid Khan**[8]and has expressed very serious concern in respect of delayed adjudications and unnecessary adjournments leading to prolonged pendency of cases. The relevant portions from the above decision is extracted hereunder;

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[7] **(2015) 6 Supreme Court Cases 353**

[8] **(2015) 5 Supreme Court Cases 705**

"An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same. The concern and anguish that was expressed by this Court in Bhuwan Mohan Singh v. Meena and Ors.[9], is to the following effect:-

"13. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in K.A. Abdul Jaleel v. T.A. Shahida[10] while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus:-

"The Family Courts Act was enacted 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."

14. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or

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[9] **(2015) 6 Supreme Court Cases 353**

[10] **https://indiankanoon.org/doc/373687/**

impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." [emphasis supplied]

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of

the brook. "Men may come and men may go, but I go on forever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more."

Thus it becomes the duty of the Judge of the Family Court as well as the Lawyers to ensure that there is no miscarriage of justice on account of delayed adjudication and by virtue of mechanical and unnecessary adjournments.

The plight of the litigants should be very carefully handled by the lawyers. If not inevitably there might be miscarriage of Justice. The intention of a litigant might be to protract the proceedings. For such reasons, though required or not, he/she may come forward with a petition for any interim relief. The request should be genuine. The scope of interim maintenance is wrongly construed. The Hindu Marriage Act 1955 envisages either of the spouse to claim interim maintenance from the other. The condition precedent is that the party claiming such maintenance has no independent income which is sufficient for him/her to maintain. Whereas The Special Marriage Act 1954, and the Divorce Act 1869 entitles the wife alone to claim interim maintenance. Though it may be a genuine need of the wife, the Lawyer has to carefully analyze the circumstance before filing such interim petition such that the main

objective of the litigant is not defeated. A slow pedaling and assessing the mindset of the other party has to be done by the lawyer. Thereafter such petitions could be brought in without emphasizing much allegations. Invariably we could see interim petitions filed with lots of allegations which are no way relevant to satisfy the requirements mandated under the provisions for interim relief.

It is also invariably seen that the filing of petitions for interim relief contain lengthy pleadings and include every averment of the original petition which is totally unwarranted. The crux of the petition alone could be explained in the affidavit. Thus the Lawyer has to be very much sensitized so that he realizes his social responsibility than that of the legal obligation.

In certain cases where there is a petition filed by a litigant for being represented by the power of attorney, there arises a strong objection from the other side. Indeed the position is settled by virtue of the Division Bench of Honourable High Court of Madras in **R.R. Pauya Vs. Kanagavel[11],** which was also followed by our Hon'ble High Court in **Sudha Ramalingam Vs Registrar General, High Court of Madras, dated 27th November 2014[12]**wherein it has been held that,

"21. Absolutely, the role of the Power of Attorney to assist the principal, who will be not in a position to appear in person to prosecute the proceedings before the Court, acquires significance for consideration.

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[11] **2014 (5) CTC 177**

[12] **AIR 2015 (NOC)266 MADRAS**

On analyzing the rulings on this issue, we gather and sum up the following regarding the role of the Power of Attorney.

i) Power of Attorney can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appeal as a witness on behalf of the principal in the capacity of the principal;

ii) The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross examined on those facts which are exclusively to the personal knowledge of the principal.

iii) In the family matters, it is not possible for the spouse to engage a power and act on his/her behalf to give evidence before the family Court which she/he alone has personal knowledge.

iv) There is no legal impediment under the Family Courts Act, for a Power of Attorney to appear on behalf of the Principal and the only legal embargo is that the recognized agent should not be a legal practitioner. Any person, not being a legal practitioner, can be nominated as an agent under Order 3 Rule 2 CPC, to prosecute or defend the parties and until the Family Court passes any specific order, directing appearance of the party, depending upon the facts and circumstances of the case. The persons who are exempted from the term 'legal practitioner' are the

parents, brothers and sisters. Even then for deposing the facts that are within the personal knowledge of the principal, they should refrain themselves, but the principal should appear before the Court and depose.

