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# **MEDIATION WAY TO CONFLICT RESOLUTION**

An eye-opening book to know  
Importance of Mediation

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## INTERNATIONAL MEDIATION ROLE IN CONFLICT RESOLUTION

Mediation can be defined as the process through which a neutral third party assists the other disputing parties and helps them in resolving their disputes. Although the term Mediation has been defined by any legislation in India, it is still considered as one of the effective ways of dispute resolution.

Mediation is one of the form of Alternate Dispute Resolution method where the parties to the dispute choose to settle their dispute by avoiding technicalities of court procedure and instead appoint a neutral third party who mediates and facilitates communication between them to resolve their issue. Online Mediation is quite similar to the usual form of mediation with the only point of difference being that in online mediation the parties to the dispute and mediator do not engage in a face to face communication but instead communicate with the help of various virtual platform.

Some of the definition given on the term Mediation are as follows:

The Cambridge Dictionary defines Mediation as:

“The process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems.”<sup>1</sup>

According to Black’s Law Dictionary:

“Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to bring the disputing parties to reach a mutually agreeable solution.”<sup>2</sup>

International Mediation refers to the mediating activities which are conducted by the various international agents with the aim of scaling down any hostilities or tensions or bringing about an amicable solution of the dispute. It tries to help resolve a problem between countries or between governments and groups challenging their power or sovereignty. The mediators were

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<sup>1</sup> Definition of Mediation, available at: <https://dictionary.cambridge.org/dictionary/english/mediation> (Last Visited on June 20, 2020)

<sup>2</sup>Black's Law Dictionary 1070-71 (9th ed. 2009).

considered to be passive actors, deprived of any self-interest, with the main aim of assisting the disputing parties and helping with the process of finding a solution. Globalisation also resulted in the increase of the number of mediating activities around the world, and thus the passive role of the mediators changed into somewhat of an active one.

There is a general difference between Domestic and International Mediation, with the latter having a much more clear structure as the sovereignty and the threat of a global scale war due to the dispute is at stake. Thus the role of the neutral third party focused more on managing the conflict and keeping the peace at the forefront between the two parties.

### **THE EFFECTIVENESS OF INTERNATIONAL MEDIATION:**

The process of mediation can be generally divided into 3 parts –

Introduction,

Problem Solving,

and Closure.

The effectiveness of such Mediation depends on the rules that's set by the parties and the skill of the Mediator. The intention plays a major part as well, whereby the disputing parties should enter the mediation room to solve their problems and not with bad faith or for the purpose of cheating the other party.

The process is voluntary and as such the parties to the dispute can opt out of the process at any given stage, if they do not like the procedural aspect of the problem solving, as mediation offers procedural assistance rather than substantive assistance. The effectiveness depends on the liking of the parties, if they do not like the process, they are given the option to look for other dispute resolutions.

The Mediation process is generally governed by a set of rules so that a fair playing field is given to the contending parties. These rules are set by the disputing parties, among

themselves, so they have more control over the issue. For e.g. by opting to submit a dispute to WIPO Mediation, the parties agree to the rules provided by the WIPO Mediation Rules<sup>3</sup>

The relationship between the parties also plays a great deal in the effectiveness of the International Mediation. The internal hostility, the cohesiveness of the parties to the dispute, the previous interaction between the parties, these factors play a great role in the whole process and generally guide the mediation. The role of the mediator in this regard is to avoid unnecessary tension and deviation from the problem solving methods.

Plan of action is necessary in International Mediation, as the risks are global in scale. A good plan of action provides a base structure to the whole mediation process. The mediator also receives confidential information from both parties, on the basis of which he forms the structure of mediation.

Multiplicity of mediators also plays a factor in the effective International Mediation as it lacks a central authority. International conflicts regularly attract more attention and are thereby in need of different outside actors. It becomes a fact that the requirement of different mediators is necessary for an effective execution.

The application of different mediation strategies also determines the effectiveness of mediation outcomes. These strategies are generally divided into 3 parties which are as follows:

### **Communication-Facilitation**

Communication facilitation strategies is a more of a passive strategy which focuses on communication between the disputing parties and the mediator. Channeling information, forming contracts between the parties, gaining their trust, enhancing the situation of the weaker parties, effective communication between them with the help of the confidential information provided by them, keeping the focus on the process and avoiding deviation from the topic at hand, are some of the ways this strategy works.

