



Impact Factor:4.081

MEDIATION IN PERSONAL DISPUTES: A PARTY-CENTERED NEGOTIATION

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ABSTRACT: *The most traditional dispute resolution process in our civil and criminal justice system is litigation whilst on the other hand, another well-known option is available i.e. Negotiation, Mediation and Arbitration. In Mediation it is the neutral person who assists both parties to reach an amicable settlement which results in a win-win solution. Mediation is the only best proven process in settling family disputes, thereby involving negotiation among the parties as well as neutral person.*

Keywords: *Dispute, Mediation, Negotiation, Neutral person, Settlement.*

I. INTRODUCTION

In today's complex society, when communication level disrupts between the parties their disparities are augmented which results in conflicts. We deal in our day to day lives with so many issues and friction in home, business, work or in person but most of us want to resolve the disputes with amity. While questing for some alternatives to the most formal litigation procedure, it is, however, be peremptory to look upon such issues and aspects of adjudicatory process that elevate the competency of judicial mechanism itself to release off the contemplations that judiciary deliver justice as well as impartiality. It is always advisable to settle the dispute outside the doors of court. The notion of alternate dispute resolution mechanism has been very effective in this context. Mediation, Conciliation, Negotiation and Arbitration are few of the methods of resolving the dispute outside the courts. But however it is enunciated that in case of personal disputes, it can be better settled with the help of mediation. Personal disputes include disputes with neighbors, colleagues, family members (family trust, joint owned property, challenge to wills, divorce, custody of children, maintenance etc.) and many more. Such typology of disputes always needs the involvement of third party in order to cull out the differences and bring the disputing parties at amicable solution. Mediation cannot be considered as any panacea or any other magic solution to surmount the institutional challenges of our traditional national court mechanisms. Similar to the other available alternative techniques of dispute resolution mechanisms, mediation also provides for a clump of features that variate from the traditional and formal mode of judicial systems which has the universal global impact over the different primary ways wherein the legal conflicts can be resolved. Therefore, in this regard the process of mediation offers for diversified capacities for settling the disputes in society.ⁱ The need for applying the core principles of mediation in family dispute settlement is never deliberated to supersede or substitute the needfulness for public adjudication or the pronouncements by judiciary over critical matters of the day, but only to supplement and preserve the core concept of judicial mechanism in the country.ⁱⁱ Mediation is often seen as a most potentially promising system of settling both simple as well as complex issues.

II. MEDIATION: PARTY ORIENTED NEGOTIATION

Mediation is always considered to be an assisted negotiation process wherein the negotiation between the parties is done through the mediator and not by them on their own. Mediation is considered as a process or method which involves negotiation

between the parties by indulging a third person in the process. Therefore, it is better known as 'assisted negotiation'. The process of assisted negotiation is aided and guided by a professional and trained person who acts independently and is known the 'mediator'. The word 'mediation' has been derived from some Latin word i.e. '*mediare*' thereby meaning 'to be in the middle'. The process provides the parties in conflict as well as their representatives, an opportunity to coincide at a particular point for their mutual agreement suiting to their needs and requirements. The process gives the chance to the parties to suggest possible measures for settlement after making due examination of their sine qua non conditions.ⁱⁱⁱ However, the mediator himself never makes any proposals for settlement nor does he impose any settlement condition upon them but only assist the conflicting parties to identify their terms of settlement that they can commit to comply with each other.^{iv} Moreover, mediation is also regarded as a 'facilitated negotiation process' because the core idea behind this is to aid and help people for a rational and reasonable conversation by clarifying their issues and to bring about more realistic approach and objectivity in settling the dispute.^v This process of mediation rests upon many factors like: nature of dispute, availability of resources, personality of the mediator, interest of conflicting parties and many more. The process focuses on the present and future and is least concerned about the past relation between the parties. Mediation is therefore, a technique for dispute settlement that empowers the parties themselves to think on their own and freed them to choose between right and wrong in order to make them liable for their own decisions. Hence, it can be better known as a professionally and scientifically managed negotiation process^{vi}. Even if the mediation is a party centric negotiation process, the services of lawyers are readily available to the parties. The negotiation involved in this process is the negotiation of the parties with the mediator directly and the negotiation of the parties between themselves. The parties get optimal opportunity to converse between themselves and with the mediator too. Therefore, mediation is termed as party oriented negotiation wherein the parties communicate with or through the mediator only. The process requires personal appearance as well active participation of the parties.