v) Under Section 13-B of the Act, a petition for dissolution of marriage by a decree of divorce by mutual consent, shall be presented by the parties to the marriage and not through the Power of Attorney since they should satisfy the Court that as on the date of presentation of the case, they had not been living together as husband and wife for more than one year, that they have not been able to live together and that they have mutually agreed for the dissolution.

vi) The endeavor of the Court should be as far as possible to sustain and nurture the institution of marriage. Section 9 of the Family Courts Act specifically envisages that in every suit or proceedings, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with nature and circumstances of the case to assist and persuade the parties in arriving at settlement in respect of the subject-matter of the suit or proceedings and thus, the personal appearance or presence of the parties concerned becomes inevitable and necessary at any rate from the stage of hearing after the appearance of the other side to the proceedings and the efforts contemplated to be made by the Family Court under the statute cannot be effectively carried out through a recognized agent or Power of Attorney of the party and having regard to the sensitive nature, personal feelings and behavioral attitudes to be assessed by the Court in carrying out the mandate

contained in Section 9 of the Family Courts Act. Personal appearance, though not initially required, becomes absolutely necessary after the appearance of the respondent to the proceedings. Therefore, the parties should make personal appearance before the Court as and when so stipulated or directed or indicated by the Family Court."

The above decision clearly lays down the restrictions and regulations for being represented by a power of attorney. When the position settled above is understood, the unnecessary waste of time in making trivial objections could be avoided.

It is also the prime duty of a lawyer to ensure that the allegations which are leveled against the opposite party contain some truth and it is supported by some material evidence. In most of the cases where there is a small suspicion the allegations are made in a very grave manner. While doing so the party leveling allegation considers that his/her case is strengthened.

It has to be taken care that the position of law as settled in various decisions in this context gives a note of caution to the spouses who level allegations without substantiation. Obviously when a person levels certain grave allegation on the other spouse as regard to the fidelity or chastity, the duty is cast on the person leveling such allegation to prove those allegations. In case if such allegations remain unproved, such leveling of unproved allegations by itself is deemed to be cruelty caused on the other spouse. There are series of Judgments in this aspect.

In **Malar Vijy Vs. Kanthan and another**[13]Wherein it has been observed as follows;

“22. In Manisha Sandeep Gade v. Sandeep Vinayak Gade[14] **a Division Bench of the Bombay High Court, while considering the question as to whether the unsubstantiated and unproved allegation of adultery leveled against the husband by the wife would amount to mental cruelty, has held that it will amount to mental cruelty. It was a case where the husband has sought for divorce on the ground of cruelty and while defending the petition, the wife in her written statement, apart from defending her and refuting the allegations made against her, had made several allegations against her husband and one such allegation was that he had illicit relationship with one Leena, wife of Vivek and in fact he wanted to marry her. While considering the legal effect of such an allegation, the Division Bench has held as follows:-**

"30. What we have to note is that when one party to the petition has sought divorce on some ground and the respondent to that petition does not merely defend it to get it defeated, but makes further serious allegations against the petitioner, it becomes a clear step towards the dissolution of the marriage. In the present matter, the petitioner has approached the Court seeking dissolution of his marriage. It is his case that there is a failure of the marriage and he seeks to point it out by

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[13] **2011 (6) CTC 35**

[14] **AIR 2005 BOMBAY 180**

invoking a ground available under the law. At that point of time, if the respondent makes a counter allegation in the written statement, that by itself shows a prima facie failure of the marriage. ....

31. .... In a matrimonial matter, one cannot apply the standard of stricter evidence. Nothing prevented her from establishing her allegations. The respondent could not have established the negative by leading any further evidence that the allegations made by the wife were false. The appellant had made the allegations. The burden was on her. She had failed to prove those allegations. Once she fails to prove those allegations and if those allegations are not in consonance with matrimonial relationship, and the husband complains that they have caused him agony, the inference that they constitute cruelty has to follow.

