

# Mediation- A Preferred Method to Resolve

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## ABSTRACT:

The Indian judiciary system is often looked down upon due to the various problems which come hand in hand with it, such as inefficiency in administration, long backlogs of cases, there has been an urgent need for finding of an alternative way to help track these problems as often suggested by Judges<sup>1</sup>, lawyers, scholars<sup>2</sup>. The use of mediation has been seen as an effective tool to resolve disputes in marriages for a long period. Divorce mediation has attracted the attention of the society at large has its features have helped to strengthen the justice system. The divorce mediation has not only helped to bring the parties to negotiate their terms but often seen as a way to negotiate their terms of relationship. The basic reason why mediation is prepared is because it helps to resolve problems and disputes effectively and efficiently with the parties actually being the rule makers. Mediation helps to make the parties a little rationale and responsible and cooperative towards compromises and acceptance.

In the paper, mediation as an alternative to the judiciary system has been discussed, focusing on its principles, reasons to prefer mediation, and the roadway to success as well as suggestions for better implementation of the method in the long run.

## I. INTRODUCTION

**“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”<sup>3</sup>**

– Abraham Lincoln<sup>4</sup>

Dates after dates, improper functioning of the judicial systems, huge costs and the never ending wait for justice and solutions to the problems have led to the rise of the alternative dispute resolution mechanisms which include arbitration, conciliation, mediation, Lok Adalat.<sup>5</sup> These can broadly be distinguished as falling within the following two broad heads viz:-Adjudicatory Process (i.e. Arbitration) and Negotiatory Processes (i.e. Conciliation, Mediation and Lok Adalat).

Among all the above mentioned methods, mediation seems to stand out. Mediation has many special features, which includes its informality, flexibility and complete voluntary and non-binding nature, that makes it preferable not only to litigation process but often to other alternative means of dispute resolution as well.

**Arbitration:** The word may be read as resolution of disputes between the parties at the earliest without the procedural technicalities associated with the functioning of a court. Arbitration may be voluntary or mandatory,

<sup>1</sup>K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226

<sup>2</sup>Hiram E. Chodosh, *Mediating Mediation in India*, available at: [http://lawcommissionofindia.nic.in/adr\\_conf/chodosh4.pdf](http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf)

<sup>3</sup><http://www.adrtoolbox.com/library/adr-quotes/>

<sup>4</sup>American statesman and lawyer who served as the 16th President of the United States.

<sup>5</sup>Different Modes of Alternative Dispute Resolution (ADR), available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf)

and the parties to dispute have the right to appeal against the award however this may be limited.

**Conciliation:** The parties refer their dispute to a conciliator who meets with the parties in order to resolve their differences. The terms conciliation and mediation are often used interchangeably in common parlance yet, there are clear differences between the two.<sup>6</sup>

**Lok Adalat:** Some may know it as People's Court, established by the government to settle disputes through compromise.<sup>7</sup> No court fees is charged for the settlement of dispute. A Lok Adalat is not strictly bound by rules of procedure and evidence like ordinary courts thus making the process more easily understandable to the less educated section of the society.

**Mediation:** It is a process where a mediator sits with the disputants and encourages them to mutually settle at an agreeable agreement. The word is derived from a Latin term "mediare" which refers to be in the middle.<sup>8</sup>

## II. WHAT IS MEDIATION?

Mediation is a form of Alternate Dispute Resolution (ADR), recognized in India under section 89 of Civil Procedure Code, 1908. It is a voluntary and confidential out-of-court process. The mediator acts as a neutral facilitator to help the parties reach an agreement on a variety of issues ranging from family disputes to commercial matters. Mediation takes place in the mediator's office or a location preferred by parties and minimizes the time and cost to resolve a dispute. In mediation, the parties informally exchange the information. This avoids the need for costly "discovery" in a court setting. The mediator listens to each party's position and provide options and alternatives for settlement to assist the parties in reaching a compromise. Although every case is different, most mediated cases are resolved in 4 to 6 sessions of two hours each. Once the issues are resolved, the mediator drafts a settlement agreement summarizing the issues. Parties are strongly encouraged to have the settlement agreement reviewed by independent lawyers before they sign it as the mediator cannot provide legal advice or represent either party in the court. After the Settlement Agreement is finalized and signed, the matter gets resolved and parties can go back to home in peace.

