



## MEDIATION AS BENIGN MODE OF SETTLING FAMILY DISPUTES

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**ABSTRACT:** *The court system has always been resorted to by the disputing parties in case of any sort of conflict in family matters. But however, with the passage time it can be seen that various other modes of dispute settlement has come into picture and 'mediation' is considered to be one such mode especially when the matter relates to the settlement of family disputes. Mediator always tries to bring such a solution for the parties that is comfortable and convenient to both of them and thereby giving the parties another chance to remain together, unlike adversarial system wherein the parties always end up in separation and least reconciliation is made upto. Therefore, the courts have also even now started to offer the parties for mediation incase such family disputes approach the doors of the court.*

**Keywords:** *Conflicts, Judiciary, Legislature, Mediation, Resolution.*

### **I. Introduction**

In a country like India, we follow adversarial system for providing justice to masses. In the coming and recent years, judiciary's role has widened to large extent and even has turned out to be very complicated in its nature. This expanding arena of judicial system has come out with lots of expenses and money. It also thereby involves inordinate delays just for the purpose of providing justice to aggrieved people who seek it. Not only the number of courts has increased, but however the number of problems and cases has also increases due to manifold issues arising in society. Apart from going to courts for dispute settlement, one of the other methods outside court's jurisdiction is to settle the dispute through arbitration, mediation, conciliation or any other feasible mode likewise. Alternative Dispute Resolution Mechanism depicts the inevitability of Article 21 of Constitution of India that provides for 'right to life' and also enshrines within it right to speedy trial<sup>i</sup>. With the adoption of such techniques i.e. alternative methods, every disputant can resort to timely disposition of his case and problem in hand.

Mediation can be said to be a contemporary incarnation of an alternative dispute resolution mechanism wherein a mediator is specially trained and act as an impartial person and also facilitates the parties in reaching at an amicable settlement by following the process. It goes on the process with different phases: introduction, joint session, caucus and agreement. Different families in their different home-set come across different issues and conflicts and such disputes and be with regard to anything<sup>ii</sup>. Some of the issues in mediation and conciliation in family conflicts are as follows:

1. Conflicts and issues between spouses
2. Issues regarding custody of children and their education

3. Maintaining contact with their children when spouses are separated or divorced
4. In case of separated spouses, financial benefit and support to children
5. Absence of faith and credence
6. Issues with regard to parenting
7. Partition matters and settlement of property conflicts
8. Disputes with respect to parental take care
9. Any sort of breakdown in marriages or relationships

Many problems, for instance, guardianship, maintenance, property issues, wills, sale of paternal home, safety of family members etc are the issues of family disputes which are likely to come in future. In such issues, when communication becomes little tedious and impossible between the family members to come out of their conflicts and disputing status, then the families had to involve third person, who can act as a skilled person (either mediator or conciliator) to 'unstuck' the family members so that they can move ahead in their life. In both the process of mediation and conciliation, the mediator or conciliator deals with the conflicting issue in a proper time and confidentiality is also therefore maintained<sup>iii</sup>. This process of mediation is more co-operative and party facilitated unlike adversarial process. This also assists the parties to manage and tie knot again in their relationships.

## **II. Mediation In Family Disputes**

When the disputing parties want to finish up their dispute by way of some sort of communication, when they want to fetch out some solutions for their problems, when the parties balances their issues with some sort of practical aspects, then the best available option is to resort to mediation and seek the advice of mediators for that matter. Now this seems to be most appropriate time to opt for some advice from an independent and unbiased person who is a mediator. The core benefit of opting for mediation as a source of dispute settlement is that it involves benefit and interest of both the parties involved therein. People believes in a thing that the family issues can be best resolved and settled by judges in the court. But however, they tend to forget that it is the mediation process only that provides for least time and cost and yet provides for the best outcome which resultantly, benefits both the parties involved in the dispute therein. One of the core difference between mediation and court process is that the mediation is such a process which allows for the people's settlement to come at with mutual facilitation of the parties, whilst, the court process just focus upon the legal rights and liabilities of the parties and without taking into consideration the mutual interest of the parties involves. The court process also lets the one party win and the other loses but on the other side, mediation offers for both side win-win situation.

