

BEHIND CLOSED DOORS: UNRAVELLING SCOPE AND IMPACT OF MEDIATION IN SOLVING DIVORCE CASES

Shreyash Deshpande *

INTRODUCTION

Despite India having one of the lowest rates of divorce cases in the world at 1.1%¹, The country has seen an increase in the number of divorces filed in the past five years. This can be attributed to the growing influence of globalization, increased education about legal rights especially in women, and a push for empowerment. As a result, the number of divorce cases is on the rise in India. Given the current state of high case backlogs and prolonged court delays in India, the necessity for effective mediation has become more pressing than ever before. This critical issue not only affects the functioning of the judicial system but also has a significant impact on the involved parties in disputes. The consequences of these delays go beyond just financial strain and emotional distress for individuals who already have been through so much and result in a delay of justice. Mediation is one of the branches of Alternative Dispute Resolution its origin dates to the era before the British entered India when *Panchayats* were used wherein elders used to settle disputes in addition to this matters were also dealt with by *Mahajans* who would act as Mediators and solve disputes among people. The proper incorporation of Mediation into the Indian Legal System was post British era through the Industrial Disputes Act of 1947. This act specified procedures and regulations for resolving disputes without going to court. As time progressed, the Legal Services Authority Act of 1987 was passed, which created Lok Adalats and solidified the position of Mediation in the legal forum. Additionally, the concept of Mediation was solidified with the addition of Section 89 in the Code of Civil Procedure 1908² through an amendment in 1996 which gave the courts authority the resolve conflicts through

*BBA LLB, SECOND YEAR, BENNETT UNIVERSITY, GREATER NOIDA.

¹ Khan, S. (2023) With lowest divorce rate, India tops world ranking in preserving relationships, The Siasat Daily. Available at: <https://www.siasat.com/with-lowest-divorce-rate-india-tops-world-ranking-in-preserving-relationships-2697285/> (Accessed: 24 January 2024).

² Section 89 of the Civil Procedure code which states that - 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 Lok Adalat: or
- (d) mediation.

mediation and other methods. This paper aims to examine the potential of mediation as a transformative tool for resolving Divorce conflicts.

Keywords: Mediation, Divorce, Legal System.

ANALYSING THE SCOPE OF MEDIATION

Famous American actor Larry David once said “ A good compromise is one where everybody feels a little cheated”. This is true even in the context of mediation as in any dispute both parties have certain priorities yet it includes letting go of certain elements of the priorities and this might lead to feeling “ cheated” however a successful mediation is one wherein both parties try to arrive on a middle ground in order to create a balanced solution which makes this feeling of feeling “ cheated” less scary and it truly ends up showing the true essence of mediation where both parties don’t resent towards each other and pave a way for a fresh start. In instances of Divorce where emotions run high be it anger, heartbreak or betrayal. Mediation serves its true purpose by aiding the individuals in this challenging process by resolving this emotional conflict and reaching an amicable solution for everyone in this loop including the courts where cases have piled up perpetuating delays and anger in the system, In 2022 more than 11.4 lakh cases were pending in the family courts³, this highlights the alarming need to turn towards ADR methods like Mediation for disposal of these cases.

Mediation undoubtedly provides an efficient, effective, speedy, convenient, and inexpensive process to resolve disputes with dignity, mutuality, respect, and civility where parties participate in arriving at a negotiated settlement rather than being confronted with a third-party adjudication of their disputes. The very fact that it enables warring parties to sit across the table and negotiate, even if unsuccessful in dispute resolution, undergoing the process creates an atmosphere of harmony and peace in which parties learn to agree to disagree.⁴

The landmark judgement of B.S. Krishna Murthy and Another Versus B.S. Nagaraj and Others⁵ wherein the court implored the idea of recommending parties who were facing family-related issues like divorce, and family business to consider Mediation before resorting to lengthy and exhausting legal battles, emphasizing the time and emotional it can cause.

³ ‘Over 11.4L Cases Pending in Family Courts, Must Be Settled Expeditiously: LS MPs’ (Hindustan Times, 26 July 2022)

⁴ Sh Yashwal Chaudhrani and others v State & Another [2019] LNIND 2019 DEL 1188

⁵ B.S. Krishna Murthy and Another Versus B.S. Nagaraj and Others [2011] 3 MLJ 199

Further in *K. Srinivas Rao V D.A Deepa*⁶ the court issued certain guidelines to be followed by the lower courts with reference to cases where matrimonial issues arise these guidelines are as follows

- The court by using the help of section 9 of the Family Courts Act⁷ authorised that it is the responsibility of the family courts to diligently attempt to resolve any conflicts in marriages through the use of mediation and potentially refer the case to a mediation center.
- Despite being considered non-compoundable under criminal law, domestic violence cases under Section 498A of the Indian Penal Code may still be resolved through mediation, if there is even the slightest possibility of saving the marriage. This means that parties involved should be given the opportunity to settle their disputes through mediation, wherein the parties can decide further whether to reconcile or walk away.
- The courts also explored the possibilities of setting up pre-litigation clinics and making it accessible and known to the general public thus enabling them to solve disputes before they are even taken up for trial.