## III. IS MEDIATION AN EFFECTIVE TOOL?

Mediation is sometimes used interchangeably for intervention but it actually differs and is a friendly act. In International Law, it helps to restore good and preserve peace. It helps to avoid the flaws of litigation. The process of mediation has to pass through various stages mainly:

- Opening statement

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<sup>6</sup> Justice M. Jagannadha Rao, Concepts of Conciliation and Mediation and their Differences, available at [http://lawcommissionofindia.nic.in/adr\\_conf/mediation%20succed%20Rao%202.pdf](http://lawcommissionofindia.nic.in/adr_conf/mediation%20succed%20Rao%202.pdf)

<sup>7</sup>Lok Adalat- KELSA available at: <http://kelsa.gov.in/lokadalat.htm>

<sup>8</sup> Mediation as an ADR available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/10/10\\_chapter%204.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/10/10_chapter%204.pdf)

- Opening statement to the parties
- Summarizing and agenda setting
- Exploring issues
- Private sessions
- Negotiation
- Agreements

A mediator must avoid opinions and judgments and should help the parties to open up regarding their issues and disclosure of interests should be a priority. In this process he helps to bridge the gap created between the parties. The mediator must remain neutral always.

#### IV. PRINCIPLES OF MEDIATION

Like any other process, mediation has its own set of principles which helps to settle disputes. Mediation is indeed a more effective process as compared to litigation and thus it has been gaining popularity due to its principles.

The basic five principles that must be followed by a mediator in the process of mediation are as follows:

- ***Parties must participate voluntarily:***

Mediation is not a process where one is forced to participate, but a process to which parties consent for themselves. Only when such efforts are done voluntarily shall it be more fruitful. And thus there shall be no lack of cooperation and harmony on the part of the parties.

- ***Confidentiality***

The mediator must ensure that anything disclosed to him shall remain confidential and shall not be used in the court proceedings neither by the mediator nor by the Courts.

- ***Mediators are impartial:***

The mediator acts as a facilitator and not as an adjudicator or advisor, he must remain impartial and must not force upon his opinions on either of the parties, he must try to ensure that the parties that the parties must be able to reach at a settlement (compromise). Impartiality of a mediator should ensure that the parties accept him as a person who sincerely wishes to resolve the dispute<sup>9</sup>.

- ***An agreement has to be settled with the satisfaction of the parties:***

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<sup>9</sup> Basic principles of mediation, available at <http://www.posredovanje.me/en/posredovanje/osnovna-nacela-posredovanja>

The responsibility of defining the problem to dispute, setting of the agenda and agreeing to a solution is in the hands of the parties. The process can be started only if there is an agreement between the parties.

- ***It is without prejudice to other procedures:***

If mediation was seen as an enforced procedure it would restrict the creativity of resolving the disputes as well as increase resistance on the part of the parties.

## V. WHY MEDIATION?

The problems associated with litigation are innumerable, the court costs and legal fees and other expenses and time consuming factors make litigation a problematic method to bring an end to the already existing problems, Mediation as a processual intervention in the legal system fulfils other instrumental and intrinsic functions apart from reducing court burden.<sup>10</sup> Mediation both quantifies and expands the qualitative capacity of the system to resolve conflicts. The advantages of using mediation may be as follows:

