

Mediation In Matrimonial Disputes: A Judicial Perspective

Mahantesh G S¹, Mamatha R², Sunil Kumar L.³

¹Assistant Professor of Law, Alliance School of Law, Alliance University, Bangalore – 562106 Karnataka.

²Assistant Professor of Law, Alliance School of Law, Alliance University, Bangalore – 562106 Karnataka.

³Assistant Professor, Alliance School of Law, Alliance University, Bangalore - 562106

ABSTRACT

The way people think about marriage and its value in society has changed tremendously in recent years. Marriage is no longer expected to be a lifelong commitment. As the idea of equality supplanted hierarchy as the driving premise of family law, additional reasons for family disputes arose, and it became socially acceptable to end marriages that were either unbearable or just unfulfilling.

In any culture or society, family is extremely important. A family is both an organisation and a group of people. In the family, not only economic requirements are met, but also, and perhaps more crucially, emotional needs are met. Divorces and property inheritance conflicts are on the rise like they've never been before. Economic factors, professional issues, and psychological imbalances are all possible causes. The author of the essay conducted a socio-legal investigation on the causes of family conflict. Society must find measures of protecting the family, as well as avoid and resolve disagreements that threaten the family's fragile fabric.

The purpose of this article is to offer mediation as an alternative dispute resolution strategy for settling family problems. For the resolution of these problems, the author recommends mediation as the best tool for a dispute resolution system, since these processes provide diverse benefits such as objectivity, proper attention to the issues, impartiality, and independence. The author also provides an outline of the various legal frameworks in India that facilitate ADR in family conflicts.

Keywords: Mediation, Family Disputes, Family Courts Act, Civil Procedure Code, Judicial approach

INTRODUCTION

The institution of marriage has evolved in today's society. It is no longer believed to be a lifetime commitment. It is no longer possible to regard marriage to be a holy relationship between a husband and a wife. Several marital cases have arisen as a result of the shift in circumstances. The judiciary, which is already overburdened by the growing number of cases, is unable to manage these matters. Alternative conflict resolution is proven to be the next best option in the face of such a load. It establishes a legal framework for settling disputes between private parties.

Mediation, which is a type of alternative conflict resolution, is a process in which a neutral third person called a mediator assists in the resolution of family issues by encouraging the parties to achieve an amicable arrangement. Mediation is now being utilised in the corporate sector to resolve conflicts. This study, on the other hand, focuses solely on the function of mediation in resolving marriage issues.

Mediation acts as a mediator to assist aside in solving a dispute. When compared to traditional judicial procedures, it gives faster justice. Alternative dispute resolution (hereafter referred to as 'ADR') creates a friendlier environment and fosters flexibility as compared to court. In contrast to courts, which are not available to the public, mediation is a private and confidential process. Mediation has become the most frequently acknowledged conflict resolution strategy for resolving marriage problems nowadays. There are, however, two ideologies. Advocates for mediation argue that it protects family bonds, particularly for children who are spared the difficult and traumatic process of a traditional judicial divorce. The critics, on the other hand, regard mediation as useless since the perpetrator escapes without being punished by the state's well-functioning criminal justice system. Regardless, mediation is now the basic foundation of society to maintain social peace.

FAMILY DISPUTES

At some point in their lives, all families face hardships and stress. Divorce and marital problems, on the other hand, are both profoundly personal and worldwide occurrences. Divorces may be defined as the decision to end a marriage and end a partnership. They are, however, often preceded by a lengthy process of ending the partnership, which may entail separation from the spouse, stress, disagreements, and even violence.¹ According to Robert & Wyer (1987), children with estranged parents have issues relating to the other sex and have low academic performance that is often long-term in nature.²

The Family Courts Act³ explains family disputes as:

1. A suit or proceeding between the parties to a marriage for a decree of a nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

¹ Paul R. Amato and Juliana M. Sobolewski, *The Effects of Divorce and Marital Discord on Adult Children's Psychological Well-Being*, 66 ASR 900, 900–921 (2001).