Family dispute resolution mechanism is a method wherein the parties who are in conflict are helped to come at some feasible solution and make informed choices about their decision. Family dispute resolution mechanism through alternative dispute resolution mechanism can include family issues, commercial issues, parent-children conflicts, school problem of children, custody of children and many more. Mediators always help the parties to approach them with some suggested results and some copacetic agreements that suits the needs of both the parties in conflict. Therefore, the

mediation is a process wherein the mediator opts for such techniques provides for basis of an amicable agreement<sup>iv</sup>.

When the disputing case is settled through the mediation process, then the settlement agreement is then written down in a form of an agreement. In all the family conflicts, the common procedure is to sign the agreement made and then file that signed agreement to the court so that the court can take it as basis for passing any such concerned order. It is often seen that parties take some sort of legal assistance before signing any such agreement and the agreement is similar to a contract as made between two parties. In case, either of such parties breaches any terms of agreement, then they can again resort to either mediation for settlement their dispute or go to court for their dispute resolution.

Hence, it can be enunciated that mediation is one of such alternate dispute resolution mechanism that always assist the conflicting parties to resolve their matter in a way that they have some sort of opportunity to be together once again<sup>v</sup>. In this way, mediation has become inevitable when the issues are with regard to children as in such cases, the interest of the children is at the pedestal and the parents have to get along for their child even if personally they are not willing to do so and do not want to stay together as husband and wife. This is how through mediation, even if they do not want to live together, still for their child, they will stay together and hoping for better outcome in their estranged relations as well. In most of the countries, when the matter is with regard to custody of children, the same is sent to mediation compulsorily provided there is no domestic issue involved therein.

This process of mediation is the one wherein both the parties move out happily with win-win situation. This process, unlike adversarial system, assists the parties to come to an agreement on any aspect like custody of children, division of property and many more<sup>vi</sup>. Mediation tends to happen when there is involvement of third neutral party, who imbibes in himself the core qualities of a mediator and help the conflicting parties to make informed decisions.

Mediation, as a method of alternate dispute settlement settles different range of family conflicts. It can be in different situations like: wherein before the divorce petition is files or in some cases after when the divorce petition is filed, with a view to reach at some marital settlement and hence can preserve the notion of marriage. Mediators, who are qualified trainers use different variety of communicating techniques so as to help both the husband and wife to reach at some amicable solution and to finish up their differences. The final decision is that of the spouses themselves and not the mediator because the process is known for its facilitative approach i.e. both the parties have a say in the decision so reached.

Mediation is always about looking for some solutions to the problem in hand<sup>vii</sup>. It involves mainly facing of many consequences as well as queries and also handling with daily practical situations of family circumstances. For instance: living schemes between family members, parenting plans between family members and many more. The mediator does not have any sort of prior knowledge of parties in issue and their subject matter and he (mediator) tends to remain unbiased through his entire procedure of mediation. The ethical values of mediation provide that the mediator should not be at all in linkage or connection with any of the conflicting parties and

moreover, in case where any such alignment occurs therein, he must withdraw there from at the spur of the moment.

### **III. Advantages of Mediation**

The process of mediation, in its most appropriate form, mentions long list of benefits for solving any sort of disputes. But however, as far these family disputes are involved and concerned, some of the core advantages of mediation are discussed as under:

