

Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh

Md. Sefat Ullah*

Abstract

The system of alternative dispute resolution (ADR) along with the formal trial system has been gaining its grounds to subdue shortcomings of our formal judicial system. However, ADR mechanisms attached with family court have yet to result in desirable outcomes because of some statutory limitations and practical challenges. This research is intended to explore the challenges and way outs of existing ADR in family courts in Bangladesh. This study is comprised of both primary and secondary methods of investigations which include amongst other analysis of relevant legal provisions and examination of the opinions of the stakeholders. By examining the myths, perceptions and practices of the stakeholders, the main barriers to attaining goals are discovered. It is, however, to be submitted unequivocally that the challenges of ADR in family courts can be subdued through adopting some feasible and effective ways out. In this paper, after due analysis of relevant legal provisions and considering the opinions of the stakeholders, attempt would be made to explore the possible ways out to meet challenges within our laws and practices so that our legal system may accommodate better mechanisms and success in resolving family disputes in alternative way.

Keywords: Family Court, ADR, Conciliation

Introduction

Human conflicts and difference of opinions within or beyond the family affairs are historical reality that we can neither completely refuse nor ignore. Disputes among the people are equally concomitant so long human society and civilization exists. It is perhaps a utopian concept to imagine a human society without conflict or dispute. The scale and length of such human dispute result in serious setbacks and multiple impacts when they are related to family issues. States are relentlessly trying to shape new policies and adopt measures through which they may resolve the disputes beyond traditional courts system. Ideally, Alternative Dispute Resolutions (ADR) process has become popular which aims at resolving disputes within minimum level of possible costs and resources can be spared for constructive pursuits (Singh, 2006, p.391). Due to stigmatizing, premature rush to court along with costs and sensitiveness of family issues, ADR mechanisms suit with settlement of family disputes.

*Senior Lecturer, Department of Law, Green University of Bangladesh

Bangladesh has historical legacy of settling dispute alternatively through panchayet or salish at village level. The traditional informal systems of dispute settlement along with formal court system have been incorporated in various legislative provisions pertaining to family affairs with a view to obtaining quick and amicable dispute resolution. Perhaps, it would be no exaggeration to argue that the ADR system in family suits has not produced the outcomes up to the expectations. Logically, the reasons and challenges of such failure are the subject matters of investigations by the different stakeholders. Thus, challenges of ADR in family courts that Bangladesh is currently confronting would be ventilated in this paper. The paper would then step further to put forward possible ways out to subdue or reduce existing challenges on settling dispute alternatively in family courts. The research questions will be linked to theoretical and practical aspects of the system in Bangladesh. Guiding research questions are: What are the challenges of ADR system applicable in family courts of Bangladesh? What are the ways and means to increase the popularity of ADR therein? And what are the measures and policies that should be taken to reform the family court based ADR in Bangladesh?

ADR Applicable in Family Suits

Conceptual Analysis of ADR

Alternative Dispute Resolution (ADR) is a process of dispute settlement outside the formal judicial system to resolve the dispute through a process of mutual compromise and agreement by parties themselves personally or through representatives. In true sense, ADR is the process of resolving dispute without going through the assessment of the court, which may bring bad publicity, acrimony, high cost and high technicality (Sayed, 2006). In words of Mostofa Kamal, J (2007), "it is an informal settlement of legal and judicial disputes through a process of mutual compromise" (Kamal, 2007, p.2). He also added that ADR is not a panacea for all evils but an alternative route to a speedier and less expensive mode of settlement of disputes. Because of the special characteristics, "ADR is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process" (Chandra, 1997, p. 83). It is a non-judicial means for simple, quick, flexible accessible and amicable rather than adversarial dispute resolution system. The primary object of ADR system is the avoidance of vexation, complexity, expense and delay, and the promotion of the ideal of access to justice (Aggarwal, 2006).

From the view point of methods of resolution, ADR mainly consists of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. Arbitration is adjudicatory and the result is binding, whereas conciliation is consensual and very helpful in making the parties in settling their disputes mutually with

the help of a neutral third person. Negotiation is a non-binding procedure resorted to by the parties for arriving at a negotiated settlement. Mediation is a decision-making process in which the parties are assisted by a third party, the mediator. The mediator attempts to improve the process of decision making and to assist the parties to reach an outcome to which each of them can consent. Due to this aspect, ADR tends to generate less escalation and ill-will between parties where the parties can continue to interact after settlement is reached (Sinha and Mishra, 2004, p. 300). Regarding simplicity, speediness, flexibility and accessibility of dispute resolution system 'Alternative Dispute Resolution' mechanisms are more suitable than existing judicial system.

