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**AN ANODYNE MODE OF NEGOTIATION: MEDIATION IN DISSENSION
OF INDIAN FAMILY MATTERS**

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An Anodyne Mode of Negotiation: Mediation in Dissension of Indian Family Matters

“Compromise. Such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due”.

- Ambrose Bierce

Introduction

It is non-viable in today's intricate society to eradicate disputes and contradictions when the disparities are augmented within the parties which results fragmentation of their communication. Peace is, therefore, sine qua non for development and one of the most important facts which help maintain peace in any society is people's faith in the justice delivery system. There are many stake-holders of justice delivery system and importantly, the consumer of justice is a litigant¹. In a country like India where the rate of family disputes is at peak cannot rely to seek justice from courts only. The justice delivery system through courts has given rise to certain problems like inordinate delay, huge pendency of cases and expensive litigation. Thus, it has become very difficult for the poor and marginalized people to have access to justice and so it becomes significantly necessary for all stake holders of the judicial system to find out some mechanism where such grey areas can be effectively taken care of². While searching for an alternative to litigation, it would be imperative to dwell upon those aspects of judicial process which elevate the competency of the system itself to discharge the contemplations that judiciary render justice and impartiality. 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 family disputes, it can be better settled with the help of mediation. Mediation is no panacea, no magic solution to overcome the institutional challenges of national court systems. Similar to other alternative dispute resolution techniques, however, it does offer a cluster of features that differ from the formal judicial systems that have had global influence over the primary ways in which legal conflicts are resolved. In this regard, mediation both

¹ Mahboob Ali, *Alternative Dispute Resolution Mechanism in Modern Indian Society*, JUDICIAL TRAINING AND RESEARCH INSTITUTE, UTTAR PRADESH, (November 5, 2017). Available at: <http://ijtr.nic.in/Alternative%20Dispute%20Resolution%20Mechanism%20inModern%20Indian%20Society.pdf>.

² *Id.*

builds and diversifies the capacity for resolving conflicts in society³. Family disputes include divorce, maintenance, custody of children, family trust, joint owned property, challenge to wills and many more. These kinds of disputes always require the involvement of third party (mediator) in order to cull out the differences and bring the disputing parties at an amicable solution. The application of mediation to the legal dispute resolution process is not intended to replace or supplant the need for public adjudication and normative judicial pronouncements on the critical issues of the day, but to complement and preserve that core normative purpose of the judicial system⁴. Mediation is often seen as a most potentially promising system of settling both simple as well as complex issues. However, the judiciary has now started taking the initiative to let the family dispute settle outside its jurisdiction and most preferably, under the mediation.

Historical Background of Mediation

The history of mediation can be traced to our historical path. The first and foremost legislation wherein the mediation was recognized was Industrial Disputes Act, 1947. Later, the Parliament of India enacted Arbitration and Conciliation Act 1996 which provides for the settlement of disputes through Arbitration and Conciliation. In 1999, Parliament amended the Civil Procedure Code, 1908 thereby inserting Section 89 in the Code which provided for referring the cases pending in the courts to other Alternative Dispute Resolution mechanism which included 'mediation' as well. This Amendment in Code of Civil Procedure, 1908 was brought into force with effect from 1st July, 2002. It is to be borne in mind that while dealing the matters under Section 89 of CPC, 1908 and while referring the dispute to mediation centre, the referral judges are not duty bound to seek the consent of disputing parties. But however the absence of consent for reference does not effect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation⁵. However after the passing of Salem Bar Association v. Union of India⁶, the Committee was appointed by the Supreme Court to prepare a consultation paper on 'ADR and Mediation Rules' and therefore, pursuant 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, in the exercise of its rule making power 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 to be followed 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

³ Hiram E. Chodosh, *Mediating Mediation in India*, LAW COMMISSION OF INDIA, (October 25, 2017), http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf.

⁴ *Id.*

⁵ Ajay Thakur, *What every Indian should know about mediation*, IPLEADERS, (October 28, 2017), <https://blog.iplayers.in/indian-should-know-about-mediation>.