1. In mediation, there is full control on the part of parties over the process. The parties are given the full right, by the mediator himself, to have full and effective control over the scope and terms of settlement of the parties. This is the reason that why in mediation process, the mediator cannot decide the terms of settlement on his own.
2. The process of mediation is participative in nature. This means that the parties are given fullest opportunity to come up with their issues and represent the case in their own language and then directly involve in the process of communication for settling their issues.
3. This process is voluntary and initiative one because the parties themselves takes the initiative and either of the parties is given fullest chance to even step back at any stage of the process, if he feels that nothing fruitful would come out. This self-determining aspect of this process provides for its compliance of dispute resolution.
4. The process is very efficient, time saving and economical.
5. The mediation process is very simple to follow. This procedure is quite flexible, in its terms that it can be altered according to suit the demands of particular cases. Such procedure of flexibility allows both the conflicting parties to perform their daily activities.
6. This process of mediation is usually conducted in a conducive environment. The relationship maintained between the parties remains cordial and informal.
7. The process is quite fair in nature i.e. the mediator who performs the mediating function provides for impartial and neutral suggestion. The mediator also mentions the core ground rules for mediation and makes it clear in the very beginning that any unequal relations between the conflicting parties will not affect their communication in the mediation process.
8. The entire process remains confidential and private unlike court system, wherein the proceedings are open to public.
9. Mediation proceedings are performed by the mediator with full consensus of the parties involved and also the result of mediation is compiled by the parties as well. As per the provisions of Arbitration and Conciliation Act 1996, the agreement from mediation is entirely enforceable in the court of law. Moreover with this, it also reduces the cost of litigation as well as cost of employing an advocate for enforcing the execution of a decree.
10. The norm of mutuality exists herein. The parties resort to mediation with a mutual consent and also they give a mutual consent for reaching at some amicable solution. Both the parties become adjustable to the issues and tries to maintain and preserve their mutual relationship.

11. Mediators are well trained officers for resolving the dispute outside court jurisdiction. They act as a neutral facilitator and also keep on assisting and guiding the parties through the full fledged proceedings of negotiated mediation.

Therefore, these are the core benefits of mediation process which can be highlighted for settling the family disputes. Because of such benefits and valuable advantages, the process has gained its importance in resolving for family issues and conflicts.

#### **IV. Jurisprudential Norms**

It is a well-accepted norm that when we mention about marital disputes to mediator or mediation centre, it seems to be entirely different from the normal property and other commercial conflicts that happens in society. There are many factors like emotional bond, responsibilities, personal attachment, mind-set of conflicting parties with regard to marital tie and other issues likewise, makes the matrimonial dispute differs from the other commercial or property disputes.

In the process of matrimonial mediation, many emotional factors play an inevitable role in that regard for settling such issues. The consideration looked upon by the mediator has to be maintained and balanced between the technical and emotional aspect. So therefore, it becomes the task on the part of the mediator to take into account the emotional aspect of the parties involved therein also because the mediator acts as a facilitator and cannot give binding decision thereon<sup>viii</sup>. The mediator gives due respect to happiness and sentiments of the parties and therefore tends to arrive at a decision which is not detrimental but which is most suitable and comfortable to both the parties. The task of mediator is not put upon any sort of pressure on parties or to inflict his decision on parties but in fact to mentally groom the parties involved to come out with some amicable solution thereto. He acts as a conciliator in the process to assist the parties to reach at some solution and not to take any personal revenge or grudges between them as the main aim of this mediation process is the ultimate peace among the parties. The mediator never acts like a judge or an arbitrator because the decision is mutually arrived at by the conflicting parties themselves and at times is proposed by the mediator himself.

The trained professional mediator is never seemed to attached with the court and does not have any sort of commanding authority over him on the parties for the decision. The core requirement in mediation procedure is that the mediator has to get the co-operation from both the parties. Parties are given full opportunity to terminate the proceedings as and when they feel comfortable at any point of given time. So this process seems to be quite beneficial in settling the dispute of marital forms especially where in a country like India, before going for a decree of divorce, always an attempt has been made for reconciliation between the disputing parties so that their marriage can be protected which is considered to be the matrimonial tie between the couple.

In a landmark case i.e. *Gaurav Nagpal vs Sumedha Nagpal*<sup>ix</sup>, the apex court stated that it is really agitating for the judicial system that plentiful cases floods the doors of court that relates to divorce petition or at times, judicial separation. There are provisions in Hindu Marriage Act 1955 that provides for divorce. Therefore, just because the option is available, it should not resorted to by the parties, unless the marriage is completely broken down and nothing can be done to preserve the

institution of marriage once again. Efforts should be made in order to cull out the communication gap between the parties that has resulted in such undesirable situations. Parties should come to court for breaking their marriages only as a last resort when everything like reconciliation has failed, after having an attempt made in that regard. The focus should always be on the saving of institution of marriage and not destroying the same. Most importantly, it is to be seen that in such cases of separation, it is the child only who suffers a lot from such situations and problems arising between the parents.

