

# Mediation: In Divorce & Other Family Matters

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## ABSTRACT:

India being a country consisting of approximately 1.324 billion people and the 2nd most populous country in the world, it becomes all the more difficult for our judicial system to look after all the petty to grave matters concerning its people therefore the ADR Act, 1996 gives alternative measures in resolving conflicts. Our paper primarily deals with the specific branch of ADR i.e. Process of Mediation in dealing with divorce and other family matters as to when it is beneficial and when it potentially hinder could or block the process. It will also include its expanding scope even in corporate matters and how it has successfully resolved the disputes within family as India has largely family-owned businesses and in case of conflict we approach the ADR mechanism instead of Courts system. But there are again in some instances judicial int

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*It is the spirit and not the form of law that keeps the justice alive.*

*- LJ Earl Warren*

## I. INTRODUCTION

India is also a biggest democracy in the world and if we talk about democracy judiciary is one of the important pillar. We all know that judiciary imparts justice and one of the important principle of this body is “Better That Ten guilty persons escape than that one innocent suffer – Sir William Blackstone” so in finding that one guilty person it is very difficult for a single body to dispatch judgement. Many of Indian Courts are full of appeals, adjournments, revisions, and cross appeals; on an average a civil case takes anything from about 5 to 8 years for its final disposal & causes are not wanting when cases have lingered in courts for 15 to 20 years. The number of cases has increased considerably and now it has reached to an extent of burden for the Indian Judiciary. Therefore in order to cope up with the piled up and back log cases and to deliver justice within reasonable time period, it was decided to come up with another institutional structure and hence forth a resolution was adopted by the Hon’ble Chief Minister and Chief Justices of the High Court and a declaration was made that if an alternative dispute resolution body is created then it would be better for the Indian Judicial System and alternative modes like; Arbitration, Mediation and Negotiation can be helpful. ADR is a mechanism to resolve the dispute without going into litigation process.

## II. WHAT IS ADR?

ADR stands for *Alternate Dispute Resolution* which basically used to resolve between the two parties without the interference of court or any judicial body means outside court settlement . Many countries including India

have accepted Arbitration, Mediation and Conciliation as the best techniques for resolution of civil disputes, particularly those disputes relating to money suits, injunctions and specific performance of contracts. In this paper we are going to deal with the “Mediation”. Now let’s talk about mediation as one of the important part of ADR and how it has effectively been used by the family courts and in matters of family disputes such as custody matters, divorce matters, etc.

### III. MEDIATION

Mediation is a discretionary process of resolution of disputes whereby another independent third party assists the parties to the dispute to reach a settlement. This process is considered as a positive form of conciliation in which the third party recommends solutions which both sides willingly accept or reject. Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.<sup>1</sup> Family mediation helps to communicate the problem in a more amicable way whereby both the parties can talk out the problems and the best suited solution and come to a mutually satisfactory and the best possible solution. If the two parties resolve the conflict and can conclude an agreement then it can be incorporated into a Court order.

### IV. HISTORY OF MEDIATION IN FAMILY MATTER

In the late 1970s, divorce mediation has been an interdisciplinary field. It started as a search for an alternative to the costly, complexities, and often emotionally savage legal process of acquiring a dissolution of marriage by means of the traditional two-attorney adversarial approach.

The theory, practice, and techniques used in family and divorce mediation evolved from such diverse fields as labor mediation, counseling, negotiation, law, anthropology, social psychology, and education<sup>2</sup>. The Academy of Family Mediators was founded in 1981 by an interdisciplinary group of mediators, including mental health professionals, lawyers, academics, and business people, to facilitate the growth of this embryonic profession. Family mediators provide comprehensive divorce mediation consisting of division of property and debt, establishment of child and spousal support, and development of a parenting plan and custody arrangement. Services provided by family mediators also include private and public sector custody. The concept of mediation traces its root in the ancient Indian legal systems like that of ‘Gram Panchayats’ and ‘Nyaya Panchayats’ and those are still in existence.<sup>3</sup>

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<sup>1</sup> Black’s Law Dictionary, 8<sup>th</sup> Ed. p. 1003.