EVALUATING THE EFFECTIVENESS OF MEDIATION IN DIVORCE: ADVANTAGES AND DISADVANTAGES

Justice Aniruddha Bose and Justice Bela M Trivedi clearly opined “Institution of marriage occupies an important place and plays an important role in the society. Despite the increasing trend of filing Divorce proceedings in the courts of law, the institution of marriage is still considered to be a pious, spiritual, and invaluable emotional life net between the husband and the wife in Indian society. It is governed not only by the letters of law but by social norms as well. So many other relationships stem from and thrive on the matrimonial relationships in society.”⁸ Now going through a divorce is a heartbreaking experience that can rip apart lives

⁶ *K. Srinivasa Rao V D.A Deepa* [2013] 3 MLJ 85

⁷ Section 9 of the Family courts act 1) In every suit or proceeding, endeavour shall be made by the 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.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

⁸ *Dr Nirmal Singh Panesar V Mrs . Paramjit Kaur Manesar @ Ajinder Kaur Panesar* [2023] LNIND SC 630

and relationships. Further the amount of stress and strain of court proceedings, and becomes even more difficult for everyone involved – the couple, their children, and their families. One major benefit is its financial feasibility, as mediation is a more budget-friendly option compared to the process of litigation. This eliminates additional expenses such as court fees and delivery charges. Along with the feasibility aspect, the speed at which the entire process is something to admire and ponder upon, On Average just 2-4 meetings with a mediator.

Not to mention Mediation is heavily dependent on the mediator's ability to effectively guide the communication between spouses. The Mediator serves as a neutral third party who offers suggestions and support without showing favouritism towards either party. The ultimate objective is to shape both individuals towards finding mutually satisfactory solutions. Furthermore, the layer of confidentiality in the process adds to its advantage. Moreover, Participants are not obligated to share personal information, and if they do, it remains confidential. Additionally, the proceedings are not made public, guaranteeing privacy for all involved which is something that doesn't happen in the litigation space⁹

Another point worth noting is there is a certain level of comfort associated with mediation instead of traditional courtroom proceedings. As with mediation, there are only three parties present which leads to a more relaxed and comfortable atmosphere for addressing the problem. With a lesser burden of stress, couples would feel more empowered to confidently express their views on the issues at hand. The mediator's role is not to impose decisions, but rather to encourage the parties to reach their own conclusions that are in their best interests.

Likewise, a key element of the mediation process is the level of control the parties have over it. Unlike in litigation here the parties have the power to choose when and where the mediation takes place. It is essential to note that the decisions made in mediation are not final, allowing the parties to consider different solutions.

On the other hand, in order for a successful Mediation, it is vital to understand that both parties should be willing to collaborate and be cooperative to find common ground as the Mediator cannot force the parties to seek an understanding and move towards a closure.¹⁰ By the same

⁹ Aishwarya sandeep, 'Mediation in Divorce Cases in India - Aishwarya Sandeep- Parenting and Law' (26 December 2023) <<https://aishwaryasandeep.in/mediation-in-divorce-cases-in-india/>, <https://aishwaryasandeep.in/mediation-in-divorce-cases-in-india/>> accessed 27 January 2024

¹⁰ 'Divorce Mediation in India - Types | Benefits | Process' (Rest The Case, 26 November 2022) <<https://restthecase.com/knowledge-bank/what-is-divorce-mediation-in-india>> accessed 27 January 2024

token if any of the partners are not able to open up and is hesitant to share their perspective with the mediator then this process will not reach its goal,

To address these drawbacks, it is recommended to increase the visibility and promotion of Alternative Dispute Resolution (ADR), particularly mediation. When we first think of law, disputes, or lawyers with the court we get transported to courts and the shift from courts to ADR mechanism is crucial, The Government can take steps to educate more people about ADR through the help of assets like Media, Schemes, etc. Such efforts can serve a dual purpose by not only promoting ADR but also reducing the number of cases brought to the court and further reducing the pending number of cases. Secondly, to support this approach, we need to train and recruit more mediators. Currently, there are only 11,969 trained mediators according to the Mediation and Conciliation Project committee website¹¹, indicating a significant need for more education, training, and infrastructure for mediation centers.

CONCLUSION

In conclusion, I firmly believe that mediation possesses incredible potential as a powerful catalyst for resolving divorce disputes in India. The alarming rise in divorce rates and the daunting issue of case backlogs and court delays only emphasize the pressing need for alternative dispute resolution methods like mediation. The impact and scope of mediation in divorce cases are vast and significant. By providing a space for couples to discuss and compromise, mediation promotes a fair and peaceful resolution. It effectively addresses the emotional conflicts that accompany divorce, lessening the burden on all parties involved and the overburdened judicial system. Recognizing its significance, the legal sphere has incorporated mediation into various acts and court protocols. The significance of mediation has been acknowledged by the legal system, as stated by various laws and court decisions promoting its utilization. To effectively use mediation in divorce cases, A strong and well-planned strategy is crucial. Raising awareness and advocating for alternative dispute resolution, specifically mediation, is imperative. Collaborative efforts from the government, media campaigns, and educational programs can aid in doing so. Furthermore, it is imperative to focus on training and appointing more mediators to meet the mounting demand. In a nutshell, mediation holds great promise for revolutionizing the resolution of divorce cases in India.

¹¹ 'Mediation and Conciliation Project Committee' <<https://mcpc.nic.in/?100009>> accessed 27 January 2024