No doubt, it is totally within the discretion, power and jurisdiction of court to make reference to the concerned parties either to opt mediation or conciliation, but however pre-litigation counselling is always been considered to be more successful in this regard. The conflicting parties prefix their mind to come and arrive at some amicable solution and in this regard the disputing parties are always ready to make some sacrifices and make adjustments so that it can help them out to come at some solution. The only focus is to settle the dispute and therefore leading to a winning situation. Along with this, another target is to promote for conciliation or mediation proceedings before the parties enter into any sort of litigation process. In the very famous case of *K.SrinivasRao v. D.A. Deepa*<sup>x</sup>, it was pronounced by Supreme Court that mediation should be promoted before litigation is resorted to. If such thing is set up, then it will save lots many hardships of families. The court also opined that whenever the disputes are taken to Family Courts then it must preferably be referred to mediation centres at its earliest possible stage. Some of the martial disputes like custody of child, maintenance and many more should be taken to mediation centre at its first instance. In some of the cases, the court has also referred to mediation for the matters mentioned under Section 498A, but that too with the consent of parties. Therefore, in that aspect court has issued many directions as well. The facts of the case were that there arose some dispute between husband and wife and hence the couples started staying separately. The wife finally filed a complaint under Section 498A of Indian Penal Code. When the court took into consideration this particular case, it went on saying that no single part can be said to be fault in its entirety. Consequently, the court held that in the cases of offence under Section 498A, Indian Penal Code 1860 and the court in this case held that the accused is not liable and not guilty under this offence.

The core difference in the task of mediator and judge is that: the mediator provides for the betterment of both the parties and provides for an amicable solution suiting both the parties, whilst the judge on the other side just focuses upon legal right and wrong and fixes the liability of the parties accordingly.

In another case of *JagrajVsBir Pal Kaur*<sup>xi</sup>, the apex court held that Parliament enacted Section 23 of Hindu Marriage Act 1955 with an intention to preserve the institution of marriage and hence, steps should be taken at point of time even by the judiciary to reconcile the relation between the parties.

In another case of *M/S. Afcons Infra. Ltd. &Anrvs M/S CherianVarkey Construction*<sup>xii</sup>, the Supreme Court stated that while resorting to Section 89 of Civil Procedure Code, 1908, the court provides to select for any of the five stated methods mentioned therein. But however, in practical scenario the court consider the facts of the case, the type and nature of dispute and then itself refer the parties to available five options and

according to the parties' preferences prefer the parties to concerned mode under Section 89 of Civil Procedure Code, 1908.

In all those instances wherein more than one round of negotiations are preferred and required or the cases which are utmost complicated, then it is suggested to let them go for mediation. No doubt the provision under Section 89 of Civil Procedure Code seems to be lengthy and technical but its not so in reality. The process calls for knowing the dispute and then looking for its as certainability either for mediation or arbitration and then proceed accordingly.

Under Section 23 of Hindu Marriage Act and also under Special Marriage Act, provisions has been made that reconciliation should be resorted to mandatorily before parties resort to divorce. Section 23(2) of the Hindu Marriage Act 1955 states that whenever any proceedings to grant any relief is pending, it shall become the duty of the court to bring about reconciliation between the parties. The court, in such cases, may refer the parties in dispute to mediation for negotiating their terms of dispute. We know that nature of hindu marriage is a sacrament and not a contract. Therefore every initiative and attempt is made at first instance that in order to avoid for divorce between the parties, reconciliation should be made so that they can reach at some amicable solution.

#### **V. Legislative Provisions**

The notion of mediation was first time given due recognition in Industrial Disputes Act of 1947. The provisions are discussed in detailed manner in other statutes as well. One of the alternative mode of dispute settlement is arbitration, which was received due recognition early in 1879 and was mentioned therein in Civil Procedure Code 1908<sup>xiii</sup>. However, when the Arbitration Act of 1940 came into force, the provision for arbitration contained in Civil Procedure Code was repealed thereby. But the Indian legislatures enacted The Legal Services Authority Act 1987 by constituting National Legal Services Authority as a Central Authority with Chief Justice of India as its Patron-in-Chief. The Central Authority was vested with many duties and functions to perform there under. These are as follows:

1. To motivate the parties to settle their conflicts with either arbitration or negotiation or conciliation.
2. To state some principles and policies which can make legal services available even in courts or other tribunals for any case that comes before them.
3. To provide for setting up some cost effective schemes.
4. To promote for doing research under the arena of legal services.
5. To provide for some training institutions and other educational awareness programmes in context of legal services.
6. To work in consonance with some of NGO's as well as governmental agencies with a view to promote more about legal services.