<sup>2</sup> Sarah Childs Grebe, Family Mediation Programs: Establishing Standards, *MEDIATION Q.*, Spring 1988, at 13, 17; Joan B. Kelly

<sup>3</sup> Anil Xavier, *Mediation: It’s Growth and Origin in India*, available at [http://www.arbitrationindia.org/pdf/mediation\\_india.pdf](http://www.arbitrationindia.org/pdf/mediation_india.pdf)

## V. TYPES OF MEDIATION

There are basically two types of mediation:

- Court-Referred Mediation - These are mediation wherein parties do not directly go the mediators on their own, it is at the instance of the Court that they refer the case to the mediators in order to avoid the cases which necessarily do not require Court's assistance. It is also mandated by Section 89 of Code of Civil Procedure and with this the case is referred to mediation.
- Private Mediation - In this mediation, the mediators who are well-trained, skilled, and experienced in this regard offer their service to their clients which includes individuals, public officials, and to government members and resolve their conflicts in an amicable manner.

## VI. PROCEDURE OF MEDIATION

- 1. The Referral Judges refer the cases, in which there appears to be an element of amicable settlement, to the Mediation Centers by directing the parties to appear in the Mediation Centre on a particular date.
- 2. When the case is received in the Mediation Centre, the Nodal Officer of the Mediation Centre appoints a Mediator and the Mediator is informed accordingly.
- 3. On the date fixed, the Mediator starts the process of Mediation between the parties. He may adjourn the matter as per convenience of parties to different dates to help parties in making up their mind.
- 4. The Mediator cannot hold a case beyond a period of 90 days.
- 5. If the case is settled, the Mediator drafts a deed of settlement in the presence of and in consultation with parties/their counsel and obtain their signatures/thumb marks thereupon, otherwise he sends the case back to Referral Court without making any observations about causes of failure of Mediation.

## VII. DIFFERENCE BETWEEN MEDIATION AND LITIGATION

	LITIGATION	MEDIATION
1.	The parties are not directly involved in the proceeding.	The parties personally take part and are active participant in the same.
2.	There is a rigid procedure.	It has a flexible procedure.
3.	It is a public proceeding.	It is private and confidential.
4.	Adjudicators are specially skilled and trained	Mediators may or may not be

	in this regard.	legally trained.
5.	Cost is more.	Cost is less.
6.	It is delayed.	It is expeditious.

## VIII. MATTERS REFERRED TO MEDIATION

Following element needs to be looked into in order to go for the process of mediation<sup>4</sup>:

- (a) Whether the order of the Court is needed? Where the court order is needed it is not appropriate to refer the matter to mediation.
- (b) Whether there is any statutory period of limitation to set the law in motion? If the law provides that a particular suit will be filed within a specific time, the mediator cannot extend the period of limitation. Time barred application or suits are not entertain able either by the mediator or even by the parties.
- (c) Whether the suit was initiated or defended for strategic reason?
- (d) Whether negotiated settlement is possible or not?
- (e) Whether there was any relationship between the parties that has already been shaped or broken down i.e. husband and wife, partners, shareholders, doctor and patient etc.
- (f) Whether there is any allegation or counter allegation against each other? It is common experience that “where the issues are raw and recent, parties may not be ready to enter into negotiations to resolve them. Where parties want to find a solution quickly and economically, mediation must be a primary option”.

### Mediation in Various Family Matters

Mediation successfully takes place in various family matters such as in child custody, matrimonial conflicts, financial issues, etc.

1. Custody Mediation - This mediation takes place when there is disagreement among the parents for the child's parenting and they sort to resolve such conflicts. The parents then ask an expert (mediator) to resolve such conflicts.

The goals of mediation are to:

- Helps you make a parenting plan that is in the best interest of your children.
- Helps you make a parenting plan that lets your children spend time with both parents.
- Helps you learn ways to deal with anger or resentment.

<sup>4</sup> Henry Brown and Arthur Marriott: ADR Principles and Practice 2<sup>nd</sup> Ed., pp. 416-417.

2. Divorce Mediation - It makes arrangement for children, finances and other matters post separation and helps in settling down the separation without going into the intricacies of litigation. Litigation is much more expensive and also takes a lot of time and the spouses have to undergo a lot of emotional upheavals which is not there in the process of mediation.

The goals of divorce mediation are as follows:

- Create an equitable, legally sound, and mutually acceptable divorce agreement;
- Avoid the expense and trauma that often accompany litigation; and
- Minimize hostility and post-dissolution controversy.

## IX. CASE STUDY ON MEDIATION IN CORPORATE WORLD

Following are the case study of few prominent family businesses in India which has successfully resolved their conflicts by resorting to means of mediation.