III. MEDIATION IN PERSONAL DISPUTES

Mediation is such a process of dispute settlement which can be used at any point of time, i.e. to say, even when the court proceedings are going on. Additionally, mediation technique is also used in cases where in litigation is not at all prospected and there is absence of any involvement of lawyers.^{vii} Because of such advantageous features, this method is being commonly used in many countries with an aim of assisting parties messed up with the court cases, so as to avoid or reduce further time and cost. This procedure also guides the people in differential settings, for instance, in finalizing some terms of a contract, in creating joint venture interest, building various relationships (professional, business and personal). Personal disputes also involve any kind of conflicts between individuals at workplace. Any sort of discord among the co-workers, employees and employers, customer and businessman or suppliers etc. will be covered under the realm of personal disputes. All types of family friction, such as guardianship, maintenance, daily trifle dissensions are considered under the ambit of personal disputes only.

Personal variance can be better resolved with the instance of mediation rather than going to court doors. The reason behind it is that conflicting parties involved in personal relationship can more easily and comfortably discuss their defending points with the mediator rather than discussing with the judge. As the process is informal and less complex, hence becomes painless for the parties to settle for the mediation proceedings. Mediation is preferred in personal disputes as the mediator will help the

parties to reach an outcome that satisfies both of them rather than aiming to prove one party right and other party wrong. Moreover, courts provide with limited remedies to resolve the personal disputes, in a way of compensation or unhappy compromise. Therefore, many other issues like business disagreements, contract dispute, insurance disputes, employment disputes and even environmental issues lend themselves to be resolved at mediation centre.

IV. WORKING OF MEDIATION IN PERSONAL DISPUTES

In order to cull out the dispute with the assistance of Mediation, the foremost step is to understand the nature of existing dispute and the core principles of dispute settlement. The reason being the way the mediator will determine the conflict is the way he will mediate the conflict. The working of mediation depends upon four major steps, namely, introduction and opening statement by the mediator as well as the parties; joint session of the parties; separate session by the mediator; and closing of the process. The stages of mediation in settling personal disputes are discussed as follows^{viii}:

1. Separate and Individual Meeting

- (a) The process begins when the mediator fixes up the time with the parties to meet them separately at the first instance. The separate session is conducted with an objective to allow the parties to open up with the story at individual level and let the mediator know what actually they want in this process to come out with for settling their issues.

2. Joint Session or Meeting

- (a) After conducting the separate session, now the mediator brings the conflicting parties together face to face and asks them to put up their side of the story in front of each other. Now the time comes when the mediator arrives at a situation to summarize and understand their points of agreement and disagreement and finally makes out an agenda/program for the disputing parties for the rest of the sessions of mediation process.
- (b) After actually exploring the core differences and issues between the parties, the mediator now tries to encourage them to initiate conversation between them thereby promoting some level of understanding as well as empathy among them. The target of this joint session and letting them communicate is to shift the parties from the past to future and insisting them to look ahead for some amicable, productive and formative solutions.
- (c) The next step with which the mediator proceeds is to ensure the solution as arrived by the parties and record the agreement which is workable and suitable to both the parties.
- (d) Finally, the mediation process is to be closed and winded up. When once the agreement is arrived at by the parties, the mediator is to provide the copy of an agreement which will be consisting detailed explanation about the responsibilities of both the parties for the purpose implementing the decision thus arrived. However, it may happen that no settlement has been arrived at and then parties may prefer going for other modes of dispute resolution. But it is to be borne in mind that whatever said in the mediation process, either by the parties or the mediator, it can never be used in any sort of future proceedings.

