

DE JURE NEXUS LAW JOURNAL

Author:

Nimisha Saikia

Bangalore Institute of Legal Studies

5th Year, B.A. LL.B. (Hons.).**ROLE OF MEDIATION IN FAMILY IN FAMILY LAW CASES:
SHOULD IT BE MANDATORY?**

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.’

INTRODUCTION

Mediation is an alternative dispute resolution resolving disputes between two parties. The term broadly refers to any instance in which a third party helps parties reach an agreement. Typically, the mediator (third party) assists the parties to negotiate a settlement. Mediation can be used in a variety of domains for example commercial, legal, diplomatic, workplace, community, and family matters, etc. The process is private as well as confidential and is enforced by law. Participation is typically voluntary which means mediation happens through a voluntary agreement between the parties. A mediator is a neutral third party. They usually facilitate rather directing the process. Mediation is peaceful and being internationally accepted to end the conflict. Mediation can be used to solve disputes between two parties of any magnitude. Mediators have various techniques to open or improve the relation between the parties basically aiming to help the parties reach an agreement. This is much depends on the mediator's skill and training.

BACKGROUND OF MEDIATION

The background of mediation goes back to Ancient Greece, where local disputes between the villagers were mediated by the village elders. Ancient Greece was the first to practice and develop mediation process where the non-marital mediator was called as a proxenetas, then in Roman Civilization; the Romans called mediators by various names, including internuncius, medium, intercessor, philanthropus, interpolator, conciliator, interlocut and finally mediator. After the war against Rome, the Kushites sent mediators to Augustus, who was in Samos, and in the year 21/20 BC, a peace treaty was concluded. ^{[1][2][3]}

Now mediators are professionally trained for mediation; it has become a professional service. In the UK mediation has developed since the Children and Families Act 2014 made it mandatory for separating couples to go through a Mediation Information and Assessment Meeting (MIAM) before hearing in the Court. There are some important statistics regarding the growth of the UK commercial mediation market, which is increased by 20% from 2016 to 2018. The statistical data in 2018 shows an increasing success rates in mediation with 74% achieving settlement on the day of the mediation session, reflecting the speedy nature of mediation once again.^[4]

WHAT IS A MANDATORY MEDIATION?

Mediation is the process which is used to settle or resolve conflicts between two parties. Mediation is an alternative dispute resolution process that is facilitated by a neutral third party who intervenes in order to promote a settlement or compromise. Mediation is generally a more cost effective and quicker means of resolving issues, and lasts a shorter amount of time than a trial.

Mediation can give disputing parties with a chance to spot and resolve the problems at hand, as well as potentially discover issues that were not originally thought to be contributing to the issue. Confidentiality of the process makes it better for resolving sensitive issues. Nothing

¹ O'Grady 79-88

² Jaques, Tony (2007). Dictionary of Battles and Sieges. **F–O**. Greenwood. pp. 713–. ISBN 978-0-313-33538-9.

³ Robinson, Arthur E. (1928). "The Arab Dynasty of Dar for (Darfur) Part II". *African Affairs*. **XXVIII** (CIX): 55–67. Doi:10.1093/oxfordjournals.afraf.a 100377.ISSN 1468-2621.

⁴ Mediation, Disputes (25 July 2019). "History of Mediation". *Civil & Commercial Mediation - Family Mediation - Workplace Mediation*. Retrieved 23 September 2019.

from the sessions may be used in court in case mediation process fails. Mediation is used to avoid litigation; therefore, if the disputed parties cannot reach an agreement by the mediation process they will need to move on with the court process or court proceedings.

The most common cases that use mediation are Divorce settlements, Child custody and child support agreements, Spousal support (also known as alimony) agreements, Contract disputes, Landlord and tenant disputes, and Employment disputes.

It is essential to Compliance with state statutes and court orders. Failing to attend mediation session could lead to serious consequences, such as being held in contempt of court, which is punishable by a court fine as well as detention in a jail facility. For example, attending sessions but refusing to speak, or attempting sabotage the sessions, may be considered as noncompliance with the court order; or your case's outcome being negatively affected. In some cases, the court may even decide against you, if you repeatedly fail to attend mandatory mediation sessions.

