

Counselling, Conciliation & Mediation in Resolving Family Disputes- Relevance and Importance

23-01-2022

NJA Refresher Course for Family Court Judges



“Santosham Paramam Sukham”

“Better than a thousand hollow words is one word that gives peace”

– Gautam Buddha

“ Mediation is one of the modes for attainment of ‘Peace’ ”

- Justice Swatanter Kumar

*“An ounce of mediation is worth a
pound of arbitration and a ton of
litigation”*

- Joseph Grynbaum

Data relating to Family Dispute Settlements at Delhi

S. No.	Category of Matters	No. of Cases Referred	No. of Cases Settled	No. of Cases Not Settled	No. of Cases NFFM/ Non Starters	No. of Connected Cases Settled
1	Matrimonial U/s 125 Cr.P.C.	6412	2916	2247	1169	2315
2	Petition for Divorce	5165	1947	2784	1779	1512
3	Case U/s 498A/406 IPC (Including Bail Application)	28668	10813	13146	4470	5316
4	Restitution of Conjugal Rights	893	344	465	80	232
5	Custody Guardianship Matter	785	289	333	145	303
6	Domestic Violence Act Cases	31618	12851	11134	5619	12309
	Total	73541	29160	30109	13262	21987

29160 Cases settled + 21987 connected cases settled
Total = 51147 from 2005 to 2021

Samadhan

Delhi High Court Mediation & Conciliation Centre

STATISTICS OF MATRIMONIAL CASES FROM 2006 TILL 31.12.2021

Category	Settled Cases	Connected matter settled but not referred	Total
Court Referred	2018	3638	5656
Pre-Litigation/ Conciliation	408	135	543

A total of 6199 Cases Settled

Delhi Dispute Resolution Society (Regd.)

Total Matrimonial Cases From Inception to 15.01.2022	Referred	Direct	Settled	Not Settled	Not Fit	Non Starter	Pending
30252	21050	9202	11863	5623	11276	727	763

11863 Cases settled

69,209

**Cases Settled through
Mediation from 22-08-2005
to 15-01-2022**

Each case has a minimum of two parties in it

69,209 X 2

=

1,38,418 Litigants go back smiling

Thus creating 1,38,418 happy homes!

Infrastructure facilities available at the Family Court Complexes at Delhi

S. No.	Name of Court Complex	Court Rooms	Ahlmad Rooms	Counsellors Rooms	Children Rooms
1	Dwarka	02	02	04	01
2	Rohini	04	04	05	02
3	Karkardooma	06	06	07	01
4	Patiala House	01	01	01	01
5	Tis Hazari	05	05	06	01
6	Saket	03	03	04	01

Improvement required: Psychologist rooms in each Court Complex

Distinguishing features of Matrimonial Disputes from other kinds of litigation

- Matrimonial cases may be settled if parties are educated, marriage is shorter with no children and the litigants are from urban area.
- Motivation
- Sentiments
- Social Compulsion
- Personal Liabilities
- Responsibility of parties
- Views of the party regarding life in general
- Views of the party in relation to the institution of marriage in particular security of future life
- Not always rational factors control the decisions of the parties
- Irrational and emotional factors have dominant roles in creation of the dispute and also in their settlement.

Ethos of the Family Courts Act, 1984

“ An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. ”

“.... both were happy with the result, and both rose in public estimation.....I realized that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundred of cases. I lost nothing thereby – not even money; certainly not my soul.”

- Mahatma Gandhi

“The entire legal profession, lawyers, judges, law school teachers, has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we should be healers of conflicts.

For some disputes, trials will be the only means, but for many claims... our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected.”

- Chief Justice Warren E.Burger

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“ Discourage litigation.

**Persuade your neighbours 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

- **The constant purpose of ADR to be borne in mind is that the duty of lawyers and the function of judges is to deliver the best quality of judgments at the least cost in the shortest time.**
- **The right to a speedy trial and to speedy justice is an essential ingredient of Article 21 of the Constitution of India.**
- **Docket Explosion**
- **increasing legal awareness,**
- **inadequate judge population ratio,**
- **proliferation of laws without judicial impact assessment,**
- **back log of cases,**
- **Welfare State – increased litigation by the State**

The Legislative Policy in India has been to cast a duty upon the Court, to make efforts and to assist the parties in arriving at a settlement in litigation by or against the Government or public officers in their public capacity and qua litigation relating to matters concerning the family i.e. Matrimonial matters, Guardianship custody cases, maintenance, adoptions, succession cases.

- Order XXVII Rule 5B CPC
- Order XXXII A Rule 3 CPC 3: Duty of Court to make efforts for settlement.—(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement. In respect of the subject-matter of the suit.

●Section 23(2) of the Hindu Marriage Act, 1955: *Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties:*

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.]