32. In the circumstances we are satisfied that the learned Judge was right in coming to the conclusion that the allegations made by the appellant wife were baseless and false and constituted a cruelty. He was, therefore, right in granting the decree of divorce on that ground. ..."

23. In Kiran Mandal v. Mohini Mandal[15] a Division Bench of that Court, has held as follows:-

"14. ... She made false allegations against her husband that he had illicit relations with his brother's wife. These false allegations did have an injurious effect on the husband.

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[15] AIR 1989 PUNJAB AND HARYANA 310

15. Cruelty within the meaning of S. 13 of the Hindu Marriage Act is not confined to physical violence but includes mental torture caused by one spouse to the other. The wife had made it insufferable for the husband to live with her. Any man with reasonable self respect and power of endurance will find it difficult to live with a taunting wife, when such taunts are in fact insult and indignities. Human nature being what it is, a reasonable man's reaction to the conduct of the offending spouse is the test and unending accusations and imputations can cause more pain and misery than physical beating. ...."

24. In Smt. Chanderkala Trivedi v. Dr. S.P.Trivedi[16], the husband sued for divorce on the ground of cruelty by wife. The wife filed a written statement wherein she attributed adultery to the husband. In reply thereto the husband put forward another allegation against the wife that she was having undesirable association with young boys. Considering the mutual allegations, His Lordship, R.M.Sahai, J., speaking for Division Bench, observed:

"Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three Courts are correct or not but what is certain is that once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any

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[16] **1993 (3) Scale 541**

circumstance be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife."

25. In the light of the law laid down in the aforesaid decisions, if the facts of the present case are considered, it could be seen that when serious allegations of adultery is made by the wife against the husband and the same stands unsubstantiated that will definitely amount to mental cruelty as far as the husband is concerned. The unfounded allegations made by the wife against her husband by itself shows the prima facie failure of the marriage.

26. As far as the contentions of the learned counsel for the appellant that unless and until the 1st respondent substantiates his allegations contained in the petition, he is not entitled for decree for divorce and merely on the ground that when the wife has made serious allegations, he is not entitled to get decree is concerned, it has to be pointed out that making unsubstantiated allegations about the character of the husband and accusing him of illicit intimacy would itself amount to mental cruelty. Therefore, the said contention of the learned counsel for the appellant cannot be countenanced when the very allegations made against the 1st respondent will amount to mental cruelty.

27. Under the above circumstances, it is immaterial that the 1st respondent should establish the allegations of cruelty pleaded in the petition. Therefore, the said contention of the learned counsel is rejected.

28. We do not find any other valid reason to interfere with the reasoning of the Court below. Hence the appeal fails and the same is dismissed. No order as to costs."

The above position is reiterated in a recent Judgement of the Division Bench of Honourable High Court of Madras in **R. Frederick Vs. H. Malini[17],** wherein it has been held as follows:

"19. Even though mental cruelty cannot be defined preciously, yet, it can be inferred on the basis of the attendant facts and circumstances of the case. In this context, useful reference could be made to the decision of the Hon'ble Supreme Court in K.Srinivas Rao Vs. D.A.Deepa[18], wherein it was held as follows:

"10. Cruelty can never be defined with exactitude. What is cruelty, will depend upon the facts and circumstances of each case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his Family Members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. Merely because no action is taken on the complaint or after trial the Accused is acquitted may not be a grounds to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act. However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse, leveling false accusations against the other spouse would be an act of cruelty….."