Attending mandatory mediation sessions is essential in order to help the process run smoothly. If you have to attend mandatory mediation sessions, but the other party has abused you in the past or is currently abusing you, you can speak with your legal counsel regarding that too. Few of the states require that judge's screen out domestic violence cases, so that the abuser and the abused are not forced to speak to each other. Some states depend on the mediator to end the session if they suspect there is domestic violence between the two parties and other states do not have any rules regarding domestic violence and mandatory mediation and in those states, the decision of ordering mandatory mediation is left entirely too each individual judge.

BENEFITS OF MEDIATION

There are various benefits if we adopt Mediation process which includes:

- **Cost**

A mediator may charge fee which is similar to that of an attorney, mediation process generally takes much less time than going a case through standard legal channels. While it takes months or years to resolve a case in the hands of a lawyer or a court, mediation usually achieves a resolution in a matter of hours. Thus less time means expending less money on hourly fees and costs.

- **Confidentiality**

Mediation remains strictly confidential unlike court hearing which is made public. Only the parties to the dispute and the mediator or mediators know what happened inside the mediation room. The importance of mediation process is the Confidentiality which is maintained in the process. In most cases the court cannot force a mediator to testify in court as to the content or progress of mediation. Mediators destroy their notes taken during a mediation with the parties once that mediation has finished. The only exceptions to such strict confidentiality usually involve mal-treatments, child abuse or actual or threatened criminal acts.

- **Control**

Another benefit of Mediation is that it increases the control the parties have over the resolution unlike in court case where the parties obtain a resolution, but control resides with the judge or jury.

- **Compliance**

Since the result is obtained by the parties to the dispute by working together and is mutually agreeable, compliance with the mediated agreement is usually high. This reduces costs, because the parties do not have to employ an attorney or a lawyer to force compliance with the agreement. The agreement is however fully enforceable in a court of law.

- **Mutuality**

Parties in a mediation process are typically ready to work mutually toward a resolution. In most situations the fact that parties are willing to mediate means that they are ready to "move" their position, thus they are more amenable to understanding the other party's side and work on issues to the dispute. This benefit in preserving the relationship the parties had before the dispute.

- **Support**

Mediators are trained to deal with difficult situations or cases. The mediator acts as a neutral facilitator to guide the parties through the process. The mediator helps the parties to think outside of the box, broadening the range of possible solutions. ^[5]

IMPORTANCE OF MANDATORY MEDIATION IN FAMILY DISPUTE CASES DURING LOCKDOWN

Noble pandemic has resulted into social distancing which will help in battling the virus from spreading further but it has certainly ignited the home battles between the married couples who have no option but to stay in together. If it would have been just about petty quarrels then it would not have attracted major attention but the whole shebang is regarding the spike in the domestic violence cases and divorce petition. Lockdown which happened because of this noble pandemic has culminated into economic crisis not just for the employers but for the employees because of layoffs and retrenchments. These situations have resulted in increasing tension between husband and wives. Problems which have started off with a small scale have often ended up in physical and verbal abuses with females on the receiving side. Anxiety and job insecurity are the key reasons attributable to all psychosocial problems which increase the risk of violence at home.

National Services Authority (NALSA) recent data shows that the nationwide lockdown has led to a rapid increase in cases of domestic violence. India has seen an unprecedented rise in the cases of domestic violence and divorce in the past two months. Uttarakhand has the highest number of cases with regards to domestic violence registered during lockdown, then

⁵ See www.synergymedmw.com, www.mediation.com, www.mediate4you.com, www.mediate4u.info.

in Haryana and in the third place comes the national capital, Delhi. Mumbai being in the top of the list of corona virus cases in the country also saw an increase number of divorce cases filed during the lockdown period. Researched data shared by Abhayam 181 helpline for women showed that during 69 days of lockdown in Gujarat, they received tremendous number of phone calls from about 9420 women who called to report domestic violence.

In India marriage is not just a ritual but considered to be an institution which has a sacred value attached to it. Divorce is not just couple breaking up but mutilation of this pious bond and breaking up of couples may also transpire due to an act of domestic violence which is a heinous offence.

