

# **ADR MECHANISM IN MEDIATION WITH REFERENCE TO FAMILY DISPUTES IN INDIA**

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**Abstract:** In present day society the understanding of the institute of marriage and its importance has changed, marriage is no longer assumed to be a commitment for a lifetime. As the principle of equality has replaced hierarchy as the guiding principle of family law it gave more grounds for family disputes and it became socially acceptable to leave marriages that are intolerable or merely unfulfilling. The aim of this article is to suggest an alternative dispute resolution method through mediation as a worthy option for resolving family disputes.

This paper promotes ADR as more appropriate way of resolving disputes in the era of technological advancement. It looks into the advantages and disadvantages of traditional method of resolving dispute. The paper gives highlight to primitive methods of dispute resolution and advent of ADR in India. It suggests the loopholes in adversarial method of dispute resolution. Further it suggests different methods of dispute resolution through ADR and analytically discuss indispensable method of dispute resolution in the age of technological era.

The following article gives insightful information as to why mediation is necessary in cases concerning matrimonial matters. Given the fact that, a marriage irrespective of the religion its union between two families and that a crack in the marriage has a trickledown effect, down to the lower most individual of the chain, mediation can save the emotional trauma of many. Hence parties often use mediation, arbitration and private judging. Norms of lawyers' professional roles have emphasized the importance of Collaborative and Cooperative Law.

**Keywords:** Mediation, Matrimonial disputes, Alternative Dispute Resolution.

**Introduction:** The need for arbitration and amicable dispute resolution was first emphasized upon by Abraham Lincoln in his words – “Discourage litigation, persuade your neighbors 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 an effective approach to resolving disputes. It is defined by the Massachusetts Supreme Judicial Court Uniform Rules on Dispute Resolution as a ‘voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions and developing a settlement mutually acceptable to the disputing parties.’

Sec. 9(1) of Family Courts Act, 1984 says in every suit or proceedings, endeavor shall be made by the family in the first instance, where it is possible to do so consistent with nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may subject to any rules made by the High Court, follow such procedure as it may deem fit.

Thus it is the duty of every family court to refer the matter for amicable settlement between the two parties. Reconciliation is mandatory under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. Under Sec 23(2) & Sec 23(3) of the Hindu Marriage Act states that before proceeding to grant any relief under it, there shall be a duty of the court in the first instance, in every case to make every endeavor to bring about reconciliation between parties where relief is sought on most of the fault grounds for divorce specified in Sec 13 of Hindu Marriage Act, 1956.

Sec.23(3) of HMA makes a provision empowering the court on the aspect of parties or if the court thinks it just and proper to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation. It must be borne in mind that a Hindu Marriage is a sacrament and not a contract. Even if divorce is sought by mutual consent, it is the duty of the court to attempt reconciliation in the first instance.<sup>1</sup>

However in *Mohinder Pal Kaur v/s Gurmeet Singh* it was held that the 6 months waiting period can be brought down in cases where an existing divorce petition is already pending for more than 6 months and efforts for reconciliation have been made earlier but without any success. Thus the waiting period cannot be curtailed in a freshly instituted petition for divorce by mutual consent if in an earlier petition on fault or other grounds, the parties have already litigating for more than six months and reconciliation between them has been of no avail. What makes mediation an effective approach is the fact that the main objective of mediation is not to prove one party wrong and other party right but to find a middle way in which both parties agree and are content to the proceeds thereof.<sup>2</sup>

**History of Alternative Dispute of Resolution in India:** ADR is not new to India; mediation was a method of dispute resolution in India even centuries before British arrived. In recent time there was panchayat system in India, this system was used by the village heads to resolve community dispute, even in the businessmen class in pre-British period. At that time impartial and respected businessman were requested by business association members to resolve disputes through informal procedure. The main significance of this system was that all proceedings were oral and there was no record of the outcome, instead of legal authority those kinds of dispute resolution procedures were regularly used and commonly accepted in the Indian society.<sup>3</sup>

Thus, in India ADR is not a new concept rather ADR relating resolution has been amended from time to time to cater speedy dispute resolution. Indian judiciary has also encouraged it at various occasions. For eg: In *Salem Advocate Bar Association v/s Union of India*<sup>4</sup> the Honorable Supreme Court of India directed the constitution of an expert committee to formulate the manner in which the provision relating to ADR incorporated in Sec 89 of CPC 1908 has to be brought into operation. For the effective implementation of ADR mechanism, several organizations and institutions like Consumer Redressal forum and Lok Adalat were revived.<sup>5</sup>

**Need For ADR:** The main reason for the origin or needs of the ADR is the tiresome processes of litigation, costs and inadequacy of the court system. It has ability to provide quick and cheap relief. The present mode of adversarial system fails in providing the real justice between the parties. The party, who approaches the court of justice with pain and anguish in their heart, faces various problems and suffers physically, economically and mentally. The present system fails to deliver quick and inexpensive relief to the party. The procedure is also very complex. This leads to search for an alternative mechanism which should be inexpensive, quick and with supplementary to the process of the traditional civil court. However at the same time the elements of judiciousness, fairness, equality and compassion cannot be discarded for expeditious disposal. It is well said that “justice delayed is justice denied” and at same time, it is also said that “justice hurried is justice buried”. In *Fuerst Day Lawson Ltd v/s Jindal Exports Ltd*<sup>6</sup> - the Supreme Court held that the object of the ADR Act, 1996 is to provide speedy and alternative solution to the dispute and avoid protraction of litigation. The provisions of the Act have to be interpreted accordingly.

