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# **USE OF ALTERNATIVE DISPUTE REDRESSAL MECHANISM VIS-A-VIS FAMILY DISPUTES IN INDIA: AN ANALYSIS**

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## **Abstract**

Provisions for Alternative settlement of disputes find a prominent place in the Civil Procedure Code, the Codified Marriage Laws and the Family Courts Act. However, settlement, reconciliation and mediation in family law matters are largely unutilized. The focus of the present paper is to stress upon the need to promote mediation as a preferred mode of dispute resolution in family disputes. The paper shall bring out the advantages of mediation over litigation. The legislative provisions regarding mediation shall also be outlined along with the case law wherein need for mediation in settling family disputes has been stressed by the Judiciary.

**Key Words:** Mediation, Alternative Dispute Redressal, Family Disputes, Personal laws

## **Introduction:**

With the increasing complexities in the social fabric, the volume of family disputes has also increased. People commonly resort to litigation as a means to settle their disputes. However, the adversarial system of litigation is no longer adequate to address the family disputes like those between husband- wife, relating to child custody and parenting, partition of joint family property, care of aged parents etc. This system does not generate a climate of consensus, compromise and co-operation which is a sine-qua-non for resolving family disputes. The parties instead of being guided by reason and logic, at times become slaves of false egos resulting in a prolonged litigation which drains the parties emotionally as well as financially. Thus, many a time's matters which could have been resolved and settled take a turn for the worse. Alternative dispute Redressal mechanisms like Mediation, Conciliation, Negotiation etc. provide a simple, less expensive mechanism for resolving a dispute with the help of an impartial mediator/negotiator/conciliator, who facilitates amicable settlement of disputes. Mediation can be pre-litigative as well as court guided.

## Meaning of Mediation

Mediation is a voluntary process in which an impartial and neutral mediator tries to bring together the parties at dispute to arrive at a mutually agreeable solution. The parties to the dispute have an opportunity to put forward their grievances and feelings and thereafter work out mutually viable solutions as per the interests of the parties. The mediator being a neutral person does not impose any solution on the parties but creates a favorable environment to enable them to reach an amicable settlement.<sup>1</sup> Mediation presents a unique opportunity for dispute resolution with the involvement and participation of all the parties and their advocates. A Mediator does not decide what is fair or right or apportion blame. Rather, a mediator acts as a catalyst to bring the two disputing parties together by defining issues and eliminating obstacles for communication and settlement.<sup>2</sup> Thus mediation is in contrast to adversarial litigation where one party wins and the other loses. Mediation on the other hand provides an opportunity where both parties could gain by getting their respective terms accepted to some extent. When a case settles through mediation, the mediator will help the parties write an agreement. In family disputes, it is common to file the signed agreement with the court or to use the agreement as the basis for a court order.

## Importance of Mediation in settling Family Disputes

Mediation is cost-efficient and faster dispute resolution method compared with other methods. Thus, parties may prefer mediation as it is cheaper and less time consuming than litigation. Another reason to prefer mediation over court proceeding may be confidentiality and the wish to preserve a good relationship with the other party, what is especially important in family disputes.<sup>3</sup> Mediation is more flexible as parties can work out solutions which would not be available in trial. Moreover, the focus is on the future of the parties rather than the rights and wrongs of the parties. The overall focus of mediation is to work out a solution harmoniously which is extremely important in family disputes as the opposing parties are related to each other in one capacity or another.