### **Procedural-Formative Strategies:**

The mediator under this strategy focuses more on the procedural aspect of the mediation. He has a bit more control than in the previous strategy. Here the role of the mediator is to form of

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<sup>3</sup>WIPO Mediation Rules, available at: <https://www.wipo.int/amc/en/mediation/rules/>

plan so that the effective communication between the parties can be done and for this end, the mediator decides the place of mediation, the time of mediation, how often will the parties meet, controlling the environment of the mediation are some of the work the mediator does under this strategy.

### **Directive Strategies:**

This strategy requires the most intervention from the mediator in comparison to the other two strategies. Directive strategies aim to direct the behavior and the motion of the parties. The role of the mediator is more of an active one, making substantive suggestions and proposals, making the parties aware of the costs of non-agreement, supplying and filtering information.

### **ADVANTAGES OF MEDIATION IN INTERNATIONAL SCENARIO**

Mediation is a time saving and cost effective process which puts the conflicting parties at a place whereby they have full control over the dispute. The neutral third party acts as an organizer between the two conflicting parties. Although, the role of a mediator is an important one, the intention of the parties to quickly get to a solution and avoid further hindrance and deviation from the effective solution is required.

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The advantages are as follows. The relationships between the parties remain intact and unharmed.

- The flow of information between the parties is generally better through the help of a third party.
- Litigation is time consuming, with the help of mediation, the parties can directly communicate with each other and help resolve their problems more efficiently and quickly.
- Litigation expenses are quite costly. The travelling costs, the hiring of lawyers, the necessary documentation, all takes money. With the help of mediation, along with the time, the money is also saved.



- Mediation requires both parties to actively work with each other and get to a solution, and hence the parties can come up with various solutions with the help of a mediator, and choose the one that favors everyone.
- Disputes that are resolved in a court becomes a matter of public record but with the help of mediation, the confidentiality between the parties are saved. Nothing gets out of the room, and the parties are at ease with their information still intact between them and the mediator.
- International Mediation is structured in a way that facilitates the need of multiple mediators. Hence, the process becomes flexible as there is no law governing them, and the parties are free to jointly choose a mediator.

#### **EXAMPLES:**

Here are some of the famous international cases that made use of Mediation to settle the disputes amongst themselves, before those disputes became their worst outcome.

#### **The U.S.S.R between India and Pakistan (1966):**

Famously known as the Tashkent Agreement, this agreement was signed between the then India's Prime Minister Lal Bahadur Shastri and Pakistan's President Ayub Khan which ended the military conflict over territorial disputes. The agreement was mediated by Soviet premier Aleksey Kosygin, who had invited the parties to Tashkent. The parties agreed to withdraw all armed forces to positions held before August 5, 1965 to restore diplomatic relations; and to discuss economic, refugee, and other questions

#### **The Algeria between Iran and Iraq (1975)**

The Algiers agreements was signed between Iran and Iraq in 1975 to settle their border dispute whereby the Iraqi government demanded full control over Shatt al-Arab. On 15 March 1975, the Iraqi and Iranian foreign ministers met with the Algerian representatives to establish a joint committee to mark the new borders. On 17 March, the protocol between the

two countries was signed by the two foreign ministers. The protocol states that the two countries undertake re-mark the border.

### **Camp David Accords**

In 1978, President Carter met with the leaders of Egypt and Israel to negotiate a peace treaty between the two nations. The negotiations dragged on many weeks with little progress – each nation was focused on what they had lost in the war, and their own demands. President Carter finally broke through the deadlock by reminding the parties that if they did not reach an agreement, the children on each side faced years of war, bombing, and military conflict. Both sides came to understand this was an attractive proposition, and agreed peace was better than continued war. The accords led to a successful peace between Israel and Egypt. Even though there has been conflict between Israel and other nations since, the peace between Israel and Egypt has held to this day

### **CONCLUSION:**

International Mediation still presents itself as one of the most useful methods of dispute resolution. The mediation process provides the disputing parties with much control over their dispute resolution. The different strategies adopted by the mediators makes the whole process altogether flexible and changes can be made accordingly to the needs of the parties.