After this, the Parliament tends to enact Arbitration and Conciliation Act 1996 making more detailed provisions with regard to arbitration and conciliation and also for foreign awards.

In the year 1999, Parliament passes an amendment in Civil Procedure Code 1908 thereby inserting Section 89 by stating that the courts can refer the cases pending

before it to other modes, which also included mediation as one of the modes. This amendment came into force on 01.07.2000.

## VI. Conclusion And Suggestions

Abraham Lincoln said *'discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time.'* Mediation is one such alternative dispute resolution mechanism which is effectively used by the disputing persons in any sort of dispute. Whatever be the issue in litigation proceedings, the things become very tedious and time consuming, once the parties knock the door of courts for justice. It is often as a social issue which in one or the other form requires therapeutic approach in society. The neither wins nor loses in this particular dispute resolution mechanism but the core aspect is settlement among the conflicting parties who are to stay together for reasons as mentioned in particular case. Not only in the family issues, but mediation has scored very high reach in professional and commercial disputes as well. The only focus in the family disputes is to apply some humanitarian approach and reconciliation should be such which do not disrupts the family issues as a whole. The matrimonial conflicts should not be dealt harshly as per criminal proceedings, rather they should be dealt cautiously with this mediation centres with an aim to make both the parties happy at the end of terms of settlement.

In the present scenario of 21<sup>st</sup> century, this method of mediation has gained very importance, especially when it comes to family issues with respect to proceedings or matters concerning divorce of the parties involved. There are different statutes that provide for arbitration, conciliation or lokadalats, but however none can be seen as such talking about mediation, which one of the most comfortable and providing win-win situation mode of dispute settlement. However, steps had been taken by Supreme Court in this regard and therefore also Model Rules has been created by Law Commission which discusses the need and value of mediation for settling various conflicts.

Mediation cannot be considered as the sole mode of dispute settlement in family issues and matters because in some extreme cases, it becomes prima facie clear that courts should intervene and let the matter decide accordingly. The only reason is that mediation provides for some practical notion to the dispute involved therein.

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<sup>i</sup> "Role of Mediation and Conciliation in Family Related Disputes", retrieved from <<http://familylawyers.in/Article.html>> visited on 07.11.2017 at 10:54 a.m.

<sup>ii</sup> *Ibid.*

<sup>iii</sup> *Ibid.*

<sup>iv</sup> "Why Mediation is important in Divorce Cases?", retrieved from <<https://blog.ipleaders.in/mediation-important-divorce-cases/>> visited on 08.11.2017 at 10:33 a.m.

<sup>v</sup> *Ibid.*

<sup>vi</sup> "Role of Mediation and Conciliation in Family Related Disputes", retrieved from <<http://familylawyers.in/Article.html>> visited on 07.11.2017 at 10:54 a.m.

<sup>vii</sup> *Ibid.*

<sup>viii</sup> "Why Mediation is important in Divorce Cases?", retrieved from <<https://blog.ipleaders.in/mediation-important-divorce-cases/>> visited on 08.11.2017 at 10:33 a.m.

<sup>ix</sup> AIR 2009 SC 557.

<sup>x</sup> K. SrinivasRaovs D.A. Deepa

<sup>xi</sup> Justice ManjuGoel, *Successful mediation in Matrimonial Disputes – Part I*, Delhi Mediation Centre <http://delhimediationcentre.gov.in/articles/htm#partI> (last updated: September 25, 2015)

<sup>xii</sup> Arbitration Petition (L.) NO.752 OF 2013

<sup>xiii</sup> "Why Mediation is important in Divorce Cases?", retrieved from <<https://blog.ipleaders.in/mediation-important-divorce-cases/>> visited on 08.11.2017 at 10:33 a.m.