² Robert Reid, *A Meta-Analysis of the Academic Status of Students With Emotional/ Behavioural Disorders*, 38, JSE 3, 130–143 (2004).

³ The Code of Civil Procedure, 1908, №5, Acts of Parliament, 1908 (India).

2. A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
3. A suit or proceeding between the parties to a marriage concerning the property of the parties or either of them;
4. A suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
5. A suit or proceeding for a declaration as to the legitimacy of any person;
6. A suit or proceeding for maintenance;
7. A suit or proceeding concerning the guardianship of the person or the custody of, or access to, any minor.

PRESENT LEGAL REGIME

In 2002, Section 89 of the Code of Civil Procedure, 1908 ('CPC') was revised to provide mediation as an alternative dispute resolution option. If the court believes the dispute may be resolved peacefully by other processes, it can send the issue to arbitration, conciliation, or judicial resolution through Lok Adalats or mediation, according to Section 89.⁴ This is referred to as court-administered mediation.⁵ There may be times when the court-ordered mediation does not work out. In that situation, the lawsuit will continue to be litigated. If the mediation is successful, the court will provide a report to the mediator and the matter will be closed. Pre-litigation mediation and court-referred mediation are two types of mediation.

Depending on the nature and circumstances of the case, the Hindu Marriage Act of 1955 directs the Court to seek reconciliation between divorce-seeking parties.⁶ The Special Marriage Act of 1954 also allows the Court to choose reconciliation as the first-instance option in divorce cases.⁷ The Family Courts Act, Section 9, also requires the courts to attempt to resolve family conflicts.⁸

JUDICIAL OUTLOOK OF MEDIATION IN MATRIMONIAL DISPUTES

The Supreme Court examined pre-litigation mediation in the context of family problems in *K. Srinivas Rao v. D.A. Deepa*⁹. Because the wife had filed a false criminal complaint against him and his family, the husband requested a divorce on the grounds of mental cruelty. The Court emphasised the merits of pre-litigation mediation as a technique of conflict resolution and awarded the husband divorce. The Court accepted that conflicts arise for petty reasons that can be resolved by filing a lawsuit. It was also discovered that data from the Delhi district courts shows that parties that seek mediation at the earliest possible stage have a better probability of reaching a successful resolution. All family courts were ordered by the Supreme Court to establish and publicise pre-litigation clinics at all mediation centers.

⁴ The Code of Civil Procedure, 1908, №5, Acts of Parliament, 1908 (India).

⁵ Niranjan J. Bhatt, Court Annexed Mediation, *Law Commission of India* (April. 07, 2022, 05:00 PM), http://lawcommissionofindia.nic.in/adr_conf/niranjan%20court%20annx%20med13.pdf.

⁶ The Hindu Marriage Act, 1955, №25, Acts of Parliament, 1955 (India).

⁷ The Special Marriage Act, 1954, №43, Acts of Parliament, 1954 (India).

⁸ *Supra* note 4.

⁹ (2013) 5 S.C.C 226 (India).

The Supreme Court stated in the case of *Gaurav Nagpal v. Sumedha Nagpal*¹⁰ that the situation of a significant number of cases flooding the courts about divorce or judicial separation is particularly troubling. The Supreme Court further stated that the Hindu Marriage Act stipulates circumstances in which a divorce decision may be sought. The mere fact that such a course is offered should not generally constitute an incentive for people to seek a divorce unless the marriage has irreversibly broken down. Instead of destroying the marriage, the focus should be on saving it. People should only go to court as a last resort if their marriage is irreparably broken.

Justice Markanday Katju stated in the case of *B.S Krishna Murthy vs. B.S Nagaraj and Ors*¹¹ that attorneys should counsel their clients to seek mediation, particularly where the conflict is family-related. Otherwise, the case would go on for years or decades, which will be costly to both sides.

Marriage is a child-centric heterosexual institution in our culture, according to the court in *G.V. Rao vs. L.H.V. Prasad*.¹² If marriage as a unit fails, however, many relationships must be adjusted, disrupting the family's normal structure and calm. As a result, family laws and courts encourage reconciliation and resolution by mutual agreement rather than litigation in marriage problems.

