

# Indic Legal Law Journal

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## **MEDIATION, THE BETTER DISPUTE RESOLUTION MECHANISM**

### **Introduction:**

Conflicts in a family usually arise when members have different views on things which further escalate from a small debate into a major chaos, lack of patience in a particular subject and jumping into conclusions without any second thought or even misunderstandings due to which people often jump into a wrong conclusion. Conflicts can be resolved if the parties involved have a deeper understanding of their bond and do not want to create a mess out of it. Without any repair, such conflicts would often lead from petty arguments to even complete resentment of the opposite party. A marriage without a conflict cannot be in existence, but an existence of a marriage with hate would lead the stakeholders nowhere.

Conflicts arise due to several reasons. In the beginning of a marriage, a couple may not give an attempt to tolerate behaviours of each other. This would be due to the wife moving into a new environment and not being able to adjust quickly, but soon would get used to it. Another reason for such conflicts is the different expectations and path with regards to the career of each of the spouses involved and hence the lack of time for involvement in the familial affairs would lead to conflicts.

In recent times, a few reasons for conflicts in a marriage are the habits which either of the spouse is having (smoking, drinking, partying, coming back from work late on a regular basis) which would often result in conflicts leading to quarrels and then huge disputes.

India has a unique view when it comes to marriage. A couple are not just married to each other but also to the spouses' families as well. To ensure that such conflicts are settled without both

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parties having to grieve later, our legal system has given consent to a new tool called mediation to see how better a tool it is than a normal court procedure and how it handles the usual marital problems.

## **Mediation in Marriage Dissolution**

Mediation is a process of dispute resolution wherein an impartial third party will be appointed to settle the differences that people often have in a manner where nobody goes home dejected. Section 89 of CPC provides for Settlement of Disputes outside the Court (ADR) and mediation is such a provision which provides for settlement outside courts.

In mediation, there is a third party i.e. a mediator who will be the person who facilitates the negotiations between the conflicting parties. A major duty of the mediator is to provide an environment which makes them comfortable so that when he assists the parties, it would make them have a clearer mind-set towards the point of view of the other party involved thereby leading them to have a settlement which is effective and amicable as well.

**Justice Manju Goel** says the strategies to be adopted by the mediator while resolving family disputes are<sup>1</sup>:

- a. Probing of Facts;
- b. Identifying the real cause of dispute;
- c. Exploration of possibilities of reconciliation or divorce;
- d. Bring the parties to an agreed solution;
- e. Shaping the solution in legal format.

In essence, a mediator is the catalyst who facilitates the happening of the mediation proceedings. Like how a catalyst works in a chemical reaction, he does not take part in the settlement negotiations but he helps by suggesting some measures which can either be accepted or not accepted by the parties, it is completely at their discretion.

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<sup>1</sup> Justice Manju Goel, Successful Mediation in Matrimonial Disputes, Approaches, Resources, Strategies and Management

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The major feature of mediation as a process is that unlike court proceedings where a third party is the one imposing a decision, which might not even be acceptable to either or both the parties as well, mediation allows for the persons conflicting to settle the differences between themselves while being moderated by the mediator.

## **Why Mediation in Matrimonial Disputes?**

Section 9 of the Family Courts Act, 1984 imposes the court to give a fair chance to negotiated settlement before adjudication of such matters. The reason why such a provision is mentioned under the act is that in most of divorce cases applied would be because of an issue which would have been escalated into a big dispute between the parties. This in provision would allow the parties to first analyse the root cause of such and hence would be allowed to even reconcile. In such circumstances, a mediator appointed would first take in all the facts and would frame them in a clearer manner so that the parties would then be able to understand where the actual problems lie and where to focus so that the issues can be fixed quickly. In essence, this provision under the Family Courts Acts, 1984 allows for mediation to be conducted which would provide for coming up with productive solutions which would not always be the case when a Judge imposes legal solutions.

As once said by Hon'ble Justice Vineet Kothari, mediation in a marital dispute is much different than a mediation in a commercial or property dispute because under the latter disputes, the question of moral factors would not play as important a role as in a marital dispute. The personal responsibilities involved in a marital dispute is, at least in Indian context is on the highest side. The reason why mediation should be promoted in marital disputes is because unlike a Judge, a mediator plays the role of a counsellor who takes in his hand the task of leading the parties to an amicable and acceptable solution to the conflict/s which would bring peace to the parties.

The major reasons why mediation is more suitable than adjudication in divorce cases is are:

- a. Cost benefits: Litigation in general is a more expensive process than mediation. The court costs, the fees to the lawyer and other intermediate and additional costs would be exorbitant towards the end of a matrimonial dispute. This would in turn cause agony to both the parties involved and would not allow them to lead a peaceful post marital life if any.

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- b. Pending Disputes: As it is a well known fact that the number of cases pending in the courts is exorbitant and it would take a lot of time for the disputes to finish as well. Taking this into consideration, it would not be a sensible option to go ahead with adjudication if at all the parties would want a swift remedy.
- c. Better Results: Even on a normal day, a person would happily follow his own accord rather than following an imposition on him by a third person. The same is the case with mediation as well. Since mediation involves a high amount of discussion and suggestions with and by the mediator, the parties would often be happy with formulating their own result rather than a third person (a Judge in this context) imposing a result which is extremely binding as well.

## **Mediation and the Future**

Mediation, unlike litigation is a more calm and composed procedure. The mediator, a trained professional would be the one who would be the person taking care of the processes involved. As said in the advantages, mediation is a more flexible mode of dispute resolution than a court procedure wherein several rules would have to be strictly followed, failure of which would lead to contempt.

But is mediation a completely recognised concept of dispute resolution? The answer to that is paradoxical because yes it is recognised and no because it is not widely recognised. The major point to be noted here is that the lawyers and litigants who are the representatives of the parties in adjudication do not even reveal the fact that there are other forms of dispute resolutions and how each type works as well. The major drawback is that when honesty was the highly prevailing trait in an advocate, there were no alternative modes for dispute resolution. And now when there are plenty available, some of which would provide for equitable settlements, there are little no advocates who are honest enough to reveal to the parties that there are better modes available, instead of continuing the mundane cash minting practices.

Awareness has increased though. People nowadays research about their case even before approaching an advocate for counselling as well. But the awareness gained must be spread as well. In disputes such as matrimonial, mediation is the most effective in providing amicable and acceptable settlements. Section 89 of the CPC makes it an obligation on the courts to provide for

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a chance to a negotiated settlement. Also, since Family Courts disputes involves a lot of psychology and understanding of the circumstances of the party like a human and not a judge, it would be extremely beneficial to make Section 89 a mandatory requirement which first has to be fulfilled and only when the objective of the provision cannot be fulfilled, adjudication must become the mode of settlement.

Mediation has a bright future. With students slowly moving in towards ADR than litigation, it would help in strengthening the hold of mediation in our judicial system and as time progresses, mediation might even become the primary dispute resolution mechanism with the courts being the ADR mechanism.