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It is a time saving process that helps provide the disputing parties with a range of settlement options limited only by their creativity and the skills of the mediator. The whole premise of the mediation process is to get to a “win-win” situation, an outcome that is favorable for both parties involved. International Mediation stands in support of world peace, and to that end, the use of this dispute resolution technique helps the cause.



## MEDIATION IN ONLINE DISPUTE RESOLUTION

Online Dispute Resolution (ODR) is a network based dispute resolution process which utilizes the data Communication Technology (ICT) to resolve disputes. It absolutely was created with an intention of providing an internet substitute for the standard face to face dispute resolution processes like negotiation, mediation and arbitration. Initially, the ODR process only targeting providing us with a network based platform for conduction of dispute resolution but where the particular settlement of the dispute was through with the assistance of the human mediators and thus, the initial model of ODR was though new in concept and idea, its application however was as same as that of the normal ADR. However, the system of ODR outgrew its initial stage and transformed into a system which not only solved the disputes arising within the web community but also, where the function of such system was to mix the method of resolution of dispute with the prevention of the dispute.

In Kenya, Article 159 of the 2020 Constitution mandates the Judiciary to promote alternative dispute resolution (ADR) methods in the administration of justice as long as ADR does not contravene the Bill of Rights. This is further given effect by the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which requires that civil disputes are resolved in a just, expeditious and less costly manner. In line with its transformation framework, the Judiciary embraced alternative dispute resolution to ensure justice is more accessible. The main alternative dispute resolution (ADR) methods available in Kenya are mediation, arbitration, and traditional justice systems.<sup>4</sup>

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The procedure of Online mediation is akin to the procedure followed by regular mediation. In Online mediation, usually, the parties submit the details of their dispute to any official site which handles such cases who then provides the services of a trained mediator. The mediator conducts the procedure in a similar manner to the normal mediation with the only difference the whole procedure is conducted with the help of encrypted chat boxes, e-mails and in some cases through video conferences. If the mediation procedure and lengthy negotiations prove to be successful, the parties draw a settlement agreement that has a binding effect similar to that of any other contract or agreement. The details of the party and issue are kept strictly

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<sup>4</sup>SOJAR report 2018/2019

confidential and procedure and conducted through secured platforms which help maintaining the privacy and confidentiality of the parties.

### **Core issues with Online Mediation**

#### **Facilitate communication:**

In the process of Online mediation, it is a very difficult task for the mediator to establish effective communication between the parties, as there is no real face to face interaction. The parties have had no real relationship or communication, as opposed to normal mediation which is why there is no background for the mediator to act upon. Thus, establishing a connection, steering the emotions and dialogue of negotiation becomes a difficult task for the mediator.

#### **Privacy and confidentiality:**

One of the most crucial edge that ADR has against the traditional court procedure is the level of secrecy and confidentiality that the parties can keep in relation to their dispute. This added advantage of ADR over court proceedings is somewhat diluted in the procedure of online mediation. As the mediation is conducted through virtual space, the question of security of the data and information becomes a prime question. With the web world expanding, the ways to gain illegal control through hacking, stealing and data leaks are also becoming prominent and therefore these imminent threats degrade the reliability of this process.

#### **Compliance:**

In offline mediation, the parties interact with the mediator who facilitates communication between them and through negotiations and discussions arrive to a solution where the parties usually sign a settlement agreement that becomes binding on the parties. In Online mediation, there is high level of obscurity in relation to which law really applies and what are the rules of mediation. In such a case, the parties to the dispute often do not comply with the final decision of mediation and even the mediator or the organization or any other body finds it difficult to enforce compliance.

### **Impact of Covid-19 on Mediation**

As the recent coronavirus pandemic has swept through the nation and has changed many aspects of our lives, so too has the landscape of the legal field. One of the most significant changes to have taken place over the last month is the way parties are conducting mediations. Although the Indiana Alternative Dispute Resolution Rules require all parties to be present at a mediation, the travel ban limiting all non-essential travel, which mediations fall under, has made it impractical for parties and their counsel to attend in-person mediations and forced attendance via video or telephone.