The Supreme Court concluded in *Jagraj vs. Bir Pal Kaur*¹³ that the parliament's aim in adopting section 23 of the Hindu Marriage Act, 1955 was to maintain the sanctity of marriage. As a result, the courts must oversee every step toward the parties' reconciliation.¹⁴

BENEFITS AND LIMITATIONS OF MEDIATION IN MATRIMONIAL DISPUTES

One of the most fundamental advantages of mediation as a conflict resolution technique is that it may save a lot of time, and money, and assure confidentiality.¹⁵ The court decided that "mediation processes are secret proceedings" in the case of *Moti Ram Tr.Lrs. & Anr. vs. Ashok Kumar & Anr.*¹⁶ When the mediator is obligated to provide the court with a report of successful sessions, he is not needed to send the details of the proceedings. If the mediation fails, he merely needs to provide a report that states, "Mediation failed." The mediator's job is to achieve long-term peace. The parties have agreed to work together to find a solution that is acceptable to both parties and allows them to have some control over the outcome. In general, mediation is less stressful than litigation. It allows children to witness their parents working

¹⁰ (2009) 1 S.C.C 42.

¹¹ S.L.P. (Civil) No(s). 2896 of 2010.

¹² 2000 ALL MR (Cri) 1375 (S.C.)= (2000) 3 SCC 693 [Para 7]

¹³ AIR 2007 SC 2083

¹⁴ Justice Manju Goel, *Successful Mediation in Matrimonial Disputes Approaches, Resources, Strategies & Management*, *Law Faculty, Delhi University* (April 21, 2019, 05:30 AM).

¹⁵ Law Reform Commission, *Report Alternative Dispute Resolution: Mediation and Conciliation* (November 2010), available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf (last visited on March 3, 2018) ('Law Reform Report').

¹⁶ (Civil Appeal No. 1095 of 2008).

together, even when they disagree. According to a study conducted by Baker McKenzie in 2004, children of divorce had greater levels of externalising behaviours that are aggressive, troublesome, and impulsive. They also exhibit internalising behaviours including despair, anxiety, and isolation. Mediation frequently results in joint custody, benefiting the children by ensuring that they have a future with both parents. It is a considerably more pleasant option to stand before a court when the parties have gone beyond aggression.¹⁷

Couples aren't the only ones who lose money in court; the government and society also suffer financial losses. In 2002, the cost of divorce in Florida was about \$2.5 billion. According to the Family Law Supreme Court Steering Committee (2003), family law cases constitute approximately 40% of court files and over 70% of reopenings.¹⁸

Mediation encourages closure. It does not allow for any additional appeals, revisions, or litigation. There's also a chance it'll assist you to mend or rebuild your relationship because there are many occasions where a disagreement is sparked by little issues. According to the author's perspective, it is also more useful for the lawyer since when a lawyer suggests mediation, the clients are happier and more likely to return to them. Mediation is also far more participatory, with each party having the opportunity to present their argument in their own words. Because the parties have agreed and signed the settlement, it leads to improved compliance. The establishment of a non-adjudicatory, non-judicial process for dealing with marriage dissolution would necessitate a fundamental rethinking of society's view of divorce.¹⁹ The realities of modern divorces, such as the high number of ongoing cases and widespread discontent, should motivate legislators to provide alternate procedures for separating spouses. Finally, mediation can lead to the resolution of instances that are related or interrelated.²⁰ Mediation, on the other hand, has its drawbacks. If the discussions fail, it might result in a waste of time, effort, and money. If the mediator is unskilled, the mediation may be incomplete or favour one spouse over the other. A clever partner may even conceal assets or income, leaving the weaker spouse bankrupt if the secret financial assets are not discovered. The settlement may be one-sided if one partner is dominant, and the other is submissive. As a result, the mediators must be well trained and competent.