Historical Analysis of ADR on Family Matters in Bangladesh

The history of ADR in Bangladesh might be discovered with the evolution of different traditional modes of informal justice, such as panchayet or local salish though the exact era cannot be pinpointed (Chowdhury, 2010, p. 78). Traditionally, salish is an informal dispute resolution process, which is prevalent mostly in the village area (Halim, 1998, p. 59). Statutory ADR can be identified as recent addition aligned with formal justice system. The British government initiated the panchayet system in 1870 to resolve the minor disputes amicably like collection of revenue and disputes arisen thereout (Halim, 2008, p. 345). In the word of Martin C.J. "to refer matters to panchayat was one of the natural ways of deciding many disputes in India" (Tewari, 2005, p. 2-3).

Muslim Family Laws Ordinance (MFLO), 1961 made an arrangement to settle family disputes among couples through quasi formal local bodies called 'Arbitration Council'. After independence, specialized family court was established in 1985 incorporating the conciliation process by court in different stages of trial. Due to less effective mechanisms and primitiveness of the trial procedure in Bangladesh, the court had to face many problems to resolve a dispute timely and diligently. At last, a light was seen on the other side of the tunnel when a time demanding initiative was taken in 1999 by then Justice Mr. Mustafa Kamal. Bangladesh Legal Study Group (BLSG) was formed under the leadership of Justice Mustafa Kamal along with other renowned jurists of the country (Akhtaruzzaman, 2011, p. 32).

The Group categorized lack of accountability, absence of discipline and fragmentation in the litigation process and the absence of resourceful alternatives to full trial as the most pressing problems for the delay and denial of efficient and due justice. The report recommended initiating an immediate pilot project on the mediation, a non-mandatory consensual dispute resolution system, in the family court using the provision of conciliation in the family court Ordinance, 1985. The Ordinance empowers the trial judge to impose and facilitate the reconciliation between the parties

both in pre-proceedings stage and in trial stage even after trial (Hasan, 2001, p. 26-27).

It was evident from the pilot project that the success rate of disputes resolution and realization of claims through mediation was far higher and better than that of through regular trail (Zulfiquer, 2015). The ADR successfully changed the mental attitude of the judges, lawyers, litigants and even the critics. It is worthwhile to mention remarks of Justice Mr. K.M. Hassan on the prospects of ADR in Bangladesh, 'the success of mediation in the family court is not an end. We look forward to the day when introduction of ADR mechanism in other court, like Commercial Courts will be achieved (Hasan, 2002, p. 2). The experience of the family courts has provided a strong foundation upon which a favorable environment to introduce ADR in any type of cases has been grounded (Akhtaruzzaman, 2011, p. 32).

Suitability of ADR on Family Suits

Alternative Dispute Resolution in the family matters has been justified from the various perspectives. It justifies its suitability and necessity in family matters due to the peculiar character and nature of the dispute that require special type of dispute settlement process other than formal dispute settlement. It is worthwhile to quote K.M Hasan, CJ, who rightly pointed out suitability ADR in family affairs in context of Bangladesh by the followings words:

"In a conservative country like Bangladesh Mediation provides a great opportunity for an aggrieved person who is a woman to directly participate in the dispute resolution process and voice her grievance. Given the traditional mindset the female aggrieved parties in the society are not prone to expose themselves to public eye by going to court. Mediation by the family court removes the risk of such exposure and allows to participate in their affairs and to settle dispute in without being condemned by critical eyes. Direct participation of a female aggrieved parties to the dispute has thus to a great extant facilities and contributed the success of the program" (Hasan, 2002, p.3).