Therefore, the mediator is not to sign the settlement or agreement and if the settlement could not be arrived at, for any reasons, with the aid of mediation; then the case would be returned back to the referral court simply stating about its failure to settle and without assigning any reasons for its non settlement. At last, whether a settlement is reached or not, the mediator is duty bound to thank all the parties concerned as well as their counsels for their initiative to approach this technique as well as their efforts for settling their dispute.

V. ROLE OF MEDIATOR AS WELL AS REFERRAL JUDGE IN SETTLING PERSONAL DISPUTES

The mediator plays a role of a facilitator in the communication between the parties. It is to be noted that mediation is one of the only method of alternate dispute resolution systems wherein, the parties have the full hold and check over the resultant solution of their dispute. Even if the mediation is referred by the courts or mediation is resorted to as a result of a contract or mediation is required under a statute, the parties retain a full control over the terms of settlement of a dispute. This can be termed as the 'right of self – determination' of the disputing parties, which is considered to be one of the essential elements of mediation process. The role of a mediator is both facilitative as well as evaluative. When the mediator facilitates the parties to work out together to reach at some amicable solution. He does not play the role of a judge by acting as an adjudicator for the purpose of resolving their conflict of interests.^{ix} A mediator, however, eases the process by making direct interaction between him and the parties. He tries to build up a cushy environment to let the parties communicate between themselves thereby impelling them to come out with some reasonable decision. A mediator as an evaluator helps the parties to crystallize the merits of all sort of claims or defences with a view to evaluate the possible resultant of the matter in dispute.^x Mediator only tries to assume the power of engaging feasible interaction skill and negotiation methodology to ease the constructive conversation among the parties so that they are in a position to surmount their conflicting interests and search for some conjunct acceptable solution.

The referral judge plays a very crucial role in settling personal disputes by inclining the parties and motivating them to resolve their dispute through mediation. Referral judge is the one who refers the case to mediation the dispute comes to it for settlement. Even if the parties are not ready to settle the dispute through mediation, the efforts are taken up by referral judge who attempts to find out the reasons as to why the parties not inclined for mediation and then try to convince them for settling their dispute through alternative forum only. In this regard, the referral judge let the parties know about the advantages of mediation thereby explaining them that how this process can lead to higher satisfaction of the underlying and conflicting interests of the parties.

VI. LEGISLATIVE PROVISIONS

The first and foremost legislation wherein the mediation was recognized was Industrial Disputes Act, 1947. The Parliament of India enacted Arbitration and Conciliation Act 1996 that provides for the settlement of disputes through arbitration and conciliation. In 1999, Parliament amended the Civil Procedure Code, 1908 thereby inserting Sec 89 in the Code which provides for referring the pending cases in the courts to other mode of dispute settlement wherein mediation is one of those modes. The Amendment came into effect on 1st July, 2002. It is to be noted here that under Section 89 of CPC while referring various cases to mediation centre, the referral judges are not duty bound to seek the consent of disputing parties. However even if the parties do not give their consent for referring their case to mediation, it will not affect the mechanism of mediation in any way and the parties will still have

the freedom to agree with settlement of mediation or not.^{xi} However after the passing of Salem Bar Association v. Union of India^{xii}, the Committee was appointed by the Supreme Court to prepare a consultation paper on 'ADR and Mediation Rules.' Subsequent to this judgment, there came '(Draft) Alternative Dispute Resolution and Mediation Rules, 2003' under the arena of Section 89(2)(d) of the Code of Civil Procedure, 1908. Later on, High Court of Delhi, under the ambit of exercising its rule making power as mentioned under Part X of the Code of Civil Procedure, 1908 and Section 89(2)(d) of the said Code and all other powers enabling it in this behalf, made the "Mediation and Conciliation Rules, 2004". The Rules are made with a view that it was to be necessarily followed in the mediation and conciliation process by the mediator or conciliator, as the case may be, in their respective proceedings. The Salem Bar Association's case has laid down the fundamentals and provided for draft model for mediation. The court may refer the case for mediation under Order X Rules 1-A and 1-B after recording admissions and denials, and at any stage in Section 89 of CPC. In case of mediation under Section 89(2)(d), the Court shall bring out a compromise settlement between the parties and shall follow such procedure as may be prescribed. In compoundable offences, and also in non-compoundable offences, where the parties settle the issue, especially in matrimonial matters, the Supreme Court has held in B.S. Joshi's Case^{xiii} that the court may quash the complaint or the first information report on such settlement, after which there may be no evidence to proceed with the trial^{xiv}.