20. Thus, the plea of Mental Cruelty cannot be precisely defined, yet, making unfounded, indecent, defamatory allegations against the spouse

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[17] **2017 (3) MWN (Civil) 673**

[18] **2013 (1) MWN (Civil) 578 (SC): 2013 (5) SCC 226**

or his or her relatives which may have adverse impact on the business prospect or the job of the spouse would itself amount to cruelty. In the present case, the respondent has harped upon by contending that the Appellant led an adulterous life with one Shubha, Bharathi and other women, but such allegations are largely not substantiated either by examining the aforesaid persons or by any other proof to show that the Appellant was in fact having illicit intimacy with them. Further, it was proved from the oral evidence as well as pleadings of the respondent that she has informed the sister, brother and mother of the Appellant as though the Appellant was living an adulterous relationship with other woman. When the respondent, without any substance, has informed the sister, brother and mother of the Appellant as though the Appellant is leading an adulterous life, definitely, it would be difficult, rather the Appellant would be ashamed, to even interact or meet his own sister, brother and mother in the wake of such scandalous and disparaging remarks made against him by the Respondent. Moreover, we are also of the opinion that if a suspicious nature of one of the spouse doubting the fidelity of the husband or wife as the case may be, becomes a perennial feature without any basis, leading to discord in the matrimonial life, it is only a reflection of cruelty inflicted by one of the spouse against the other. In such circumstances, we feel that the accusations made by the Respondent against the Appellant, which remain largely unsubstantiated, with respect to adulterous living, would have definitely caused him a scar, mental disturbance and mental cruelty to him. Therefore, we hold that the Appellant has proved that he was inflicted with and subjected to matrimonial cruelty at the hands of the Respondent."

Hence a Lawyer should be very cautious while making the cross examination and shall ensure that the allegations leveled against the other spouse should not become fatal to his own case.

The recent March of Law is in respect of the petitions filed for divorce by mutual consent. The Act(s), though it be, The Hindu Marriage Act, The Special Marriage Act or The Divorce Act, mandates that where the spouses consent for divorce by mutual consent and file their petition, such filing of the petition amounts to their first motion to the Court. Thereafter the second motion in pressing their consent divorce petition shall have to be made after the lapse of the six months waiting period. The intention of the Legislators was in anticipation that the emotional stress of the spouses may come down and this waiting period of six months may cool them and enable the spouses to rethink over their decision of separation and thus the sacramental matrimonial tie could be saved. However this causes agony in certain cases where the marital tie could not work out anymore and where the spouses are separate for a long duration and where the wedlock has become a dead lock. The further waiting would agonize them. In such cases there was no ventilation to the estranged spouses.

In this context it becomes incumbent to cite the decision of the Honourable Supreme Court of India in **Amardeep Singh Vs Harveen Kaur**[19] wherein a question which arose for consideration was that whether the mandatory period of six months stipulated under Section 13 B(2) of the Hindu Marriage Act, 1955 (the Act) is mandatory for making the second motion or can be relaxed in any exceptional situations. The Apex Court on considering number of judge-made Laws, in order to determine the question whether the provision is mandatory or directory, applied the principles laid down in

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[19] **2017 SCC ONLINE SC 1073**

Kailash Versus Nanhku and others[20] and finally concluded that the provisions are not mandatory but directory.

The Honourable Apex Court has formulated certain guidelines to the Subordinate Courts dealing with such matters in para 19 of the above Judgment as follows:

i) the statutory period of six months specified in Section 13 B(2), in addition to the statutory period of one year under Section 13 B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC /Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

In such cases, the waiver application can be filed after seven days of the first motion by stating the reasons for claiming the waiver of cooling period. When the above conditions are satisfied, the waiver of the waiting

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[20] **(2005) 4 SCC 480; http://indiankanoon.org/doc/877414**

period of six months for the second motion could be waived off by the Concerned Court which will be at the discretion of the concerned Court. The Apex Court has left it open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