- **Party Control:** The central theme of mediation is self-determination. Partners' best know how to resolve their own disputes. In mediation, the parties remain in full control of the entire process.
- **Confidentiality:** Confidentiality is essential for any mediation proceeding to be successful. Maintaining secrecy vis-à-vis mediation proceedings is the hallmark of mediation and helps create a safe environment allowing the parties to directly target the issue. The mediation proceedings must be confidential, and the mediator must simply place agreement before the court without conveying to the court what transpired during the proceedings.<sup>11</sup>
- **Privacy:** Mediation proceedings are strictly private, they are not available for public recording nor subjected to public scrutiny. The element of privacy not only reduces psychological inhibitions but proves to be a great catalyst for honest conversations thereby expediting the process.
- **Time:** As of 2018, the Indian courts are jam packed with litigations, mediation on the other hand ensures to resolve disputes faster, it helps parties to resolve disputes in a simpler way and leave the baggage and move ahead. Mediation has proven to be quick and efficient, with two-thirds of mediated disputes being resolved at an average rate of 173 minutes per case in 2015.<sup>12</sup>

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<sup>10</sup>Dr. Justice Dhananjaya Y. Chandrachud; Mediation- Realizing the Potential and Designing Implementation Strategies available at [http://lawcommissionofindia.nic.in/adr\\_conf/chandra\\_chud3.pdf](http://lawcommissionofindia.nic.in/adr_conf/chandra_chud3.pdf)

<sup>11</sup>Moti Ram v. Ashok Kumar, (2011) 1 SCC 466.

<sup>12</sup>VIDHI CENTRE FOR LEGAL POLICY, Strengthening Mediation in India: Interim Report on Court Annexed Mediations, 42, (July 29, 2016), available at <https://static1.squarespace.com/static/551ea026e4b0adb21a8f9df/t/579ee7be5016e10ca2ae65f0/14700319>

- **Emotional Stability:** Several visits to the courts, rigorous questioning can have an adverse impact on the individual, thus mediation is preferable since it is offered in a private manner and away from the stares of the public.
- **Costs:** Expenses in litigation cases vary from lawyer's fees, court fees, filing fees and further innumerable expenses compared to which mediation being flexible and relatively short offers the disputants the less expensive way out thereby reducing monetary costs.

## VI. ROLE OF A MEDIATOR

A Mediator is a facilitator. The role of a mediator is to create an environment or a surrounding such that the parties voluntarily settle the disputes amongst them. The mediator is supposed to be neutral, he does not deliver a judgment like the Judge at the court nor does he dictate terms of the agreement to the parties like an arbitrator. He is a facilitator and he must enable the parties to understand the interests of both the sides. He must ensure that during the process he is neither judgmental nor an advisor but only the facilitator helping the parties to reach at a conclusion which is in the best of interests for both sides.

The very essence of the process is that (1) focuses on the parties; (2) allows flexibility; (3) maintains confidentiality.

## VII. MANDATORY MEDIATION

### *Mediation is mandatory in case of matrimonial disputes:*

The Civil Procedure - Alternative Dispute Resolution and Mediation Rules, 2003 and the subsequent Rules framed by the High Court's contain provisions for mediation or conciliation in matrimonial disputes. Rule 4 of the Model Rules impose a duty on the referral court to give guidance to parties to opt ADR methods. Before the party chooses the option for ADR, the court guides the parties by drawing their attention to the relevant factors, which they have to take into account before exercising the option<sup>13</sup>, Clause (b) of Rule 4 treats matrimonial dispute as a dispute where relationship between the parties should be preserved<sup>14</sup>. Therefore, when the party opts for ADR under Rule 4(b), it could be either conciliation under Section 89(b) or mediation under 89(d), CPC. Further, Rule 5 states the procedure to be followed in cases where in one party may not agree to

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<sup>13</sup> The Civil Procedure-Mediation Rules, 2003, r. 4 reads: "Court to give guidance to parties while giving direction to opt (a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely... (iii)that, where there is a relationship between the parties which requires to be preserved, it will be in the interests of parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of subsection (1) of section 89".

<sup>14</sup> Rule 4, Expn reads: "Disputes arising in matrimonial, maintenance and child custody matters shall, among Others, be treated as cases where a relationship between the parties has to be preserved".

arbitration. On the other hand the process for mediation is relatively simpler, since on the agreement of one party the other party is sent notice after hearing, and if there is a chance of settlement, the court send the case for compulsory mediation. The mandatory reference as per the Rule is a move to preserve the relationship between the parties. The court has to figure out whether the relationship between the parties can be maintained, before making such reference.