Firstly, The high costs of any dispute resolution system or mechanism may restrain disputant's ability to access justice, the prime pillar of justice. In case of family matters this problem is very acute, because most of the victims are jobless housewives (Chowdhury, 2013, p.145). On the contrary, in case of out of court mediation and NGO mediation people may not have to bear such costs (Chowdhury, 2005). For example, Bangladesh Legal Aid and services Trust (BLAST), Ain O Shalish Kendro (ASK) conducting mediation free of cost, and Bangladesh Lawyers Association (BNWLA) takes registration cost of only amount of 20 BDT. It is rightly pointed out by Prof. Sumaya Khair 'the most tangible gain from mediation services is the lesser cost of disposing the disputes' (Khair, 2004, p. 85). Considering the

above points it can be said that ADR mechanism is not only desirable but also effective in family matters.

Secondly, no complex procedural or evidentiary rules which are to strictly be followed by the facilitators of ADR in family matters (Mehtab and Rahim, 2015) because most ADR system is 'fact and act oriented' and a good ADR mechanism is 'person oriented' (Chowdhury, 2013, p. 49). The simplicity of the system and no requirement of legal representation lessen the cost in ADR. Moreover, practices of ADR minimize the probability to delay in disposing cases (Chowdhury, 2013, p. 50). Thirdly, ADR system in family matters may ultimately ensure justice for the poor and other disadvantaged people. It has a considerable impact on protecting women's rights in the family and outside. As ADR is cheap and easy so they can move to dissolve any dispute issue with nominal cost that they can afford. Alternative dispute resolution has initiated a shift in the attitude of men who have come to accept that women have to treat equitably (Khair, 2004, p. 87).

Fourthly, reaching the court is a taboo for victim from rural areas and formal court system often offends family tradition and prestige. Moreover, the court process is open and often does not respect people's privacy but the privacy is more important (Chowdhury, 2013, p. 54). Thus, ADR mechanisms may effectively ensure the privacy of the disputants of family matters.

Fifthly, overwhelmingly Informal nature of ADR turns it as unique character. Most of the cases the mechanisms that practiced in Bangladesh are flexible and the parties have the autonomy to settle their disputes (Chowdhury, 2013, p. 54). Thus, ADR mechanisms of settling the dispute are habitually less stressful for the parties than the litigation in the court.

Finally, unlike adversarial trial, win-win outcome is an important feature of a successful ADR. It helps to resolute the dispute in a nonviolent way. To evaporate the disputes, the parties select the decision makers and proceedings. Thus, resolution of dispute through ADR helps parties to continue their relationship in harmony (Chowdhury, 2013, p. 54).

Manifestations of ADR in Family Court Trial

The complicated, lengthy and costly dispute settlement system in Bangladesh places justice beyond the reach of poor and mass people (Khair, 2004, p. 59). However, ADR mitigates the formal complexities, unnecessary delay and cumbersome procedures. It resolves the dispute of delicate nature effectively. Thus, ADR is overwhelmingly required for ensuring effective and desired outcomes of particular issue, especially, in the delicate family affairs. Bangladeshi legal framework has

been tried to accommodate the mechanisms of ADR in settling family disputes.

The establishment of the family courts in Bangladesh under Family Courts Ordinance, (FCO) 1985 is a landmark decision of the government. Prior to establishment of FCO all litigations relating to family matter were adjudicated by the ordinary civil courts. Consequently, the formal, lengthy, costly alongside the complicated procedures often place the justice beyond the reach of poor and mass people (Khair, 2004, p. 59). Moreover, MFLO was only applicable to Muslim communities, thus, all the ADR procedures were attached to the citizens with Islamic religion not others. A separate special law for all was required to deal with family disputes in a uniform manner irrespective of religion (Chowdhury, 2013, p. 142). The FCO, 1985 which under Section 5 incorporates some key subject matters of family disputes (i.e. dissolution of marriage, restitution of conjugal rights, dower, maintenance, and finally guardianship and custody of children) precisely contains the provisions of ADR in the form of pre-trial, pre-judgment and post-judgment conciliation as outlined in the section 10, 13 and 23 of the FCO, 1985.

Pre-Trial Conciliation

Section 10 of FCO envisages pre-trial conciliation in the family dispute. When the written statement is filed by the defendant, the family court shall fix a date ordinarily of not more than 30 days for pre-trial hearing of the suit. As farther elaborated on the date fixed for pre-trial hearing, the court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deem fit hear the parties. The provision of ADR was effectively mentioned in section 10(3) of FCO 1985, under which, at the pre-trial hearing, the courts shall ascertain the point at issue between the parties and attempt to affect a compromise or reconciliation. If the parties agree to mediate the presiding judge usually meet them in his chamber. Lawyers may or may not be allowed to stay, however in most of the cases, the family court judges do not allow lawyers to stay in the conciliation session (Chowdhury, 2011).