However such exercise of the discretion shall be in par with the above guidelines only. In cases where the spouses are litigating for years together, and where it is apparent that they are separated for more than one and half years, and where the records would show that the spouses have undergone mediation or conciliation and resulted in a failure in the pending proceedings, the exercise of the discretionary powers in waiving the statutory period of six months could be very well exercised, when the spouses finally settle down with the option to get separated by divorce through mutual consent. In case, where the parties have approached the Court for the first time seeking divorce by mutual consent, and when they request to waive the six months cooling period, the duty of the Judge and the Advocate is to verify whether the separation is more than one and half years. Then comes the question of mediation or conciliation. The parties might appear determined. However the decision taken by the parties to get separated should be ascertained by referring them to mediation centre. Even after mediation, if it is found from the report of the mediator that the parties could not re-unite, then the Courts could proceed further to allow the waiver petition and put an end to the agony of the spouses.

Apart from that the Apex Court has observed that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such

as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice. Hence it becomes the duty of the Advocate to explain to the above position, so that the spouses would not be taken to much stress of thinking about the waiting period of further six months, even in genuine cases also.

Another area of concern is that of the filing of Interlocutory Applications. The frequently filed petitions are that of the petitions for Interim Maintenance, Interim Custody of the Child, and return of articles. In certain cases, the need of the spouse for interim maintenance would be inevitable. Under desperate situation, such claim would be made. But in most cases, where the husband has filed the main petition for divorce and the wife opposes it, the petition for Interim Maintenance is filed by wife despite having sufficient means to maintain herself , with an only motive to either harass the husband, or to prolong the issue on the firm belief that the husband would rejoin her.

In some cases, the wife aims for lapse of certain period of time so that the husband might come up for a settlement. But a psychological approach would make us to understand that the husband gets aggravated on such petition for interim maintenance as he knows the financial capacity of the wife. This has to be approached in a sensitized way by the advocate, who has to advise party accordingly. Instead, more counseling sessions, or mediation sessions could be requested. The Courts are ready to concede to such requests of reference to counseling sessions, or mediation.

Without making a specific reference, a typical instance is quoted here. A case where the husband has filed the divorce petition is pending. The husband is in an oscillation mind whether he could join his wife. Without understanding the issue, the wife comes forward with a petition for Interim maintenance. She also files a separate petition for restitution of conjugal

rights and files a separate petition for litigation expenses. Finally she lands with a petition under section 125 Cr.P.C. seeking maintenance from her husband. At this stage, the husband decides that his wife is only after his money and she has no affection or whatsoever on him. Thus such guidance would tend the shattering of the matrimonial tie once for all.

The Evidence Act has no role to play in Family Court matters. In case of expert opinion like DNA test, the invoking of the provisions under section 45 of the Evidence Act is unwarranted. Section 12 of The Act, deals in respect of approaching an expert to assist the Court. Hence the Courts as well as the Lawyers should be sensitized very much. The issues should be attempted to be settled at the budding stage by adopting subtle methods else, the small wear and tear would lead to the eruption of volcano.

The pre-litigation counseling could be one of the best solution which the Lawyers could adopt and advice their clients. The role of lawyers in assisting the Courts in referring the matters to mediation centers or to the counseling sessions assume much significance. Where a litigant is not able to understand the importance of settlement through counseling, mediation or conciliation it becomes incumbent on an advocate to explain to his/her client, the importance of such processes which would help the litigants to avoid the unpleasant adversarial procedure by which the second round of litigation by way of appeal could be avoided.

Last but not the least, the Lawyers are the guiding lights to the litigants who struggle in dark in search of justice. It is also to be remembered that the best Judgments come from the bench where there is Good Bar. The litigants should be enlightened in respect of their rights, if not the Law would not come to their rescue. It would be worth quoting the legal maxim ***"Ignorantia facti excusat, Ignorantia Juris non excusat"*** which means that

the Law excuses the ignorance of facts and not the ignorance of Law. Thus the role of a Lawyer becomes laudable when the righteous approach is made towards Justice by balancing the Equity coupled with Humanity.

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