DIFFERENT MODELS OF MEDIATION

In practice, there are three basic mediation models: facilitative, transformational, and evaluative. When the mediator promotes a discourse between the parties who are mostly in the same room, this is known as the facilitative model. By asking questions, summarising what the parties have said, and so on, the mediator assists in elucidating the parties' particular points of

¹⁷ Brenda L. Bacon and Brad McKenzie, Parent Education after Separation/ Divorce, 42 *Family Court Review* 87, 85-98 (2004).

¹⁸ William J. Henry and Kelly Bohac, Parenting Coordination, and Court Relitigation: A Case Study, 47 *Family Court Review* 687, 682-697 (2009).

¹⁹ Steven H. Hobbs, Facilitative Ethics in Divorce Mediation: A Law and Process Approach, 22 *U. Rich. L. Rev.* 325 (1998).

²⁰ Thomas E. Charbonneau, A Consideration of Alternatives to Divorce Litigation, 1986 *U. III. L. Rev.* 1119 (1986).

view, interests, and requirements. However, transformational mediation, which is similar to facilitative mediation but assumes that the parties should come up with their solutions, is best for marriage issues.

When the parties are in different rooms for the most part, and the mediator moves back and forth between them, this is referred to as evaluative mediation. Typically, the mediator examines the legal aspects of each party's case, pointing out flaws in one or both sides' arguments. Contractual and corporate issues are more suited to this type of mediation. There has recently been the development of a new kind of mediation known as narrative meditation, in which the focus is on developing a new "story" or "narrative" to comprehend and alter the conflict. It necessitates substantial training and is quite specialised. The narrative form of mediation has a long tradition in countries like New Zealand and Australia. It's most commonly employed in workplace conflicts and education.

PROCEDURE OF MEDIATION

There is no legislation for mediation, unlike the Arbitration and Conciliation Act of 1996, which deals with arbitration procedures and technicalities. It's bad because, although mediation is encouraged on one hand, there is still no legislation defining the method and technicalities of mediation on the other. Regardless mediation in India can be started in two ways:

1. Parties refer to mediation voluntarily i.e., private mediation.
2. Court refers the parties to mediation under Section 89 of the Civil Procedure Code.²¹

In the case of *M/S. Afcons Infra Ltd & Anr v. M/S Cherian Varkey Construction*, the Supreme Court said that the court has the authority to choose any of the approaches. However, in practice, the rule states that "the court will have access to section 89 of the Code once the pleadings are complete and after requesting admission/denials wherever appropriate, and before formulating questions." The courts may submit the matter to mediation if the questions are intricate or if the case requires multiple rounds of dialogue. There can be no appeal or amendment of a decree issued based on a settlement agreement reached through court-ordered mediation. In family and marital matters, the best time for mediation is just after the respondent has been served and before the respondent files written statements/objections.²²

In the lack of legislation governing mediation, procedures are conducted according to the guidelines established by each court.²³ The Supreme Court, however, held in *Salem Advocate Bar Association v. Union of India*²⁴ that there is a need for regulating mediation processes due to the lack of a framework, rendering Section 89 ineffectual. In the recent case of *M.R.*

²¹ Gracious Timothy, *Why Do We Need A Mediation Law? After All, Mediation and Conciliation Are The Same Thing, Right?*, Live Law (April 29th, 2019, 09: 26 PM), <https://www.livelaw.in/need-mediation-law-mediation-conciliation-thing-right/>.

²² *Ibid.*

²³ Mediation Training Manual of India, Supreme Court of India.

²⁴ (2005) 6 S.C.C 344.

Krishna Murthi v. New India Assurance Co. Ltd and Others,²⁵ the Supreme Court advised the government to create an Indian Mediation Act, stating that such legislation is urgently needed. Legislators will eventually empower individuals to choose their marriage fate, and courts will prefer not to deal with divorce cases.