Pre-Judgment Conciliation

The provision of pre-judgment mediation is prescribed under section 13 of the Family Court Ordinance 1985. If a pre-trial mediation fails, after completing the trial process and before pronouncing judgment the judge shall ask parties regarding their intention to solve the dispute through mediation. If parties reach in agreement, the court shall give compromise decree. The significant feature of family court mediation is that the mode of mediation practiced in family court is mandatory both under sections 10 and 13.

Post-Judgment Arbitration

The post-judgment mediation is facilitated under section 23 of the FCO if the divorce decree is pronounced. The judge sends the judgment to the concerned chairman of Union Council or Municipality to take the initiative under section 7 of the MFLO *mutatis mutandis* treating the judgment as a notice of divorce. If the arbitration council can hold successful mediation, the judgment will be vacated and marriage will be restored and vice versa. On such notice the chairman shall constitute an Arbitration Council within thirty days to try and reconcile the aggrieved couple. The Arbitration council shall be constituted by the chairman and two nominated representatives from both sides. The decision will be taken on the opinion of the majority. If the attempt is successful, the divorce is avoided; otherwise talaq shall be effective after 90 days from the chairman receiving the decree or the end of pregnancy if the wife is pregnant at the time of pronouncement whichever occurs later.

Statutory Limitations and Practices of ADR in Family Courts

It is always imperative to explore the limitations-inbuilt or otherwise- in a system to make it workable in practical terms and justifiable in theoretical aspect. From practical aspect, we should think that how we can make an alignment of statutory provisions and procedures in a way so that it “transforms a family court system from one that disrupts and tears apart families to one that helps heal them” (Babb and Danziger, 2014, p. 4). In this section, an exploration would be made to identify the statutory limitations on ADR system in family courts under the current legal framework of Bangladesh. It would also be ventilated how those drawbacks, if any, have their impacts on justice dispensation process in family matters.

Although there were some confusions and ambiguities on the applicability of FCO, 1985 on basis of religion, however, the confusions have been removed by judicial decisions. At the outset, it was claimed that FCO is only applicable to Muslims not to other religions. In *Krisnapada Talukder vs. Geetasree Talukder* (BLD 1994 HCD, p. 415), the question arose whether a Hindu female can claim maintenance under FCO. It was held by the High Court Division that FCO is only applicable to the people who belong to the Islamic religion, thus, people from other religion cannot claim any remedy under FCO. The view of the court has been changed later on in *Pochon Rikssi Das Vs Khuku Rani Dasi and others* (50 DLR (AD), p. 47) by removing all the confusions. It was held that The Family Court Ordinance has not taken away any personal right of any litigant of any faith and it is applicable to all litigants irrespective of their religions. Thus, Family Courts have jurisdiction over all citizens if it is covered by section 5 of FCO, 1985.

Family Courts also empowered to resolve the dispute alternatively to the conventional process of the court. If the parties agree to mediate the presiding judge

usually meet them in his chamber, the lawyers of each party may or may not be allowed to stay. However it has been observed in most of the cases, the family court judges do not allow lawyers to stay in the mediation session (Chowdhury, 2011). As a result the parties can hardly reaches in an agreed position. The main purpose of mediation is that parties should be able to express their grievances and in the process by their active participation would be able to reach at reconciliation. However, in many cases, parties cannot do so because of the time constraint, unwillingness of advocates even non-facilitation from the judges. Despite the satisfactory legal provisions for mediation at FCO still the outcomes are not good enough due to the existing practices at ground level.

Regarding the post-judgment reconciliation by Arbitration Council, it has been a matter of great concern that often the purpose of reconciliation between the parties under section 7(4) has been frustrated because of statutory limitations and practices thereof. The MFLO imposes a duty upon the chairman to constitute an arbitration council but without containing any explicit provisions as to what will happen if the chairman does not constitute that willfully or otherwise. The whole scheme of arbitration council has been turned into optional one rather than mandatory (Huda 2004, p.112). Even if the arbitration council is constituted which does not take any effective steps or no step at all to bring about reconciliation, nowhere in the MFLO remedy is provided in such case (25 DLR HCD, p. 227). Moreover, in the context of social reality of Bangladesh, chairmen of Union Parishad do not play neutrally good role in discharging their duties in the reconciliation process.