ADR promotes amicable settlement and help in the preservation of the relations. Since there is direct involvement of parties in the settlement process there is no need of the involvement of technical and formal procedures. However, amicable settlement does not mean compromise at any cost rather it is reasonable compromise factor. Mediation is a process in which a third party facilitates a negotiated consensual agreement among parties, without rendering a formal decision.

**Mediation – More Than Just A Dispute Resolution Method:** Mediation is not a natural extension of the practice of law because mediation permits a broader definition of conflict as well as a more complete

approach to its resolution. Family mediation generally devotes considerable attention to non-legal emotional and relationship issues, it leads to a reconciliation and reunification of both parties.

In general, we can name two styles of mediation process, that is joint sessions and a caucus. The first one allows each side to hear the other's view and a prospect on the dispute but the second one being a private meeting between the mediator and just one of the parties in dispute that takes place out of hearing of the other party.

The purpose of 'caucus' session is to uncover issues that parties were reluctant to discuss in the joint session. Considering the emotional side of family disputes that often prevents the parties from soberly assessing the situation and reaching a consensus, caucus seems to be a more effective style of mediation process. It is also emphasized that face to face mediation is not always viewed as desirable in divorce mediation, with only a limited face to face meeting between the parties has attracted support in certain divorce situations. The complexity of issues that must be resolved concerning child custody, property division, future relationship, plus the confusion and distraction caused by family miscommunication are often cited as warranting a more activist mediator role. According to author especially in family disputes with its very special emotional side, the professionalism of the mediator should be unquestionable and doubtless as the neutrality of the mediator plays a big role and his personal life experience should not affect his attitude towards the parties and harm the communication process.<sup>7</sup>

**Legislations relating to ADR in India:** Legislators in India have incorporated various provisions in different statutes pertaining to ADR. The lists of such legislations are as follows :

1. Sec.89 of CPC, 1908
2. Order 23 Rule 3 of CPC, 1908
3. Order 32A of CPC, 1908
4. Sec.80 of CPC, 1908
5. Arbitration and Conciliation Act, 1996
6. Legal Services Authorities Act, 1987
7. Industrial Dispute Act, 1947
8. Sec.320 of CrPC, 1973
9. Sec. 9 of Family Court Act, 1984

Mediation has many benefits for couples experiencing separation or divorce

- Mediation helps preserve family relationships by encouraging communication, fostering understanding and reducing the conflict between the parties.
- The parties make their own decisions about what is best for them and their children
- It is a confidential and non-judgmental process. Information learned in mediation may not be used in court proceedings either during or after mediation
- Mediation is generally less costly than litigation which leaves more money available for the needs of the children and parents.
- Research has shown that ongoing parental conflict has long term, negative impacts on children of all ages

Family mediators facilitate communication and problem-solving between the parties and help couples develop agreements that meet the challenges of separation and divorce in a cooperative and confident manner.

**Conclusion:** The practice of amicable resolution of dispute can be traced back to historic times. In rural India the panchayats decided nearly all the disputes. The methods of amicable dispute resolution were recognized methods of administration of justice and not just an alternative to the formal justice system formed by sovereigns' feudal lords or the Adalat system initiated by British and formal court system.

Adopting mediation in matters such as family law, contract law, land problems and other compoundable offences will not only reduce the burden of the judiciary but will grant the Honorable Judges more time

to apply their minds on issues such as those in public interest. Resorting to mediation has already been adopted in developed countries such as the UK in which 70% of the civil cases are solved by means of mediation. It was high time that we evolved and took steps in direction which will help use humanize and civilize not only our society but also our judiciary.

**References:**

1. Arriving at a settlement under Family Court Act, 1984: Deconstructing the Role of the judge of the Family Court and Counsellor, Journal of Indian Law Institute, Vol.56, NO.3, pp 376-385, Oct-Dec 2014
2. Praveen Dalal, The culture of ADR in India, [www.ordr.info/The %20 culture%20of%20ADR%20India.doc](http://www.ordr.info/The%20culture%20of%20ADR%20India.doc).
3. Anurag K Agarwal, Role of ADR methods in development of society: 'Lok Adalat' in India, [www.napsipag.org/pdf/Lok\\_Adalat.pdf](http://www.napsipag.org/pdf/Lok_Adalat.pdf)
4. Writ Petition (civil) 496 of 2002
5. Mediation as an effective tool of ADR system in Matrimonial Disputes, Samarth Khanna, Symbiosis Law School
6. SPL (CIVIL) No. 11945 of 2010
7. J. Lande-The Revolution in Family Dispute Resolution, Missouri University Legal Studies Research Paper Series, Research Paper No.2012-10, 24 J. of the American Academy of Matrimonial Lawyers 411(2012) P.412-413

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