Because of the very nature of disputes involved in matrimonial disputes, mediation becomes mandatory but there are cases where the courts do not check whether there is an element of settlement but simply refer these cases to mediation centres due to which the number of 'no mediation cases' are on a rise and at the same time it leads to waste of time for both the mediators and the courts. It is thus the need of the hour to emphasise on the Rule.

#### ***Mandatory mediation in commercial suits:***

The commercial Courts Act, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 was passed on 10 August 2018 it provides for mandatory mediation prior to institution of a commercial suit. Section 12A provides for mandatory mediation before a part approaches a Court, the exception being in cases wherein interim relief is sought. The Rules define Mediation as a process to resolve, reconcile and settle a commercial dispute between the parties.

### **VIII. COMPLICATION OF IMPLEMENTATION**

There is need for proper strategy to implement the process of mediation so that the society can be benefitted from it. More mediation centres must be set up and the courts must ensure there exists chances of settlement before such cases are given to the mediation centres. Mediation is considered to be one of the best available alternatives in India keeping in mind the state of the judiciary system in India. Lawyers must understand the scope and potential of mediation which still remains unexplored, strategies are to be evaluated so that these can be accepted by the society at large. The ones who are capable, should try to spread awareness about the nature and advantages of mediation, there should be a proper institution created for the same and proper and actual implementing should take a fast track.

### **IX. ISSUES RELATING TO IMPLEMENTATION**

- ***Lack of Regulation:***

The success of mediation cannot be said to be if there are no rule making authorities, and genuine efforts made to promote the process of mediation. The Mediation and Conciliation Rules, 2004 were brought into effect from August, 11, 2005. The very fact that the rules contrast with the other forms of ADR shows that the rules were

never made with the right intentions of implementing. No proper rules and requirements for training, code of conduct have been framed.<sup>15</sup>

- ***Lack of mediation centres :***

Due to the dearth of mediation centres with well-equipped facilities, the society still prefers to rush to the court to bring an end to any ongoing disputes.

- ***Lack of awareness:***

The lack of public awareness is one of the major factors due to which mediation is not preferred. Steps to promote mediation are still haphazard and have not been able to achieve the basic objectives.

- ***Reluctance of the Bar:***

The general thinking that the rise of mediation shall lessen the income of the advocates contributes as one of the major negative factors for mediation in the society.

## **X. RECOMMENDATION**

After discussing the advantages and the issues relating to mediation the following solutions may help to develop a better perspective towards mediation in the society.

- **Regulatory Framework:**

Unlike the other ADR processes, mediation suffers from lack of a framework to bring about changes and fulfill the objectives as well. A board must address the issues relating to training and standards of mediators, enforceability of settlements to bring confidence of the general public, establishing of a central authority, having a set of guidelines for compulsory mediation before moving to the court.

- **Role of law schools and the Bar:**

Law students are often subjected to trainings in the field of drafting, mock trials, moot courts, conveyancing as per rules of BCI. However, mediation training still seems to be nowhere on the list of the syllabus, only if this was introduced in schools shall law students consider it as an option in the career.

Simultaneously, lawyers, advocates, judges play a major role as they are responsible for enhancing the confidence of the general public. Lawyers must themselves advice for mediation as the first step.

- **Training:**

It is important to explain the very role of mediation and why it is necessary. It should be an important aspect of

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<sup>15</sup>SriramPanchu, “*Mediation Practice & Law The Path to Successful Dispute Resolution*”, Second Edition, 2015, LEXIS NEXIS P. 321

training of the judiciary.

- **Public Awareness:**

Awareness through various forms of media, highlighting the importance and benefits of mediation only then shall the public prefer to follow the path of mediation and then litigation.

- **Suljhao Magar Pyaar se!**

Mediation is the need of the hour, to improve the efficiency of the judicial system. Mediation is not a means to improvement but the very end to it. Thus, suljhao magar pyaar se.