●Section 23(3) of the Hindu Marriage Act, 1955: *For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.*

- Section 9 (1) of the Family Courts Act, 1984 : *(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.*

- Industrial Disputes Act, 1947

- Legal Services Authorities Act, 1987

The Malimath Committee in its study on “Alternative modes and forums for dispute resolution” endorsed the recommendations made in the 124th and 129th Report of the Law Commission to the effect that the lacuna in the Law as it stood then was due to the want of power in the Courts to compel the parties to a private litigation to resort to arbitration or mediation required to be filled up by necessary amendments in the law.

- Resulting thereby in

- Reduction of the burden of Trial Courts
- Reduction of burden of Revisional and Appellate Courts

Resultant Enactments

- Arbitration and Conciliation Act, 1996
- Legal Services Authorities (Amendment) Act 2002, which amended the Legal Services Authorities Act, 1987
- The Code of Civil Procedure (Amendment) Act, 1999

Mediation as one of the modes of Alternative Dispute Resolution (ADR) is recognized by the Code of Civil Procedure (Amendment) Act, 1999 by the enactment of Section 89 which came into force from 01.07.2002.

Section 89 of the CPC reads as follows:-

“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 Lok Adalat;*
or
 - (d) mediation.*
- (2) Where a dispute has been referred -***

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The section provides for formulation of the terms of settlement by the Court and reformulating the same, if necessary, where it appears to the Court that there exists an element of a settlement, which may be acceptable to the parties and then a reference by the Court, inter alia, to mediation.

“The obligation of the legal profession is ... to serve as healers of human conflicts ... we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about”. These words of an eminent former Chief Justice of the US Supreme Court Warren E. Burger actually say what mediation is all about.

- **The Supreme Court of India in 1994 – 95 initiated an Indo-US exchange of information between high ranking members of the judiciary. A national study team was formed to examine case management and dispute resolution as a part of a joint project with the United States.**
- **The Indo-US study group suggested procedural reforms including legislative changes to legalize use of mediation.**

The Supreme Court of India in the case *Salem Advocate Bar Association V. Union of India, (2003) 1 SCC 49* has upheld the constitutional validity of Section 89 CPC. A committee was constituted to ensure that the amendments in the Code of Civil Procedure, 1908 be made effective and resulted in quicker dispensation of justice and to devise a model case management formula as well as rules and regulations which ought to be followed in taking recourse to the mode of ADR referred to in Section 89 CPC.

The Supreme Court in the case *Salem Advocate Bar Association V. Union of India, (2005) 6 SCC 345* has adopted the Civil Procedure ADR and Mediation Rules.

?

Mediation Bill, 2021 is yet to become a statute

To effectively implement Section 89 of the CPC and to infuse a new lease of confidence in the overburdened, adversarial, technical and sometimes painful aspects of the judicial system, and in order to ensure that the legal maxim ***ubi jus ibi remedium*** is not an empty promise, Hon'ble the Chief Justice of India, Mr. Justice R.C. Lahoti appointed a Mediation and Conciliation Project Committee (MCPC) on 09.04.2005. This Committee was also formed to oversee directly the implementation of ADR at a National level.

The High Courts of the country have set up Mediation Centres to encourage disputants to arrive at a negotiated understanding with a minimum neutral external assistance with their primary object, being avoidance of vexation, expense and delay, and promotion of the ideal of '*access of justice to all.*'

MEDIATION PROCESS

Mediation is a structured process where a neutral mediator uses specialized communication and negotiation techniques to assist the parties in resolving their disputes.

Negotiation process

Neutral third party

Facilitate resolution of disputes

Mutually acceptable to parties

Specified negotiation and communication techniques.

- **Assisted negotiation of a dispute settlement**
- **Neutral as between the parties**
- **The mediator advocates for settlement**
- **Seeks to get each party to move enough to get there**
- **A way of making contact in a manner that enables us to resolve a dispute and feel that we are active participants in a larger community.**
- **The source of morality in mediation is the parties freedom themselves to evaluate the law and the facts, and to walk away with no decision if either of them does not like the deal that is offered.**

- **Mediator does not decide what is fair or right.**
- **Decision making power left with the parties.**
- **Mediator acts as a catalyst.**
- **Brings the disputing parties together by *defining issues and limiting obstacles to communication and settlement.***

BENEFITS OF MEDIATION

Mediation is private, prompt and affordable. It provides an opportunity to the parties to talk about their case in their own words and to directly participate in negotiation of their claims. It is a forum for parties to develop creative, non-traditional remedies that promote their underlying business and personal interests.