### **Time to Embrace Technology and Consider Remote Mediation?**

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Alternative sorts of dispute resolution should be considered in light of the present difficulties in accessing the courts. The restrictions introduced as a result of the COVID-19 pandemic have the potential to create the performance of contractual obligations difficult or in some circumstances, impossible. In such extraordinary circumstances, contracting parties should attempt to preserve healthy business relationships notwithstanding the lack of 1 or more parties to perform its obligations. Nonetheless disputes arise and alternative sorts of dispute resolution like mediation could provide a value effective and efficient solution.

Mediation may be a popular style of alternative dispute resolution, not least because it leads to a settlement without the increased costs and time delays related to litigation. With court access restricted, remote mediation should be considered by parties contemplating litigation. The exchange of mediation documents, like the mediation agreement and case statements, already occurs by e-mail in most cases. The sole change to the method that remote mediation brings is that the negotiation itself takes place remotely with each party participating through telephone or video-conferencing platforms. The mediator can still work as an intermediary between each of the parties and have effective engagement with other parties by creating virtual meeting rooms. Each of the parties can speak privately as they'd usually knock off person. The mediator can join the meeting rooms to talk privately to the individual parties or create joint meeting rooms where all parties speak on to each other. Confidentiality is significant in any style of mediation particularly remote mediation. Parties must be reminded that mediation shouldn't be overheard or interrupted by anyone who isn't a celebration to the mediation.

## **Pros of Online Mediation**

- One of the most notable benefits of conducting virtual mediations is the efficiency it produces. This is true for plaintiff attorneys as well as defense attorneys and insurance companies. The most evident efficient aspect is not having to travel to the mediation, which saves about a half-hour of preparation time to leave the office and then the actual time of travel to the mediator's office. An aspect that benefits an insurance company is not having to pay an attorney to travel to the mediation. This can be a significant cost-saving measure for an insurance company if the mediation is several hours away from the attorney's office. For a plaintiff attorney, not having to spend several hours away from the office will allow additional time throughout the day to check emails, meet with clients, review discovery and prepare motions.
- Another benefit to virtual mediations, and ultimately another cost-saving measure, is the actual length of mediations. According to me the virtual mediations can be through Telephones or by Video conferencing like throughZoom . A quick side note on Zoom — Zoom has a great feature that allows the mediator to send the parties into a breakout room, which allows the parties to be in their own "room," similar to if they were separated into different rooms at a mediator's office. This function even works when an attorney and their client enter a Zoom meeting from separate computers in different locations. This allows clients to be in the same breakout room as their attorney while they are in the comfort of their home or office. The mediator can also, if needed, separate an attorney and client so she can talk directly with the attorney, which is sometimes challenging during in-person mediation.
- While there are several benefits to the parties, a convenient aspect for the mediator is he is able to conduct the mediation from her desk. This allows her to quickly change from breakout room to breakout room with just a few clicks of her mouse. Mark Metzger, who has already conducted numerous mediations via Zoom since this pandemic started, reports that using Zoom has cut the time of mediation in half. This time-saving measure through virtual mediations will put and keep more money in the clients' pocket.

## **Cons**

- One of the potential negative aspects of virtual mediations is also one of its biggest benefits: convenience. Many times, parties want to apply pressure at mediation and wear out the opposing side. This is harder to accomplish when parties have not had to dress up, travel and sit in an office for several hours. Additionally, a mediator may be able to assert additional pressure on a party when they are sitting in front of them as opposed to talking to them over the phone or a computer screen where a party can instantly end the mediation with the click of a button.
- Another drawback with virtual mediations, specifically with Zoom, is that the clients, particularly those who are not technologically inclined, have trouble accessing Zoom and are not comfortable using the online platform. Although with the social distancing that is currently in place more people than ever before are learning how to communicate through video, their preference may be to meet in person when that opportunity eventually returns.

### **Conclusion**

Communication is the prime factor contributing towards the amicable settlement between the parties. It is the most required skill by the negotiator, mediator and arbitrator. The main challenge for constructing an ODR platform is to meet the requirements of an effective communication. Effective communication leads to amicable settlement which in turn leads to restoration of relationships. As everything has some pros & cons so as is the case with online Mediation. But in this covid-19 the Online Platforms Really plays a vital role is Mediation. Thus the sooner Online Dispute Resolution is the better it will be for the nation in general and the justice seeker in particular.