1. *Reliance* is India's largest private sector company. It was founded by Dhirubhai Ambani, who passed it on to his two sons, Mukesh Ambani and Anil Ambani, after his death in 2002. In November 2004, the younger brother Anil raised questions about Mukesh's power related issues, saying that he was violating his authority and power in various issues and company dealings. Problems between the two continued till 2005, and ended only when they agreed to let their mother, Kokilaben Ambani be the mediator in this feud. She split the Reliance Empire between the two brothers, and now Mukesh Ambani manages Reliance Industries, and Anil Ambani manages the Reliance ADA Group. Dhirubhai Ambani did not leave any known will or plan of succession.

### Mediation Mandatory According to the Direction of Apex Court

In the case of *K. Srinivas Rao v. D. A. Deepa*<sup>5</sup> the Apex Court issued directions to all courts dealing with matrimonial disputes to settle all matrimonial disputes at first instance through the process of Mediation. The Supreme Court directed Family Courts and Criminal courts to refer parties to Mediation Centres to settle disputes through settlement under mediation. The Supreme Court of India directed Family Courts in view of section 9 of the Family Court Act to make all possible efforts to settle matrimonial disputes especially in relation to maintenance, child custody etc. through the process of mediation and to refer parties to mediation centres with the consent of parties.

### Mediation in Divorce

Divorce is a process by which marriage is legally dissolved so in this process mediation is required because a

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

divorcing couples knows that divorce simply does not finish everything concerning a wedding, though it ends the legal contract between a husband and a wife but, it shatters the household that was based on that marriage. It also fails to sever the ties that the couple shared after tying the knot with each other. In the case of divorce, it can prove to be more useful as this kind of cases requires special assistance and patience and also deals with a lot of emotions and large no. of stakeholders as compared to other family disputes whereby on the other hand, the time-constraints and torturous/embarrassing arguments are very much a part of the Indian litigation world which again proves the mediation settlement to be better from both the ends. A mediator could be a trained skilled who does not force rather assists the parties in their own negotiation while not creating choices for the parties. A mediator is some sort of counsellor who makes the party understand the situation and probable conclusions.

## **X. ENFORCEABILITY OF AGREEMENT**

An advantage for litigation is the execution of the decision of judge. This compulsion is not there in an agreement of mediation. Particularly in the family law area, many of the 'losers' in a Family Court war do not agree with court judgment. Under the Family Law Act 1975 the low level of compliance with maintenance orders is well documented although this has been mitigated in part by the Child Support Act 1988. However, it is generally acknowledged among writers on ADR that accordance with mediation agreements is high, frequently higher than for comparable court imposed judgment which are hypothetically enforceable. In addition, it is possible to give a mediation agreement fulfilled by contract. In practice, once settlement has been reached by the disputants, heads of agreement are usually drawn up at the mediation by the mediator or the parties themselves; the disputants will usually then have the terms checked by their solicitors before signing. Once agreed in contractual form, an offending party can be sued for breach of contract.

## **XI. SUCCESS RATE IN INDIA**

Mediation is a systematically organized dispute resolution process where a neutral third party helps these conflicting parties to come to an amicable conclusion in a win-win situation whereby there are various techniques and negotiation measures used to turn down the conflict and further the idea of dispute resolution. However, even though these systems are still existing in many parts of rural India, the people of the country, especially the ones that were still relying on these legal systems for justice, have lost their faith in them. This is so because these Panchayats are prone to influence from the influential and powerful people residing in these areas. These influential people often use these systems to mete out justice depending on their own whims and fancies and also exercising their bias/influence in the decisions of the Panchayats. This has played a hugely negative role in the dwindling of the popularity of the Panchayat systems. In the process of addressing these

concerns, the Indian government is making incessant efforts to revive these indigenous justice delivery methods by allocating funds and trying to make better rules for their reinvigorated and unbiased functioning<sup>6</sup>.