Statutory Challenges to Implement ADR

Despite the huge expectation that settlement of family dispute alternatively will bring significant changes in the landscape of dispute settlement in Bangladesh, however, ADR is yet to produce the expected results due to some of the common obstacles and challenges. The following figure reflects the judges’ opinions on the effectiveness of ADR in response to common questionnaires:

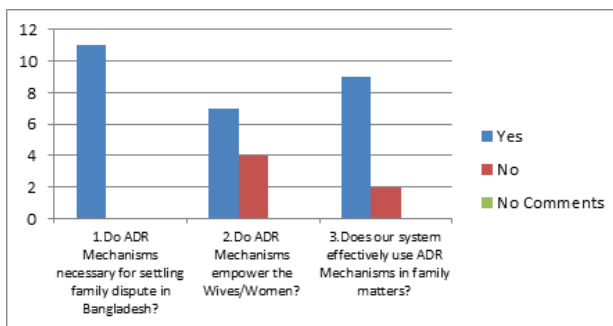


Figure 1: Reflections of Family Court’s Judges on Current Scenario of ADR

The primary data have been collected by the authors from eleven judges of family courts of Bangladesh by questionnaire and interview. It has been a matter of fact that all the eleven judges of family courts from different districts of Bangladesh have unanimously endorsed the necessity of ADR in trying family matters. In regard to the empowerment of women by the ADR process they are bit divided although lion share of them agreed that ADR mechanisms are not being effectively followed in our country. It has been a matter of investigation for researchers and stakeholders why our systems cannot efficiently reap the benefits of alternative dispute resolution. There must be some intrinsic and extrinsic challenges or setbacks for which we cannot make best use of ADR in family court.

The challenges of ADR process in settling family affairs may be summarized in followings. It is generally argued that non-cooperation from the part of lawyers is the prime cause of ineffectiveness ADR. The lawyer's community is always against the ADR process because they feel that it will eat their share of pie. Furthermore, the leading cause of delay in disposal of suits lies in dilatory tactics played by the lawyers by way of seeking repeated time petitions (Mehtab and Rahim, 2015, p.57). However, it is somehow became a blame game where judges are generally blame the lawyers and lawyers shift the responsibilities to the courts and overall systems. Paucity of public awareness in Bangladesh is another reason of unsuccessful working of ADR, especially the people who work in the rural area most of them don't know much about ADR that is why litigants have to rely on their pleaders. Our people do not aware about their benefits of settling the dispute through ADR. Most of the cases Arbitration councils as lowest possible unit of ADR are not fully functional (Ameen, 2005) and so people have to take recourse to the family courts to resolve their disputes. Sometime arbitration council may become politically biased and do not provide fair justice to concerned parties, especially the women folks often become sufferers (Siddiqi, 2006). It is also worthwhile to mention that there is no option for judicial review to oversee the fairness of decisions made by an arbitration council until the matter taken into court (Chowdhury, 2013, p.202). The judges of family courts in Bangladesh have to deal with ADR issues while the dispute is under their jurisdictions. It is understandably appropriate to say that they have the better insights about the shortcomings and challenges of ADR within family affairs in Bangladesh. Following points demonstrate the perceptions of some judges of family courts from eight different districts of Bangladesh on challenges of ADR process:

- lack of awareness among the parties to dispute
- lack of interests of the lawyers and at times of the judges
- lack of resources and infrastructures including well trained mediators and arbitrators
- lengthy procedures in doing ADR as well

- lack of compromising attitudes among the litigants. Advocates are mainly responsible for ineffective use of ADR in family matters, they discourage the parties
- unreasonable and political interference of local Union Parishad Members and Chairmen
- initiation of fake criminal cases along with civil litigations by the parties
- legal provisions of ADR in family matters were not made by taking consideration of socio-economic condition of the parties

The above points reflect that they have added some new and interesting challenges along with the setbacks that are already known in the existing literatures. The judges community are overwhelmingly put finger at the lawyers for ineffective ADR in family dispute. They also believe that lack of compromising attitudes of litigants coupled with lack of well-trained mediators or arbitrators are hindering the process.