## **ROLE OF MEDIATION IN FAMILY DISPUTE**

### **INTRODUCTION**

Family is a unit where people, living in a dwelling house, are connected to one another, either by blood or by marriage. The needs and desires of each person, belonging to a family, vary, which many times lead to disputes. The conflicts can emerge over various issues such as, property, different beliefs, misunderstandings, financial conditions, etc. which sometimes lead to get divorced. Comparing to the 19<sup>th</sup> century, when people could not even think of divorce, when wives were considered subordinate to their husbands; but today this is not the case. Today the concept of equality has replaced the concept of hierarchy. Now wives are not considered subordinate but equal, which gives them equal rights, opportunities, and decision making power as that of their husbands. Formerly, the only fault that could be considered for divorce was adultery, but now when the partnership is preferred to hierarchy, it became socially acceptable that one can leave the provided the marriage is being intolerable.<sup>5</sup>

It is not always favorable for parties to go to court and resolve their disputes. As the hearing Indian courts follow the adversarial form of system, where the only issue is to find who is right and who is wrong. Family being an important pillar of the society, should try to resolve the dispute and clear the misunderstanding between the spouses. Mediation is a way that should be preferred over court hearings. In the process of mediation, a neutral party observes the disputes providing equal opportunity to both the parties, to express their views separately. Mediation is an Alternative Dispute Resolution(ADR) that aims for bringing the parties to a voluntary settlement which further takes the form of a written contract.<sup>6</sup>

### **WHY MEDIATION?**

Mediation can be formal and informal. In an informal mediation, a family member or a friend can help to talk through the disputes, whereas in a formal mediation a professional mediator is involved. When the matter cannot be solved through mediation then the dispute goes to the court to make a decision. The process of court is long, expensive, and stressful, which is why

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<sup>5</sup> Marina Kamenecka-Usova, Mediation for resolving family disputes, Research Gate, January 2016, 308134271\_Mediation\_for\_resolving\_family\_disputes

<sup>6</sup> ibid



people avoid going it. Mediation aims to avoid this cumbersome process.<sup>7</sup> The main thing which differentiates between litigation and mediation is that it ensures the confidentiality of the matter. Everything you say before the mediator is confidential. Litigation does not always lead to satisfactory results. Maintenance of peace and harmony is paramount in any family dispute.<sup>8</sup> In a family dispute mediation, the mediator assists the communication between the parties, encourage understanding and it focuses on the individual and the common interest of the parties.<sup>9</sup> So going for mediation should be preferred to litigation.

## **MEDIATION LAWS IN INDIA**

The Civil Procedure Code, The family courts Act, 1984, Hindu marriage Act, and the Legal serviced Authority Act, all these Acts contain the provisions for mediation and conciliation. The family court was enacted to promote the dispute resolution in a conciliated manner. **Section 9(1) of the Family Court Act**, “In every suit or proceeding, endeavor shall be made by Family Court in the first instance, where it is possible to do so consistent with the 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.”<sup>10</sup> While **Section 9(2)** directs the family court to adjourn the proceedings if it appears that there is a reasonable possibility of a settlement between the parties for such period as it thinks fit is necessary for taking the required measures for bringing about the settlement.<sup>11</sup>

Though these provisions refer to the parties, when it deems fir, to mediation, but it does not make the mediation mandatory.

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Among the other provisions, section 89 of the code of civil procedure states that settlement of disputes outside the court where it appears to the court that apparently there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and re

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<sup>7</sup> Family mediation and dispute resolution, <https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution#a1>

<sup>8</sup> Mandonna Jephi, Conciliation and Mediation: An Effective Family Dispute Resolution, Law times Journal, January 10<sup>th</sup>, 2019, <http://lawtimesjournal.in/conciliation-and-mediation-an-effective-family-dispute-resolution/>

<sup>9</sup> ibid

<sup>10</sup> Section 9(1), Family Courts Act, 1984.

<sup>11</sup> Section 9(2), Family Courts Act, 1984.

fer the same for arbitration; conciliation; judicial settlement including settlement through lok adalat or mediation.