The functional stages involved in mediation are —

- i) Introduction and Opening Statement,
- ii) Joint Session,
- iii) Separate Session(s), and
- iv) Closing is the functional step involved in mediation. In the beginning, the mediator introduces himself by providing information such as his name, areas of expertise (if any), and years of professional experience. Following that, each party makes a statement. He then discusses his appointment as a mediator, the case that has been assigned to him for mediation, and his experience, including whether or not he has successfully mediated a comparable issue in the past. The mediator then conveys his or her wish for a peaceful resolution to the issue and asks the counsels and parties to identify themselves. Establishing impartiality, winning the parties' trust, creating a pleasant environment, inspiring the parties, and so on are some of the goals of this stage.²⁶

The parties are then allowed to convey their points of view and tell their case, explain perspectives, vent emotions, and express thoughts without being interrupted or challenged in the second stage. The mediator may ask questions at this point to clear up any doubts and help both parties understand each other better. During this session, the mediator will identify the areas of agreement and dispute. The parties may react to the arguments made by the other party and, with the mediator's consent, may even ask them quick questions.²⁷

Separate sessions in the third stage offer more particular information to the mediator and allow him to follow up on problems made by the parties during the combined session. While dealing with the delicate problems at hand on a deeper level, the mediator considers emotional considerations. It aids parties in gaining a true understanding of the matter.²⁸ He should ask good questions and be aware of the concerns. The mediator should be precise, succinct, and sensitive to the parties' concerns and feelings.²⁹

MEDIATION IN FOREIGN COUNTRIES FOR MATRIMONIAL DISPUTES

The parties reassemble the case with their attorneys after reaching an agreement on the terms of the settlement, and the mediator orally confirms the terms of the settlement. Both parties sign the contract once the terms are laid out. A copy of the signed agreement is supplied to each party, and the original signed agreement is sent to the referral Court, which will make an appropriate order based on the agreement. The mediator thanks and congratulates the parties

²⁵ Civil Appeal nos. 2476–2477 of 2019.

²⁶ *Supra* note 13.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

for their participation. Throughout all of these stages, the mediator should retain his neutrality and create an atmosphere in which the parties feel free to express their emotions.

Mediation has only been governed by the law in Germany (the Mediationsgesetz). Since its inception at the Landgericht Gottingen in 2002, mediation and conciliation have been tried in court.³⁰ Mediation has proven to be a popular approach for resolving family disputes in Australia as well.³¹ Since its inception in 1976, the Family Court of Australia has provided family counselling services. The judges and legislators have recognised the value of counselling experts' contributions.³²

Online divorce mediation has also been launched in the United States, which uses contemporary video conferencing to decrease travel and hearing room costs.³³ In 2015, the Dutch Legal Aid Board also developed Rechtwijzer, a new platform that concentrates on online divorce mediation in the Netherlands. The Hague Institute for Internationalisation of Law created the platform.³⁴ Despite certain legislative and municipal government efforts to encourage mediation, the growth of family mediation in Italy has been quite restricted. There is also some overlap between family mediation, counselling, and other social services geared at assisting families in certain contemporary pieces of law.³⁵

WHETHER MEDIATION IS SUITABLE FOR DOMESTIC VIOLENCE CASES

Domestic abuse is dealt with in Section 498A of the Indian Penal Code, 1860 (hence referred to as the "IPC"). Domestic abuse, according to the 1908 Code of Criminal Procedure, is a non-compoundable offense (hereinafter referred to as CrPC). These are major violations that courts will not be able to mitigate.³⁶ The courts, on the other hand, have taken a different approach. The courts have shown no aversion to using mediation to resolve marriage problems. In *Mohd. Mushtaq Ahmed vs. State*,³⁷ the wife filed a divorce petition along with an FIR under Section 498A IPC against the husband. The couple was ordered to go to mediation by the Karnataka High Court. The situation was resolved, and the wife chose to have the FIR dismissed. The High Court stated that in suitable instances, the court might cancel criminal

³⁰ Wendy Kennett, *It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution*, 30 *International Journal of Law, Policy and The Family* 33, 1- 31 (2016).

³¹ Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters*, <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20arbitration%20in%20family%20law%20matters.pdf> (May 2007).

³² Moloney Land Hand K, *Evaluating the Work of Australia's Family Relationship Centres: Evidence from the first 5 years*, 51 *Family Court Review* 227, 224–233 (2013).