⁶ AIR 2002 SCR 353.

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 effect a compromise between the parties and shall follow such procedure as may be prescribed.

Family Legislations Prevalent in India

There are handfuls of legislations enacted by Indian Parliament to eliminate the differences between the parties occurring in family matters. The Indian Parliament has enacted the many family laws which are applicable to the religious communities defined in the respective enactments themselves⁷. The core legislation which is applicable to majority population in India with respect to family issues is the Hindu Marriage Act 1955, which is an act to amend and codify the law relating to marriage among Hindus. The Act of 1955 enunciates about the divorce, legitimacy of children and maintenance provisions for the parties in conflict. Hindu Succession Act 1925 is an act to codify the law relating to intestate succession among Hindus. It discusses about the devolution of the property on legal heirs after the death of male or female. The Hindu Minority and Guardianship Act 1956 is an act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act 1956 is an act to amend and codify the law relating to adoptions and maintenance among Hindus. For non-Hindus, there is Guardian and Wards Act 1890. Most fascinatingly, Section 125 of the Code of Criminal Procedure Code, 1973 provides that irrespective of religion, any person belonging to any religion can approach a magistrate for request of maintenance. So, both Hindus and non-Hindus have independent and equal right of maintenance under the general law of the land under this Code. Special Marriage Act 1954 is an enactment providing for marriage by registration (compulsory) resorted by Hindus, non-Hindus or foreigners marrying in India. This law governs people of all communities irrespective of their religion. Parsi Marriage and Divorce Act 1936 for Parsis in India. Likewise, Indian Christian Marriage Act 1872 for marriage of Christians in India. For Muslim community, special laws have been enacted like Muslim Personal Law (Shariat) Application Act 1937, The Dissolution of Muslim Marriage Act 1939 and The Muslim Women (Protection of Rights on Divorce) Act 1986. In addition to all these, Family Courts Act 1984 has been enacted by Parliament to provide for establishment of family courts with a view to promote reconciliation in order to secure speedy settlement of disputes relating to marriage and family affairs. Moreover, Order XXXII A of the Code of Civil Procedure 1908 talks about suits relating to matters concerning family which provides for special provisions in this regard.

Mediation: Party Centric Negotiation

The word 'mediation' is derived from a Latin word '*mediare*' which means 'to be in the middle'. Mediation is weighed as 'party oriented negotiation or party centric

⁷ Anil Malhotra and Ranjit Malhotra, *Alternative Dispute Resolution in Indian Family Law-Realities, Practicalities and Necessities*, (November 5, 2017). Available at: https://www.iafl.com/cms_media/files/alternative_dispute_resolution_in_indian_family_law.pdf

negotiation' because it is a process under which negotiation takes place between the parties through a guided, trained, independent and impartial professional person i.e. mediator. The mediator does not make a determination of the issues in dispute or impose a settlement on the parties, but aims to assist the parties to identify and agree a settlement that is responsive to their needs and with which they commit to comply⁸. The parties get optimal opportunity to communicate with each other in the presence of the mediator. Even though the mediation is a party oriented negotiation process, the services of lawyers are always readily available to the disputing parties. It gives the parties in dispute and their representatives an opportunity to agree jointly the details of any settlement after an examination of their respective needs and of the options and possibilities for resolution⁹. Mediation is considered to be a facilitated negotiation as the idea is to assist people to communicate in a rational and problem-solving manner, clarify issues and to help negotiations by bringing realism and objectivity to a dispute¹⁰. The process of mediation rests upon many factors like: personality of the mediator, interest of conflicting parties, nature of dispute, availability of resources, and many more. However, the process compasses the present and future relation of the parties and slightly pertains about the past relation of the parties. Mediation is therefore in a sense empowering the parties to think for themselves and choosing what is right for them so that they owe the responsibility of arriving at their own decisions. In short, it is a professionally and scientifically managed negotiation process¹¹. The negotiation involved in this process is the negotiation of the parties with the mediator directly. Therefore, personal appearance as well active participation of the parties is the core requirement of this process.