What is important to understand is that the ongoing period of lockdown has extensively affected the mental health of couples staying together within the four walls. Even the small fights have aggravated to serious issue and ultimately filing of divorce petitions. Domestic violence is also a derivation of this adverse mental condition during lockdown. So such sensitive family issues or problems must not be decided by long legal battles but by sitting face to face and reaching a middle ground with the help of a mediator.

Mediation is a favourable process which should be made mandatory for exercising in all those cases which are instituted during the pandemic period of Covid-19. Since all the family members are not accustomed to staying home in a state of monetary imbalance coupled with joblessness due to which the frustration is vented out which ultimately may lead to divorce, that is why mediation must be made mandatory to resolve the problem in a short period of time. Such cases must be handled delicately and should not be sent directly for the court proceedings. All these disputes happen in the heat of a moment and thereby not appropriate to be taken up by the court directly but rather be sent for mediation process so that there is a chance of resolving the dispute. The main objective behind encouraging mediation is to promote friendly cooperation which is mutually beneficial to both the parties. Even the financial factors and cost incurred in mediation are much economical in comparison to high priced attorneys. Confidentiality maintained in the mediation process makes this process important and mandatory in solving sensitive issues like divorce.

Progressive Approach

Domestic violence is not a compoundable offence under Criminal Procedure Code; in many cases several courts have taken a pro-mediation approach where they believed that dispute could be settled or settlement could be achieved through mediation process.

In Supreme Court case of **K. Srinivas Rao v. D.A. Deepa**, the Court observed that if the parties were sent to a mediation then the problem between them would not have escalated and that the offences under Section 498A can be settled through mediation process if elements of settlement exist but judges need to be careful that erring spouse should not be able to get out of clutches of law by manipulating the mediation.

Section 89 of Civil Procedure Code read with Order X Rule 1A provides for reference of cases pending before the courts to Alternative Dispute Resolution and Order XXXIIA also provides that the courts shall make an endeavour to effect settlement between parties to the suits or proceedings relating to matters concerning the family. The duty of the court to make efforts for settlement which is mentioned under Section 9 of The Family Courts Act, 1984 . Section 23(2) and 23(3) of Hindu Marriage Act, 1955 and Section 34(3) of the Special Marriage Act, 1954 also put obligation or a duty on the family courts to make efforts in resolving the family disputes. These provisions give discretionary powers to the court to decide whether to refer the matters to Alternative Dispute Resolution or not. There must be and suitable amendment to bring in the clause of mandatory mediation and render mediation compulsory before the proceedings are brought before the court exempting from its ambit the exceptions provided under Section 23(2).

Since filing of the majority of cases during the lockdown period of this pandemic is nothing but an impulsive decision on the part of either of the spouses and the disputes that have arisen are nothing but the by product of frustration followed by loss of temperament which makes mediation mandatory. Court proceedings for such matters are bound to be adversarial whereas mediation is probable of being fructuous and a mode of solution for the disputing parties.

Mediation also helps in reducing pending of cases before the courts and subsequently aids in preserving the family with its collaborative approach. Thus, mediation process should be made mandatory for all the divorce and domestic violence cases instituted during the lockdown after looking into gravity of the facts.

Conclusion

Mediation as an alternative dispute resolution can be effectively used. The litigation proceedings in respect of matters related to family, divorce, maintenance and alimony or custody, the trial of juvenile offenders or any other matrimonial cause are seen in legal terms. They need to be viewed as a social issue which requires therapeutic approach. Winning or losing should not be the prima facie concern in these cases. The essential part here is an amicable settlement between people who are/were bound by marriage. Family disputes need to be viewed with a humanitarian approach and hence attempts should be made to reconcile or remove the difference so as to not break the family structure. The matrimonial disputes are not criminal in nature; they are not causing harm to general public at large. So such disputes need to be dealt separately through mediation and not through long court proceedings.

However mediation as a method to resolve disputes is gaining importance in the current scenario. It has been effectively used to resolve disputes particularly related to divorce. There already exist some provisions for conducting arbitration, conciliation and Lok Adalat in different statutes, there is a need for proper amendment for the existence of provision for mediation. The step has been taken by the Supreme. The Model Rules drafted by the Law Commission need to be brought into force to streamline the whole process of mediation.