## CONFIDENTIALITY IN MEDIATION

The main aspect of mediation that attracts the parties to opt is the confidentiality of the matter. Confidentiality plays a crucial role in provoking the parties to reach a settlement. A person can express their views openly only when he/she is comforted with the fact the confidentiality is at the core of the settlement.<sup>12</sup>

Now, in the case of **Perry Kansagra v. Smriti Madan Kansagra**,<sup>13</sup> one of the important issues regarding the confidentiality of the proceedings of mediation was discussed by the Supreme Court.

### Facts of the Case –

- The appellant, Perry Kansagra (husband) and the respondent Smriti Madan Kansagra (wife), husband was Kenyan and British citizen. After the marriage, the wife also shifted to Nairobi, Kenya, and started living in her matrimonial home with the appellant. A son named Aditya Vikram Kansagra was born to them in New Delhi. After delivery, they both returned to Nairobi, and used to visit India on occasions.
- In March 2012 they came to New Delhi, and were to return to Nairobi in June, 2012. But before that, the wife filed a civil suit before the High Court of Delhi praying for an injunction to restrain the appellant (husband) from removing Aditya from the custody of the Respondent.
- Upon notice, the appellant filed Guardianship Petition praying inter alia that he be declared the legal Guardian of Aditya and be given his permanent custody. This application was registered before the Family Court, New Delhi.
- In view of the pendency of the guardianship petition, the suit filed by the respondent was disposed of by the High Court on 31.08.2015, leaving the parties to place their grievances

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<sup>12</sup> Shraddha Bhosle, Confidentiality in Mediation: An Indian Perspective.

<sup>13</sup> Perry Kansagra v. Smriti Madan Kansagra, 2019 SCC OnLine SC 211.

before the Family Court. Family court, upon application by the appellant, allowed Aditya to be visited by his father.

- Against this, the respondent filed a case in High court, and the division bench of the High Court after hearing referred the case to mediation. During mediation, the mediator and counselor interacted with the Child, and the report was submitted to the court, mentioning the personality and behavior of the child. Upon this report, the appellant (child's father) prayed for permission to talk to Aditya on phone.

- Opposing this prayer, the respondent objected to such reliance on the ground of confidentiality. To which the High Court said, that where the scope of mediation is the solution of a child parenting issue, a report by a mediator or a child counselor concerning the behavior and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record. The mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of.

Section 12 of the Family Courts Act, 1984<sup>14</sup> –

“Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.”

- Respondent then filed the review petition, by which the High court reversed its judgment.
- So now, the appellant had filed a Special Leave Petition.

### **Issues before Supreme Court**

a). Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment and

b). Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor, in this case, were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports.

### **Judgment**

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<sup>14</sup> Section 12, The Family Courts Act, 1984.

On the first issue, the Bench held that review was not the proper remedy and the High Court had erred in entertaining the review petition as “the logical course in the circumstances would be to set aside the judgment under appeal and permit the respondent to challenge the previous judgment of the High Court.

On the second issue, the court held that the report of the mediator and the counselor was of paramount importance. The counselor is obligated to give a report, relating to some of the parties, their personalities, and their relationship with the child, to render complete justice and deciding the question of guardianship of the child. The intention is clear that the normal principle of confidentiality will not apply in matters of custody and guardianship. And the court must be equipped with all materials touching upon relevant issues. This departure from confidentiality is consistent with the underlined theme of the Act in general and section 12 of the particular.

## **CONCLUSION**

Mediation is an alternative dispute resolution to get to the core of the dispute and resolve it amicably. It is the best way to clear the differences and unify the marriage. Or if the parties want to get separate it helps the parties to reach an agreement for the custody and parenting of the Child. One of the advantages of mediation is that it is confidential, which means that the information does not become part of the public record. This is promptly important when the issue concerns the child.

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## COMPARATIVE STUDY OF MEDIATION IN INDIA AND USA

Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.

- Abraham Lincoln

### INTRODUCTION

Alternative Dispute Resolution refers to a procedure by any means of litigation as arbitration or mediation for settlement of disputes.<sup>15</sup> Mediation is one of the most tranquil methods to resolve the disputes of the parties. It is the modest approach to alternative dispute resolution to solve the disputation of one or more parties in which third person or party intervenes in between the controversy of parties and meant to be termed as Mediator. Certain country has narrowed the sense of mediation but some other countries such as USA<sup>16</sup>, UK and China<sup>17</sup> has acknowledged this at huge level.