³³ Loic E. Coutelier, *The New Frontier of Online Dispute Resolution: Online Divorce Mediation*, American Bar Association (April 21st, 2019, 10:30 AM), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/dispute-resolution/new-frontier-online-dispute-resolution-online-divorce-mediation/

³⁴ *Ibid.*

³⁵ Paola Ronfani, *Children, Law and Social Policy in Italy*, 15 *International Journal of Law, Policy, and the Family* 285, 276–289.

³⁶ The Code of Criminal Procedure, 1974, No.2, Acts of Parliament, 1974 (India).

³⁷ (2015) 3 AIR Kant R 363.

proceedings, FIRs, or complaints in the exercise of its inherent jurisdiction to fulfill the purposes of justice.

Even though the offenses are non-compoundable, the court concluded in *Gurudath K v State of Karnataka*³⁸ that Section 329 CrPC would not preclude the exercise of the authority of quashing of FIR. There is no problem if the parties have reached an amicable agreement. The accused in domestic violence cases would have lower odds of being convicted as a result of this shift by the Indian courts. Between 2003 and 2013, the number of domestic abuse complaints filed climbed by 134 percent, from 50,703 to 118,866, a 10-year rise of 134 percent.³⁹

CONCLUSION

In India, the scope of mediation is promising for bringing inequitable treatment and a feeling of fairness and justice to society. Mediating abilities, particularly unbiased communication skills and persuasive negotiating methods, will be used. Abraham Lincoln said “Discourage litigation; persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost, and time.”

Conflict can't be avoided, but it can be managed. Every relationship has ups and downs as a result of life's cycles, such as procreating and raising children, pursuing a job, and experiencing current economic realities. The government must enact legislation to allow ADR to be used to resolve marriage conflicts. It's past time to accept the idea of no victor, no vanquished.

But it doesn't stop there; a large portion of our society is unaware of the benefits of mediation. The government should take aggressive measures to promote mediation, such as arranging more legal assistance clinics and camps, advertising in newspapers, radios, and television, and placing informational leaflets in prominent locations such as police stations and courthouses. Judges and attorneys should urge mediation more frequently as well. Foreign countries and the actions they have taken can teach us a lot more. Mediation is unquestionably a discipline that has to be expanded and investigated more, and it will undoubtedly lead us down a revolutionary route in terms of how we resolve conflicts.

SUGGESTIONS

India has been experimenting with and debating non-judicial options such as mediation, conciliation, arbitration, and negotiation as less expensive judicial alternatives to make justice a poor man's pragmatic hope. The mounting backlog of cases in the courts may result in unfairness to the average man. The study worker would like to suggest/recommend the following to achieve the objective of justice for all or any through ADR:

³⁸ Criminal Petition №7258 of 2014.

³⁹ Pandey, G, India “fails” victims of abuse, BBC News, (April 22nd, 2019, 10: 55 AM), <http://www.bbc.com/news/world-asia-india-29708612>.

1. The first and most important step that the government must take is to raise awareness about the ADR mechanism through the creation of a website, publication in the media, such as native cable television, radio, pamphlets, brochures, and newspapers, or by holding seminars, workshops, and symposiums.
2. The current strength of judicial officials is insufficient to handle their workload, thus they will have little time to create an efficient ADR process. As a result, additional judges should be appointed to alleviate the situation.
3. A group of legal professionals should become ADR practitioners. Lawyers must provide appropriate training and participate in role-plays or simulated practices to achieve this goal. Different types of mediators and conciliators should be formed for them to function in their various domains of specialty, such as family, business, and so on.
4. The government should take effective measures to allocate sufficient funds to meet the essential requirements for the proper implementation of the ADR mechanism, such as adequate infrastructure, higher-up authority, manpower, and a panel of trained mediators, conciliators, and arbitrators, among others.
5. Because the majority of unresolved issues in the courts are cases brought by or against the government, a special defender or treasurer should be appointed to handle cases brought by or against the government.