VII. BENEFITS OF MEDIATION IN SETTLING PERSONAL DISPUTES

Besides some issues pertaining to mediation like its settlement is not statutorily executable and lack of comprehensive statutory framework for its provisions; still it edges out with many profitable aspects which are discussed as follows:

1. Confidentiality of the process: Mediation offers the ability to discuss the real issues privately among the four walls of the mediation centre. Privacy of the process may embolden up the parties to speak more openly that can allow true reasons for the disputes to materialize more quickly. The conversations between the parties are so protected from being raised or questioned in any court or arbitral proceedings later on.
2. Impartiality of the mediator: Mediator remains an impartial and unbiased person who tends to listen both the parties either in a joint session or in separate sessions in order to cull out some solution which is happily acceptable to both the conflicting parties.
3. Voluntary participation of parties: It is a voluntary process because the parties are not compelled to go mediation centre, in fact they just agree to sit together in good faith and at least discuss their differences with each other so as to pick out the points of dissension between them.
4. Control over the process and Power Imbalances: As mediator acts just as a facilitator in the entire process, so the entire control remains in the hands of parties only. The terms of settlement may be suggested by the mediator but however, the final consent of the parties is required and nothing can be imposed by the mediator under the ambit of his power and authority.
5. Informal, Simple and Flexible process: Mediation, unlike litigation, is one of the forms of Alternate Dispute Resolution Mechanism which provides for an informal and a very approach. The entire proceedings are determined as per the parties and their availability. There is absence of any statutory procedure as well as settlement which tends to provide greater flexibility in the process as nothing is controlled or governed by any kind of statutory provisions.

6. Cordial and Conducive environment: It is one of the core duties of the mediator to create a conducive and comfortable environment. The more the environment will be conducive, the more the parties will be able to develop cordial relations and the more quickly the settlement will be arrived at.
7. Cost effective and Speedy process: If a dispute is resorted to mediation, then the cost of preparing and conducting litigation is eluded. The parties can also escape themselves from paying high legal costs to the lawyers or practitioners. The process, in comparison to litigation, is speedier as the outcome is reached within few days or months.
8. Finality of decision: Once the proceedings are completed, decree/order of the settlement is always and hence no appeal can be filed therefrom. Reached settlements can be then put into a form of a binding agreement which is arranged by the lawyer of concerned party and can be altered only with the consensus of all parties.
9. Mutual Beneficial Settlement: Mediation is the process which aims to provide benefit to both the parties. It is a method which ends up with 'win-win' approach. The process, at its initial stage only, aims for the mutual benefit of the parties and such a settlement which can provide with maximum satisfaction to all involved in the dispute. The settlement becomes binding only if the conflicting parties mutually agree to reach at some acceptable agreement.
10. Long Term Interest of the Parties: Mediation is an interest-based and multi-dimensional process, which is more durable and long lasting because the parties have consented for their resultant outcome.
11. Variations to the process: In the process of mediation, there can be as many as number of parties even more than two. There can be a single mediator or co-mediators or a leading mediator who works with an assistant mediator. However, the process of mediation should take place on one day for a particular point of time, but in some extreme cases or circumstances, pre-mediation meetings can also be conducted thereby leading to mediation process lasting for several days.^{xv}
12. Preservation of relationship: Mediation is a process which seeks to preserve the relationship, as one family member may remain dependent on another for care-giving or financial assistance. Upon listening to the parties, the mediator may understand how to deal not only with the present issue in controversy, but with issues that arise in the future as well.