In family disputes like divorce, custody of children, maintenance issues, distribution of parenting responsibilities, safety and health concerns, wills and estates, the sale of the family home etc. can

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<sup>1</sup>[http://delhi.gov.in/wps/wcm/connect/doi\\_t\\_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/About+Mediation](http://delhi.gov.in/wps/wcm/connect/doi_t_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/About+Mediation) last accessed on 11.8.18

<sup>2</sup> <http://mediationcentrephc.gov.in/> last accessed on 24.08.2018

<sup>3</sup> **“Mediation for resolving family disputes”** SHS Web of Conferences **30**, 00018 (2016) [https://www.shs-conferences.org/articles/shsconf/pdf/.../shsconf\\_shw2016\\_00018.pdf](https://www.shs-conferences.org/articles/shsconf/pdf/.../shsconf_shw2016_00018.pdf) last accessed on 12.8.18

divide a family for years to come. When communication is difficult and critical decisions are put on hold, families may need the help of a skilled mediator & Conciliator to get them “unstuck” so they can move forward. In mediation and conciliation, people deal with the problems and issues under dispute in a timely fashion and in privacy. It is a cooperative rather than an adversarial process, so participants are often able to repair their strained relationships. Because family members develop their own solutions, which reflect their family’s unique perspective, the satisfaction with the outcome is quite high and these resolutions tend to be workable and long lasting.<sup>4</sup> The Hon’ble Supreme Court in the case of *Jagraj Singh v. Birpal Kaur*<sup>5</sup> outlined the importance of reconciliation in matters pertaining to marital disputes and held that in fact it is a mandate upon the courts to first attempt reconciliation between parties before passing any other order. This decision clearly confirms that settlement efforts in matrimonial matters are not an empty, meaningless ritual. Matters of the family which can be repaired must be mediated and settled by sewing and patchwork. Human relationships must be bonded by settlement and, as far as possible, not litigated in Court.<sup>6</sup> Mediation is particularly useful in situations involving children, since it is in the interests of the children that their parents “get along” even if they will no longer live together as husband and wife. In many countries all cases that involve contested custody or visitation matters are referred to mandatory mediation, provided the parties are represented by an attorney and there is no allegation of domestic abuse.<sup>7</sup>

The need of the hour is to promote settlement of family disputes outside court as such problems need therapeutic handling. Matrimonial relief carved out of settlement will serve better than the results obtained by adversarial litigation involving time, effort, finances and, above all, breaking-up of a family.

## Legislative Provisions

The law makers too realized that family disputes need special method of settlement. Thus we find various provisions under our present legal regime favoring mediation and amicable settlement of disputes. Under the Code of Civil Procedure, 1908 express provisions are contained where a duty is cast upon the courts to make efforts for settlement in suits relating to matters concerning

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<sup>4</sup> <https://www.familylawyers.in/mediation-and-counselling-at-family-courts-kerala-india...> last accessed on 14.8.18

<sup>5</sup> AIR2007SC2083

<sup>6</sup> “Promote Alternative Dispute Resolution in family Discords” available at <http://www.Apcpkerela.org/Purpose.Php?Id=3> last accessed on 12.8.18

<sup>7</sup> <https://www.divorcelawinfo.com/Divorce%20Mediation.htm> last accessed on 11.8.18

a family.<sup>8</sup> Similarly, a duty is cast upon the court in a suit against the government or a public officer to assist in arriving at a settlement.<sup>9</sup>

Under the civil procedure, it is also provided that at the first hearing of the suit the Court must ascertain from each party or the counsel whether the parties admit or deny the allegations of fact as are made in the plaint or the written statement. After referring to the admissions and denials, the Court shall direct the parties to the suit to opt for either mode of the ADR as specified in Section 89 (1) i.e. Arbitration and Conciliation, Lok Adalat or Mediation.<sup>10</sup> Thus, in the initial stages itself, it is mandatory for the courts to try for alternative dispute resolution including mediation.

The Code of Civil Procedure<sup>11</sup>, lays down that where it appears to the Court that there exists an element of settlement, which may be acceptable to the parties; the Court shall formulate the terms of settlement and give time to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer to either (i) arbitration (ii) conciliation (iii) Judicial Settlement including the settlement through Lok Adalat or (iv) Mediation. When a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply.<sup>12</sup> When the Court refers the dispute to Lok Adalat for settlement by an Institution or person, the Legal Services Authorities Act, 1987 alone shall apply. It is only in the case of mediation that the Court itself shall effect compromise.