The concept of mediation as a form of dispute resolution was started back thousand years ago, in South Asian countries. The process of mediation has traceable origin from the Chou Dynasty which is the longest running dynasty in China. However, with the advancement of time it spreads around the western countries by creating awareness among the people.<sup>18</sup>

### SIGNIFICANCE OF MEDIATION

In other countries, people chose mediation over litigation but in India due to lack of awareness of people they go for litigation. As there is no such particular law regarding mediation governing in the country but the Code of Civil Procedure Amendment Act, 1908<sup>19</sup> was passed by the Parliament in which it was stated that Section 89 of the Code of Civil Procedure, 1908 entails the courts to go for alternative dispute resolution (ADR) methods for sorting out issues. By the consent of respective parties the court could refer cases for arbitration, conciliation, judicial settlement through LokAdalat<sup>20</sup>, or mediation.

Advantages of mediation over litigation are as follows:-

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<sup>15</sup> Black's Law Dictionary 91 (9<sup>th</sup> Ed. 2009).

<sup>16</sup> Uniform Arbitration Act, 1955 or Revised Uniform Arbitration Act, 2000 (RUAA).

<sup>17</sup> The People's Mediation Law of the People's Republic of China.

<sup>18</sup> Alan Redfern, 'Law and Practice of International Commercial Arbitration', 4<sup>th</sup>ed 2004.

<sup>19</sup>238<sup>th</sup> Report On Amendment Of Section 89 Of The Code Of Civil Procedure, 1908.

<sup>20</sup> The Legal Services Authority Act 1987.

- They are more confidential.
- Less formal than the court and courts proceedings.
- Legal representation is not required.
- Not as costly.
- The parties are in control of authority.

But as there are two sides of the same coin, same there are certain disadvantage also as mediation may or may not solve the dispute and also this method is applicable in all the cases.

### **MEDIATION IN INDIA**

Mediation was first legally recognized in the Industrial Disputes Act, 1947 for settling out the disputes.<sup>21</sup> Section 89<sup>22</sup> of the Code of Civil Procedure (CPC) provides for Alternative Dispute Resolution methods to settle the disputes pending before the courts requiring the consent of the parties. But the referred judge has power to pass it compulsory, because parties do not opt for mediation to settle the dispute with his rival who dragged him to the litigation and other party may consider this inclination as weakness.<sup>23</sup>

In *Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.*<sup>24</sup>, Supreme Court issued guidelines regarding cases that would be eligible for ADR. It stated that the following nature of cases would be considered suitable for ADR-

- Cases relating to trade, commerce and contracts, arising out of contracts<sup>25</sup>, specific performance, suppliers and customers, bankers and customers, developers/builders and customers, landlords and tenants/licensor and licensees, insurer and insured.

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<sup>21</sup>AkankshaMathur, How Does The Mediation Process Work – Steps and Procedure, Ipleaders Blog, December 28 2018, accessed on 19<sup>th</sup> June 2020.

<sup>22</sup>. The Civil Procedure Code, Section 89 states, “Settlement of disputes outside the Court. -

(1)Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for

a) arbitration;

b) conciliation;

c) judicial settlement including settlement through LokAdalat; or

<sup>23</sup> Gary Soo, “Working through Unworkable Mediation”, *Arbitration* 2000, 66(3), 207, p. 208.

<sup>24</sup> 2010 (8) SCC 24.



- Cases arising out of strained relationships such as matrimonial causes<sup>26</sup>, maintenance, custody of children, partition among family members/co-parceners /co-owners and partnership among partners.<sup>27</sup>
- **Cases where there is a need for continuation of pre-existing relationship in spite of the disputes, such as disputes arising between** neighbors, employers and employees and among members of associations/apartment owners associations.
- Cases arising out of tortuous liability like nuisance, defamation, negligence, trespass etc.

Following nature of cases would not be considered suitable for ADR-:

- Representative suits under Order 1 Rule 8 CPC which involves public interest or welfare of numerous persons who are not parties before the court.
- Disputes relating to elections of public offices.
- Disputes arising out of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- And prosecution of some criminal cases such as murder, acid attack etc.