**CHARACATERISTICS OF
MEDIATION vis-a-vis
ADVERSARIAL SYSTEM AND
ARBITRATION AND CONCILIATION**

Values of Mediation v. adjudication, whether in Court or arbitration

Mediation Values

- *Much Compromise*
- *Help from the Mediator in communication, in mood and tone, in reality checks*
- *Party to party communications*
- *Party control, nothing happens without party consent*
- *Inquiry into and preservation of relationships*

Adjudication Values

- *Very Little Compromise*
- *Adjudicator decides rules*
- *Lawyer to tribunal communication*
- *All control given away to a stranger, a stranger rules.*
- *Injury to relationships is irrelevant*

Values of Mediation v. adjudication, whether in Court or arbitration

Mediation Values

- *Broader relevance to include focus on interests, values, goals, aspirations, as well as relationships*
- *Focus on future and future relationships*
- *Cultural factors are important*

Adjudication Values

- *Narrower relevance, essentially limited to issues defined by pleadings*
- *Focus backward, on the application of the rule of law only to pass acts.*
- *Cultural factors tend to receive minimum attention. The law written in another factual context is applied*

Values of Mediation v. adjudication, whether in Court or arbitration

Mediation Values

- *Value misunderstandings are massaged out*
- *The law is determined, applied or disregarded by the parties*
- *The facts are determined, compromised or disregarded by the parties*

Adjudication Values

- *Stranger determines value*
- *The law is determined and applied by a stranger.*
- *The facts are found on some times unreliable evidence*

COMPARISON BETWEEN MEDIATION AND ARBITRATION

Mediation

- *Process: Introduction, Joint Session, Caucus, Agreement*
- *Nature of Process: Negotiatory, Collaborative*
- *Procedure: Non-procedural*
- *Neutral Third Party: Facilitator*
- *Role of Parties/Advocates: Active and direct*
- *Level of Formality: Informal*

Arbitration

- *Process: Claims/counter claims, Examination of witnesses, Arguments*
- *Nature of Process: Adjudicatory, Directive*
- *Procedure: Procedural rules and rules of evidence.*
- *Neutral Third Party: Adjudicator*
- *Role of Parties/Advocates: Active only during evidence*
- *Level of Formality: Formal*

- In litigation, the judges decide the case on the basis of evidence while in Mediation parties themselves take the decision for the settlement of their disputes.
 - In litigation, the focus is on the past & to determine the liability. In Mediation, the focus is on the future.
 - Litigation is procedural and does not yield quick results. Mediation depends upon cooperation and is solution oriented.
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- Mediation avoids win-lose situation and instead tries to achieve a win-win solution which puts an end to the dispute.
 - Arbitration proceedings are adversarial in nature like litigation. Arbitrators also pronounce awards in favour of one party and against the other.

Mediation and Conciliation

Mediation as seen in the western world and conciliation recognized in India are the same. In order to understand that mediation and conciliation are synonyms, the following meanings attached thereto in Black's Law Dictionary are reproduced below:-

Mediation:

A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution—Also termed conciliation. (Black's Law Dictionary Seventh Edition Page 96).

Conciliation:

- a. A settlement of a dispute in an agreeable manner.**
- b. A process in which a neutral person meets with the parties to a dispute (often labour) and explores how, the dispute might be resolved.**

(Black's Law Dictionary Seventh Edition P.284).

The distinction between MEDIATION AND CONCILIATION is widely debated among those interested in ADR, arbitration and international diplomacy, some suggest that conciliation is a 'non binding arbitration', whereas mediation is merely 'assisted negotiation'. Others put it this way : conciliation involves a third party's trying to bring together disputing parties to help them reconcile their difference, whereas mediation goes further by allowing the third party to suggest terms on which dispute might be resolved. Still others reject these attempts at differentiation and contend that there is no consensus about what the two words mean – that they are generally interchangeable. ***Though a distinction would be convenient, those who argue that usage indicates a broad synonymity are most accurate.***

Bryan A. Garner. A dictionary of Modern Legal Usage. P.5554 (2nd Edn.1995)

If we see our role only as operators of the Code of Civil and Criminal Procedures, we diminish ourselves and the legal profession.

If we are able to see ourselves as resolvers of conflict, we can find sustenance and satisfaction in our work, relevant to our education, training, skills, experience and our best sense of self.

- . Mediation in Matrimonial Disputes
- . Focus on future
- . Ability to salvage and better relationships
- . Litigation has enormous destructive capacity because of high voltage emotions, unleashed during family conflict.

•Mediation is attractive in family matters because:-

- It promotes the interest of the entire family including children..
- It reduces economic and emotional costs.
- Confidential communications
- Face saving
- Pre-litigation mediation before polarisation most appropriate

•**Strategies to be adopted:-**

- Focus on the future
- Probing of facts
- Identifying the real cause of the dispute
- Exploration of possibilities of reconciliation or divorce
- Bringing the parties to agreed solution
- Shaping the solution in legal terms

K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226

Decided on 22-02-2013

The Hon'ble Supreme Court directed

“46. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.

46.1. In terms of Section 9 of the Family Courts Act, the Family Courts shall make all efforts to settle the matrimonial disputes through mediation. Even if the counsellors submit a failure report, the Family Courts shall, with the consent of the parties, refer the matter to the mediation centre. In such a case, however, the Family Courts shall set a reasonable time-limit for mediation centres to complete the process of mediation because otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance of settlement, the Family Court in its discretion, can always extend the time-limit.

46.2. *The criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case.*

46.3. *All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage.”*

Children's Room



Dwarka Family Court



Rohini Family Court

THANK YOU!

ANU MALHOTRA