Hon'ble Supreme Court Of India in *Afcons Infrastructure Ltd. & Anr. Vs. Cherian Varkey Construction Co. (P) Ltd. & Ors.*<sup>13</sup> summarized the procedure to be adopted by a court under section 89 of the Code. It was emphasized by the court that it is the duty of the court to ascertain whether the case falls under the category of cases fit to be referred for ADR. Once having decided so, it must explain all the different ADR mechanisms available. If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms

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<sup>8</sup> Order XXXII A, Rule 3

<sup>9</sup> Order XXXVII Rule 5B

<sup>10</sup> Order X, Rules 1-A, 1-B and 1-C

<sup>11</sup> Section 89

<sup>12</sup> Section 89(2)

<sup>13</sup> (2010) 8 SCC 24

of it, keeping the principles of Order 23 Rule 3<sup>14</sup> of the Code in mind. Thus a wide nature of disputes, including Matrimonial, Labour, Motor Accident Claims, eviction matters between landlord and tenants, Complaints under Section 138 of Negotiable Instrument Act, Petitions under Section 125 Cr. P.C. or any compoundable offence can be referred for mediation. If only one of the parties makes a request and the other party is not averse to the idea of mediation, the dispute can still be referred. Any court can otherwise make a reference of a dispute as provided under Section 89 of Code of Civil Procedure.<sup>15</sup>

Moreover, under The Hindu Marriage Act, expressly provides that where a petition for divorce is filed under Section 13 of the Act on certain grounds, before proceeding to grant any relief, the Court, 'in the first instance', should make an endeavour to bring about reconciliation between the parties.<sup>16</sup> The Family Courts Act also provides for such a mandate.<sup>17</sup> Thus, the legislative endeavour is to promote methods of mediation or other ADR methods especially in matters concerning family disputes. In the case of *K. Srinivas Rao v. D.A. Deepa*<sup>18</sup>, the Hon'ble Supreme Court highlighted the role of settlement of family discords through mediation even though there are criminal cases alleged against parties. The court stated:

“We recognize 'mediation' as an effective method of alternative dispute resolution in matrimonial matters and that is the reason why we want the parties to explore the possibility of settlement through mediation in matrimonial disputes.”

The Punjab and Haryana High Court has set up a mediation centre and mediation is being actively initiated in district courts of Punjab and Haryana.<sup>19</sup>

## Conclusion and Suggestions

Mediation in family disputes is an attempt to get to the core of the conflict and resolve it amicably. Mediation can significantly diversify and facilitate family dispute resolution procedures, as well as help separating couples to reach agreements that are in the best interests of their children and in some cases even prevent couples from separating. Although we do have legal provisions which mandate the courts to promote this method among parties, there is a lack of awareness among

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<sup>14</sup> The said provision provides for court to record compromise decrees where parties have entered into a written agreement and adjusted their claims

<sup>15</sup> [http://mediationcentrephhc.gov.in/?trs=ref\\_pro](http://mediationcentrephhc.gov.in/?trs=ref_pro) last accessed on 14.8.18

<sup>16</sup> Section 23(1)

<sup>17</sup> Section 9

<sup>18</sup> (2013) 5 SCC 226

<sup>19</sup> For details see [http://mediationcentrephhc.gov.in/?trs=ref\\_pro](http://mediationcentrephhc.gov.in/?trs=ref_pro) last accessed on 14.8.18

people about the uses of this method. Moreover, the outcome of mediation is not binding upon the parties, which sometimes renders the exercise futile. There should be uniform procedure prescribed for mediation all over the country through legislation. The existing legal provisions provide for mainly post- litigative mediation. Thus, only when the parties approach the court, the court itself refers the case for mediation. There is no formal structure or procedure where parties by their own choice can approach mediation centers. Thus, it is essential to enact a law wherein proper procedure for mediation is prescribed including pre-litigative mediation.