Family Mediation

Family Mediation is a process in which a mutually-chosen and/or court-appointed neutral third party facilitates communication between people to promote settlement. It is an alternative to asking the court to decide the outcome of family disputes¹². Mediation can be used at any time, whether or not; court or other formal proceedings are in progress. Often, mediation is used in circumstances where litigation is not even in prospect and where no lawyers are involved¹³. Similarly it is increasingly used in many countries to help parties in a court case to avoid the further cost, time and risk of court

⁸ Varda Bondy and Margaret Doyle, *Mediation in Judicial Review: A practical handbook for lawyers*, NUFFIELD FOUNDATION (October, 25, 2017). Available at: <https://www.nuffieldfoundation.org/sites/default/files/files/MJRhandbookFINAL.pdf>

⁹ *Id.*

¹⁰ Alexander Bevan, ALTERNATIVE DISPUTE RESOLUTION 18 (1992)

¹¹ R.V. Raveendran, *Mediation—An Introduction*, BOMBAY HIGH COURT (April 4, 2012). Available at: http://bombayhighcourt.nic.in/mediation/index_articles.htm

¹² *Family Mediation: A How-To Guide*, MEDIATION CENTRE. Available at: https://www.mediationcentermn.org/uploaded/Doc/fm_guide_671848.pdf (last visited November 5, 2017)

¹³ John Sturrock, *Making Better Use of Mediation to Resolve Disputes and Manage Difficult Issues*, MEDIATE (October 28, 2017). Available at: <http://www.mediate.com/articles/SturrockJ35.cfm>.

proceedings. All types of family friction, such as guardianship, maintenance, daily trifle dissensions are taken under the ambit of personal family 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.

Mediation can be a good choice for settling family matters in respect of: before the parties separate, when the parties need to decide about parenting responsibilities, when the property is to divide, when the relation is to be ended with someone with whom one have children or property that is to be divided, when the parties need to discuss child support, when the concern is about spousal maintenance and many more issues. 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. Mediation is a method that results in win-win solution of the conflict thereby appeasing all the parties in discord. It is pertinent to note that courts can never compel the parties to mediate if they are in an abusive situation.

Working of Mediation in Family Disputes

Family mediation is meant to settle grievances between parents, divorcing couples, teenage – parents, adult siblings, parents – adult children and among other members of the extended family where communication or relationships are problematic. The working of family mediation involves five major steps, namely: Introductory Remarks, Statement of the Problem by the Parties, Information Gathering time, Identification of the Problems, Bargaining and generating options and reaching an Agreement. These steps are discussed as under¹⁴:

- (a) *Introductory Remarks*: The mediator waits to start the session until both parties are present and then makes introduction. The mediator will then give an opening statement. This outlines the role of the participants and demonstrates the mediator's neutrality. The opening statement during the introductory remarks will set out the ground rules for the mediation. These ground rules are what help the mediation move along smoothly. The mediator will usually ask that if attorneys are present, they can confer, but the clients should speak for themselves. Parties should not interrupt each other; the mediator will give each party the opportunity to fully share their side of the story.
- (b) *Statement of the Problem by the Parties*: After the opening statement, the mediator will give each side the opportunity to tell their story uninterrupted. Most often, the person who requested the mediation session will go first. The statement is not necessarily a recital of the facts, but it is to give the parties an opportunity to frame issues in their own mind, and to give the mediator more information on the emotional state of each party. If there are lawyers present who make the initial statement, the mediator will then ask the client to also make a statement. The

¹⁴ Jessica A. Stepp, *How does the Mediation Process Work?*, *MEDIATE* (November 11, 2017), <http://www.mediate.com/articles/steppj.cfm>.

rationale behind the statement of the problem is not a search for the truth; it is just a way to help solve the problem.