## MEDIATION IN USA

USA is among one of the country where the concept of mediation is used by widely by the people to attain justice. National Conference of Commissioners on Uniform State Laws (NCCUSL) in the USA stated that use of mediation is continuously growing.<sup>28</sup> Being a Presidential state, mediation is not regulated at federal level. Consequently each state can make their regulations to the same. The concept of mediation in USA was brought by the early settlers from England. In 20<sup>th</sup> century, country expanded its width in the area of mediation by solving the labor disputes so as to avoid strikes and lockouts. Many attempts to pass legislation were also made in the late 1970s and 1980s.<sup>29</sup>

<sup>25</sup>*Afcon Infrastructure Ltd. Vs. Cherian Varkey Construction Co.(P.) Ltd.*

<sup>26</sup>*MohdMustaq Ahmad Vs. State* (2015) 3 Kant R 363 see also *K.Srinivas Rao Vs. D.A. Deepa* (2013) 5 SCC 226, 241-242.

<sup>27</sup>*GurudathVs. State of Karnataka*, order dated on 20-11-2014.

<sup>28</sup>Riyanka Roy Choudhry, Naman Kumar, National Law University of Odhisha, Cuttack, *Mediation Tradition in Asia and Legal Framework in India, China abd Other Asian Countries in comparison with US and EU*, June 2013, Pg.6.

<sup>29</sup>Lexology, *Mediation in USA*, September 2019.

But today mediation in civil matters is widely used to avoid the burden on the courts and also to avoid the cost which requires in filing a suit. In 2017, 75% of cases are resolved through voluntary ADR proceedings and 55% of cases are resolved by court ordered proceedings through ADR.<sup>30</sup> In USA, there is well established mediation practice which provides mediation agencies for both part- time and full- time mediators who offers their service to act as a mediator.

Mediator is a person who is a neutral third person, helps to sort out the dispute between the parties. A mediator may be selected by the parties itself which may be a friend or any other person or courts can appoint a mediator to a party.

National Conference of Commissioners on Uniform State Laws<sup>31</sup> enacted Uniform Mediation Act in all states of USA which aims at promoting the uniformity and use of mediation throughout the states. The emphasis on uniformity was foreseen because the statement made during any case of mediation in any of the state can be sought in a litigation or administrative process in another state.

This is the most notable success of ADR in the U.S. was imputed to the Federal Aviation Administration (FAA).<sup>32</sup> Analytical data of 2013 case management statistics provided by Office of Dispute Resolution for Acquisition, it is observed that there were 893 cases filed and of those, 124 were considered pre-dispute and of those, 97% was resolved through ADR and only 2 cases resulted in litigation. Out of the 893, 20 were contract disputes and of which, 182 (90%) was resolved via ADR and the remaining 20 went through adjudication. Same scenario was observed in many industries in the United States including businesses, construction, private matters, and many more. This was a great success of the programs awareness of ADR because of the cost and time savings, among the other aforementioned benefits.

## CONCLUSION

Well it is clear from both the studies that mediation would not replace the judicial system but instead make the judicial system more efficient. In both the United States and in India Alternative Dispute Resolution methods have existed informally long before it was

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<sup>30</sup> Alternative Dispute Resolution at the Department of Justice, Fiscal Year 2017 Report, Statistical Summary.

<sup>31</sup><http://www.uniformlaws.org/>.

<sup>32</sup> Office of Dispute Resolution for Acquisition: Case Management Statistics," Federal Aviation Administration, 2013.

recognized by the government as a system to resolve disputes but USA is far ahead of India because number of cases are sorted which ultimately lessen the burden on the courts but in India people are still not aware and even they don't want to go from this path and hence India has been slow to implement ADR methods and the current systems in place is really inefficient in saving time, money, and promoting more peaceful ways to resolve disputes, despite the overwhelming case burden on the current court system.

However, in January 2020, Supreme Court set up a panel headed by mediator Niranjan Bhatt to draft a Mediation law for the country. In order to improve the current situation of the judiciary and to ensure its growth, steps must be taken to ensure efficiency within the processes, such as reducing delays, banish negative images by establishing a code of conduct, regulating mediation education and training, and also increasing awareness of ADR and its accessibility. By taking steps to improve its processes, mediation can flourish in India and can potentially serve as an alternative to litigation for dispute resolution.



**Centre for International Commercial Arbitration**