The use of mediation in personal disputes, in today's time, hosts lots many advantages. It is because of these benefits of mediation, it has now been universally treated and surfaced as a tremendously popular alternative dispute resolution mechanism which supplements the present notion of formal judicial mechanism. Resultantly, mediation in its more elementary and rudimentary form is accepted all over India for settlement of personal disputes.

VIII. CONCLUSION AND SUGGESTIONS

Mediation is considered best for settling personal disputes, for the reason that in most of the cases, it need not to be just limited to the conflict referred to the concerned authorities but can also proceed ahead to settle all the other issues related thereto. Mediation should be resorted to in order to settle personal disputes. But however if it goes unsuccessful then the parties can knock the doors of judiciary or other means of dispute settlement mechanism. It can be enunciated that mediation is deemed to be a weapon against delay and injustice. Mediator acts as "catalyst" to help the persons indulged in personal disputes to develop a mutual satisfactory plan. As a matter of

fact, there had been long list of arrears of cases which needs a serious consideration in that regard. As a result to deal with arrears of cases, mediation as an alternative technique to court procedures, have proved to be the best for the same. Mediation has one of the quality feature of reducing the court's burden. Along with such feature, it has brought about a qualitative change from shifting the mind set of people from adjudicatory method to other modes of dispute settlement. The mediation has become successful not only because of some regulatory framework but on the fact that it leads to address some of the basic issues of societal and human resource development.^{xvi} In addition to this, the judiciary, inter alia, prepared a 'National Plan for Mediated Settlement of Disputes' which provides for the training of mediators, developing important mediation manuals for its smooth working, arranging for some appropriate mediation centre in judicial complexes and most importantly, spreading the awareness among the parties about the core benefits of mediation with an intent to more popularize this method of dispute settlement.^{xvii} Therefore, it can be articulated that popularity as well as familiarity of mediation is rearing every day in India as numerous amount of people are admitting its serviceability as well as productiveness. Mediation has been a successful and time tested conflict resolution mechanism in the west for centuries and centuries. In order to imbibe these, we also need to bring out and accept those experiences of the west with regard to mediation, thereby developing that aspect of mediation procedure in our country as well in the context of socio-economic circumstances and conditions prevailing in our society with an intend to create a *sui-generis* environment of model of mediation. Such things can be better done away with keeping in mind the core, fundamental and imperative requirements as well as aspirations of our adjudicatory system. However, one thing can be assured at this point of time that mediation has now become a necessitous part of our justice delivery system because the people has also started to rely upon this sort of mechanism^{xviii}. The only thing required at this point of time is steady assessment and a concentrated and well escorted drudge for more advancement and enhancement of mediation technique.

ⁱ Hiram E. Chodosh, "Mediating Mediation in India", retrieved from <http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf> visited on 28.10.2017 at 05:18 p.m.

ⁱⁱ *Ibid.*

ⁱⁱⁱ Varda Bondy and Margaret Doyle, "Mediation in Judicial Review: A practical handbook for lawyers", retrieved from <<https://www.nuffieldfoundation.org/sites/default/files/files/MJRhandbookFINAL.pdf>> visited on 25.10.2017 at 07:44 p.m.

^{iv} *Ibid.*

^v Alexander Bevan. *Alternative Dispute Resolution* (London: Sweet and Maxwell, 1992) p.18.

^{vi} R.V. Raveendran, "Mediation – An Introduction", retrieved from <http://bombayhighcourt.nic.in/mediation/index_articles.htm> visited on 11.04.2012 at 08:02 p.m.

^{vii} John Sturrock, "Making Better Use of Mediation to Resolve Disputes and Manage Difficult Issues", retrieved from <<http://www.mediate.com/articles/SturrockJ35.cfm>> visited on 28.10.2017 at 04:43 p.m.

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^x *Ibid.*

^{xi} *Ibid.*

^{xii} AIR 2002 SCR 353.

^{xiii} AIR 2003 SC 1386.

^{xiv} Sunil Ambwani, "Mediation as a process of dispute resolution", retrieved from <http://hcraj.nic.in/Paper-Speech/07-Speech_Justice_Sunil_Ambwani_7_03_2009.pdf> visited on 29.10.2017 at 09:24 p.m.

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