- (c) *Information Gathering*: The mediator will ask the parties open-ended questions to get to the emotional undercurrents. The mediator may repeat back key ideas to the parties, and will summarize often. This helps the mediator build rapport between the parties, especially when a facilitative style is used.
- (d) *Problem Identification*: This might also be part of other segments. The mediator tries to find common goals between the parties. The mediator will figure out which issues are going to be able to settle or those that will settle first.
- (e) *Bargaining and Generating Options and Reaching an Agreement*: Methods for developing options may include group processes, discussion groups or sub groups, developing hypothetical plausible scenarios, or a mediator's proposal where the mediator puts a proposal on the table and the parties take turns modifying it. However, the most commonly used method is the caucus. Once the participants are committed to achieving a negotiated settlement, the mediator will propose a brainstorming session to explore potential solutions. This can lead to a final agreement, which diffuses the conflict and provides a new basis for future relations. The mediator may decide to hold private sessions with both parties in order to move the negotiations along. This caucus session will be confidential. The caucus provides a safe environment in which to brainstorm and surface underlying fears. The goal of the session is to find some common ground by exploring lots of options, and to bring about possible solutions for the parties to think about. Parties can also entertain alternative solutions to their problems without committing themselves to offer the solutions as concessions.

Once the parties reach at a settlement, the mediator is not to sign the settlement or agreement and if the settlement could not be arrived at through mediation, the case would be returned to the referral court simply stating about its failure to settle and without assigning any reasons for its non-settlement.

Benign of Mediation in settling Family Disputes

Proponents of family mediation contend that mediated settlements are longer lasting and protect the interest of the children. Although the benefits of mediation are most evident and beneficial outside of the court process, if a dispute did proceed to court, studies suggest that mediation in the litigation process is equally as effective as early in the process as clients have grown tired of the fight¹⁵. Mediation edges out with many favorable aspects which are as under:

1. *An Empowering Process*: Mediators empower and encourage the parties to cull out their concerns to face to face. Trained mediators are excellent in dealing with disputing parties in a more delicate and direct manner. Most of the family disputes offer themselves to mediation process only.

¹⁵ Milka Vujnovic, *The Benefits of Mediation*, (November 11, 2017). Available at: <http://www.mvfamily.ca/benefits-of-mediation.php>.

2. *Long Term Interest of the Parties*: Mediation is an interest-based and multi-dimensional process, which is more durable because of the parties consent in the outcome.
3. *Reducing Stress as well as Cost*: It is well established belief that through mediation in family disputes, the emotional trauma is reduced thereby reducing the stress of the parties. In different family mediations like elder mediation, divorce mediation, family business mediation etc, the parties can preserve their ongoing relationship through settlement in the future.
4. *Mutual Beneficial Settlement*: Mediation is the process which aims to provide benefit to both the parties. It is 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. A binding settlement is reached only if the parties arrive at a mutually acceptable agreement.
5. *Privacy of the Process*: Mediation offers the ability to discuss the real issues confidentially 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.
6. *Impartiality of the Mediator*: Mediator always remains an unbiased person who listens to both the parties either in a joint session or in separate sessions in order to ascertain some solution which is heartily passable to both the disputing parties.
7. *Control Over the Process and Power Imbalances*: Mediator just acts as a facilitator in the entire process, so the entire control remains in the hands of parties only. But this thing does not nullify the role of mediator as such. Usually, the terms of settlement may be suggested by the mediator, but however, the final consent of the parties is needed and nothing can be levied by the mediator under the realm of his command.
8. *Cordial and Facilitative Environment*: It is one of the core duties of the mediator to create a conducive and comfortable environment in family mediation. The more the environment will be comfortable to the parties, the more they will be in a position to evolve cordial relations and hence the settlement will come up.
9. *Keep Up of Family Relationship*: Mediation is a process which seeks to conserve the relationship, as one family member may remain dependent on another for care-giving or financial assistance. Therefore, after listening to parties, the mediator usually understands as to how to deal not only with the present issues in controversy, but with issues that may arise in future as well.
10. *Voluntary Participation of Parties*: It is a voluntary process in the sense that 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.
11. *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. Procedure and settlement are not controlled or governed by statutory provisions thereby allowing flexibility in the process.