Like every other issues political interference in Arbitration Council or dealing the dispute politically have been causing serious havoc. Most often, fake suits or cases have been instituted in order to bind other parties to make compromise. It is a serious misuse of ADR process which ultimately vitiates the whole scheme of ADR in family matters. Our learned judges also opined that ADR provisions in family matters have not been made after due consideration of socio-economic condition of parties, especially the women segment who usually do not have economic and other associated powers to make effective negotiation. In consequence, they have been forced to compromise in compliance of the sweet wills of the dominant male section of the society.

Findings and Recommendations to Subdue Roadblock

The existing challenges within the family affairs ADR may be lessened if not totally removed by adopting the appropriate policy and practical measures analyzing the following research findings:

- The family disputes that are settled by ADR are more sensitive and complicated for which more impartiality and neutrality is required.
- The personnel associated with ADR process must be impartial so that they can ensure the best possible outcomes.
- Since decisions reached by ADR are bindings on the parties, the higher standard of transparency should be ensured.
- Most of the cases, mediators and arbitrators do not have sufficient knowledge and skills regarding settlement of disputes through ADR.
- People from village area are not aware about importance of ADR. So, they prefer the formal trial rather than adopting ADR.

- Institutional arrangements with necessary resources are very few and inadequate though some NGOs are working on it.
- Lawyers can play active and significant roles to facilitate the ADR in the family dispute by encouraging parties to settle through ADR.

The family court judges from their practical experiences make out some possible ways out to subdue the challenges in using ADR mechanisms in family suits. After due analysis of the opinions of the stakeholders including judges, following common and useful recommendations may be suggested for more successful ADR mechanisms in family disputes:

- Building awareness among all stakeholders who are associated with the ADR process in family matters in Bangladesh.
- Active role by the lawyers to pursue the parties regarding advantages of ADR.
- Active intervention of the judges of family court
- Appointment of well-trained mediators with sufficient skills to discharge the ADR mechanisms in family matters.
- Cooperation between Bar and Bench in ADR process.
- Active involvement of legal aid office.
- More transparent and visible provisions for ADR when dispute comes to the court.

Conclusion

The idea of settling dispute alternatively in respect of family issues is of great significance. Bangladesh has been trying to make fruition of ADR mechanisms with the trial of family disputes through different legislative provisions. Thus, we have incorporated ADR mechanisms from Muslim Family Laws Ordinance, 1961 to Family Courts Ordinance, 1985 with a view to achieving quick disposal of family disputes in amicable manner. Perhaps it would not be incorrect to state that Bangladesh has already got some sorts of good outcomes using ADR in family courts, however, it is yet to utilize benefits of the system in expected scale. Because of some challenges that are associated with our system we are not on the board properly. The statutory limitations, existing practices, unwillingness of lawyers in some case of judges, ignorance of parties along with systematic mismanagements have been obstructing the ADR mechanisms on family issues in Bangladesh.

The concerned parties are generally shifting the responsibilities to lawyers for pursuing properly about ADR process and its benefits. Judges of family court to some extent are concomitant with the prevalent opinion that lawyers are mainly responsible for un-popularity of ADR on family matters. In contrast, the lawyers also cast the blame to courts in general and our system in particular. It is perhaps

not untrue to say that such blame game will not result in good outcomes. Thus, all the stakeholders including policy makers, implementing authorities, lawyers and judges should play a holistic role in order to subdue the existing challenges of ADR mechanisms in family matters. Our judiciary should introduce a credit based approach for settling dispute alternative by a judge. Our family court judges under obligation to dispose certain amount of suits within a deadline. If credit is given for ADR in any family dispute then judges will be encourage to go for it. However, the lawyers interests and conflict of interests should also be given some kind due attention. Our lawyers' communities should consider that earning money alone is not goal of this noble profession. Even within the ADR system of family matters they might become the ADR experts through which they might be able to live their dignified professional life. It is the duty of the government to undertake some advocacy and circulation programs to aware the mass people about ADR mechanisms.

List of Abbreviations:

ADR = Alternative Dispute Resolution

AD = Appellate Division

BLD = Bangladesh Legal Decisions

DLR = Dhaka Law Report

HCD = High Court Division

FCO = The Family Courts Ordinance

MFLO = The Muslim Family Law Ordinance

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