## XII. ANTI-SUIT INJUNCTIONS AND LIS ALIBI PENDENS RULE

These injunctions has a long connection with the common law system whereby it was used by the English Courts in the settlement of arbitration agreements between the conflicting parties and the sanctity of arbitration agreements were kept intact. This injunction is of great help when any of the two parties approaches the foreign court with an ulterior motive to hinder the process and to harass the other party, then it is at the instance of the harrassed party to ask the court to issue an anti-suit injunction. Once the court issue injunction, the party has to forfeit the foreign proceedings and thus, the intended effect will be avoided and the substantive interest<sup>7</sup> of the contracting party will be safeguarded. The another disputed contention is whether this power of issuance of anti-suit injunction is in the hands of arbitral tribunal. Arbitrators do have the authority to issue anti suit injunctions where it is believed by them that it is necessary and one of the party fraudulently has tried to undermine the jurisdiction of the tribunal<sup>8</sup>. Certain arbitral rules, for example the UNCITRAL rules<sup>9</sup>, give power to arbitrators to issue interim measures which have a similar effect to an anti-suit injunction. The arbitral practice also confirms arbitrators' power to grant anti-suit injunctions<sup>10</sup>. It is also understood that on the basis of few principles the arbitral tribunal issue such injunctions which are popularly the principles of international arbitration laws: the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award. Arbitrators have the power to sanction a contractual breach either by an award of damages or by ordering specific performance<sup>11</sup>. In that context, anti-suit injunctions ordered by arbitrators are regarded as nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic court<sup>12</sup>.

## XIII. SUGGESTIONS

The major task or target for the success of arbitration community is to draft or carve out its future endeavors in order to be called as well planned and long lasting and so that it sustain being well-prepared for the difficulties to overcome and thereby achieve the zenith of sky. Following are few suggestions in order to make our walk

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<sup>6</sup> Madhu S, *Mediation in India*, available at <http://cppradr.blogspot.in/2008/07/mediation-in-india.html>.

<sup>7</sup> Journal of private international law, Vol. 6, No. 2, p.282.

<sup>8</sup> LAI International Arbitration Series No. 2, Anti-suit Injunctions in International Arbitration, 2005, p.128-129.

<sup>9</sup> Available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

<sup>10</sup> International Arbitration 2006: Back to Basics?, p.239.

<sup>11</sup> Ibid. p.237.

<sup>12</sup> Ibid. p.239.

with arbitration smoother and avoid difficulties to a larger extent which might not bring victory but definitely will improve chances of the same.

- **Reciprocate settlement figures prior to the process.** This will help you better understand the effectiveness and significance of the process and this will help us prepare well before for the result or end that might come later and will also make the person apprehend as to the chances of success. .
- **Documents to be set forth sufficiently prior to the mediation process.** The next process for the better and convenient process, one must bring all the records pertaining to the claim beforehand and ensure that both the sides are aware of the same so that further there is no difficulty in establishing one's own contention. This would also ensure that later on the other party does not come up with some evidence that would loosen my case suddenly and would avoid any delays on our part..
- **All the necessary parties be present.** It is advised that all the parties necessary for the smooth functioning of the process should be present to avoid any further discrepancies and mis-communication from both the sides and to make the process as fast as possible. It is required that individuals party to suit, their relatives and ever other person who is a necessary party to the suit. Parties present in the proceedings are only one who has got consent from both the parties to agreement. If a party necessary to the suit is not there or not present, then a notice of 3 days will be given to the opposite party so that the mediation process is not stopped by the said disappearance of the party and further it can be rescheduled, if required. All parties attending must have full settlement authority.
- **Documents necessary for the process.** While it is not necessary for the parties to submit position papers, briefs or documents to the mediator in advance of the mediation session, you are certainly free to do so at least a week in advance of the mediation session. If you choose not to do so, but do have documents that will be of assistance to the mediator or to counsel, you are encouraged to bring a sufficient number of copies of such documents to the mediation.
- **Forward the claim for reimbursement.** It is always advisable to get all the terms and claims clear prior to the proceeding which expedites the process and which also prevents the parties from having another representation for the same while the process is going on.
- **Verdict history.** It is often preferable to know the verdict history in the venue where case is pending and to the point you can get information from lawyers in that county or circuit, it may be useful in the evaluation of the case.

## XIV. CONCLUSION

Mediation which is a very recent process known to Indian dispute resolution fraternity and the common people, therefore it need not come into existence simply with the legislation made, rather it require a change in perception and an attempt to make it in use. Also what is embedded in the Indian society is social stratification in terms of economy, physical power, and societal power and which further troubles the parties to resolve the conflict on equal footing which is an essence of the arbitration agreement. Therefore these differences vary from case to case, and in few disputes its almost impossible to negotiate on equal terms which makes the litigation or Court's visit inevitable. Therefore at the end of the paper what we conclude is that the family disputes are something which may arise in any family which is the pillar of any society, therefore it is advisable to resolve one's dispute in an time-effective and cost-effective manner which would further contribute to an individual's growth, society growth and growth of a nation in whole.