In present days' time, mediation in family disputes hosts lots many advantages. It is because of these advantages of mediation, that it has now globally surfaced as an extremely popular Alternative Dispute Resolution mechanism to supplement the present formal judicial mechanism. Resultantly, all over India, 'mediation' in its more fundamental and generic form has been elevated at higher pedestal for settlement of family issues.

Position of Referral Judge and Mediator in Family Mediation

Referral judge is the one who refers the case to mediation once the dispute comes to it for settlement. The referral judge plays a very pivotal role in settling family conflicts thereby impelling the parties to resort to mediation to reach at some amicable solution and also explaining the parties about the notion of mediation and its benefits which in turn, will satisfy the underlying interests of the parties. Even if the parties are not ready to settle the dispute through mediation, the referral judge tries to ascertain the reason for their disinclination and try to persuade them for settlement outside the court.

Mediator acts as a convener, educator, communication facilitator, translator, questioner, clarifier and overall a process advisor in the negotiation between the parties. 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 the essential elements of mediation process. The mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative¹⁶. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable solution. A mediator evaluates when he assists each party to analyze the merits of a claim/defence and to assess the possible outcome at trial¹⁷. Mediator only tries to assume the power of engaging feasible interaction skill and negotiation methodology to ease the constructive communication between the parties so that they are able to surmount their conflicting interests and search for some conjunct acceptable solution. This proves about the magnitude of mediator in concluding family matters and other issues related thereto.

Conclusion and Suggestions

Mediator acts as a "catalyst" to help the persons suffering from family disputes to develop a mutual satisfactory plan and land up at viable agreement. Mediation is the

¹⁶ Ajay Thakur, *What every Indian should know about mediation*, IPLEADERS (October 10, 2017). Available at: <https://blog.ipleaders.in/indian-should-know-about-mediation/>.

¹⁷ *Id.*

not answer to every dispute in family and neither the litigation is. But however, mediation is the one which provides with most practical solutions in majority cases of family matters. It is advisable that mediation should be the foremost remedy which the parties should resort to even before they step into a litigation process. But however, if the results of mediation go bad or unsuccessful, the parties then can approach the doors of courts or any other method of dispute settlement. It is suggested that there is an urgent need to create awareness about the prevailing laws related to women and children and to provide them referral services like: free legal aid (which is a constitutional mandate), vocational training etc. The success of mediation will depend not merely upon the evolution of an appropriate legal and regulatory framework, but upon addressing basic issues of human resource development¹⁸. In addition to this, the judiciary, inter alia, prepared a 'National Plan for Mediated Settlement of Disputes' which conceived training of mediators, development of mediation manuals, setting up of mediation centres in court complexes and spreading awareness about mediation amongst litigants so as to popularize mediation¹⁹. The core requirement of the time is 'resolution' and not the 'litigation'. Therefore, mediation is now being schemed as a truly global and worldwide profession for settlement of disputes. It can be enunciated that modishness of mediation is disseminating day after day thereby making people accept its constructiveness. We need to imbibe the experiences of mediation in context of socio economic conditions in our country in order to make 'mediation' stay forever and become an imperative part of our justice delivery mechanism. It's high time for all of us to welcome 'mediation' as a new mode of dispute resolution system so that assurance can be given to our citizenry that this process can contribute in bringing social harmony and communal harmony thereby creating a loving and caring world and also that they live under the shield of a productive and operative legal regime.

- Rattan Singh* & Shikha Dhiman**

¹⁸ Dhananjaya Y. Chandrachud, *Mediation – realizing the potential and designing implementation strategies*, LAW COMMISSION OF INDIA (October 29, 2017). Available at: http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.

¹⁹ K.G. Balakrishnan, *Law Day Address to the Nation*, SUPREME COURT OF INDIA (November 25, 2008). Available at: http://www.supremecourtindia.nic.in/new_links/Law_Day_Message_As_recorded_on_25.11.08.

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