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With this thought, we hereby present to you

# **RESOLUTION OF CHILD CUSTODY ISSUES THROUGH NON-ADVERSARIAL TECHNIQUE OF MEDIATION: A STUDY**

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## **Abstract**

Divorce and child custody are a branch of such disputes that targets the emotions of parties and our legal system has resolved to provide a relatively more calming dispute resolution method, that is, mediation. Mediation involves a third neutral party who helps parties to negotiate and reach a consensual decision. Since, parties are the ones who most aptly know their past and present, they will also be the best judges of what will work for them in the future. But this can only be achieved with the help of an efficient mediator. However, the system is not new or introduced by law only, it has existed from ancient times. That system was resolution of disputes with help of meetings of elders in the family or thorough panchayats. These people not only help to mediate and negotiate divorce and child custody issues but also act as counsellors aiming to bring about reconciliation.

**Key words:** Child Custody, Mediation, Maintenance, Settlement

## **Introduction:**

Marriage and family are considered to be the most sacred institutes of our social system<sup>1</sup>. And its preservation is of utmost importance for smooth functioning society<sup>2</sup>. A happy family represents not only cooperation and togetherness but also safety from social vulnerabilities<sup>3</sup>. So its breakdown is not only problem for society, it also represents problem of every individual in the family. Its breakdown

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<sup>1</sup> Divya Chowdary, Approach Of Family Court In Settling Matrimonial Disputes. Available at: <https://blog.iplayers.in/matrimonial-dispute-settling> (Last Visited: 18-08-2018 at 21:22)

<sup>2</sup> Justice Shivaraj V Patil, "Children- Supreme Assets of Society", 2 *SCC (Jour)* 55 (2005), available at: [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=5&do\\_pdf=1&id=249](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=249). (Last Visited:26-03-2018 at 21:12)

<sup>3</sup> Divya Chowdary, Approach Of Family Court In Settling Matrimonial Disputes. Available at: <https://blog.iplayers.in/matrimonial-dispute-settling> (Last Visited: 18-08-2018 at 21:22)



not only creates dilemmas for the spouses but also embarks a difficult time for the children born in the wedlock. During this phase each and every member is going through turmoil of emotions<sup>4</sup>. They are in fact in a very aggressive and antagonistic phase of their life. The spouses are waging wars in court rooms to settle scores with each- other<sup>5</sup>. Their aim is not only securing divorce in their favour but also to seek custody of their minor child(ren) and his maintenance order to their suitability.

They are already in their aggressive phase and the aggression is further added through the adversary system of litigation. Adversary system of litigation means that the parties file their disputes/ case to courts and they argue against each other. In the adversary system the losing party is not only the spouses but the one who is most effected is the child. It is so because not only that the child is blameless but he has to face the consequences of his parents. However, once the spouses have decided to separate their ways they cannot be saved from legal system and procedure but what can be done to mitigate the consequences - is to encourage them to resolve their difference through mediation. Mediation is a system of dispute resolution which encourages parties to resolve their dispute amicably with the help of third neutral party.

## **MEDIATION**

Mediation is defined as “a non-binding dispute resolution method achieved with the help of third neutral party who tries to help parties to reach a negotiated settlement”<sup>6</sup>. Mediation encourages parties to reach their own settlement. In mediation the mediator creates an environment for the parties to mutually resolve the dispute rather than deciding the right and wrong between them, as in the case of litigation<sup>7</sup>.

The aim of mediation is to not only to reach at a mutual decision but also to avoid cons of adverse system. It attempts to avoid the expenses and trauma of litigation. It also helps in reducing the

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<sup>4</sup> Andrew Schepard, “Taking Children Seriously: Promoting Cooperative Custody after Divorce”, 64 Texas Law Review 687 (1985), Available at: [http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1832&context=faculty\\_scholarship](http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1832&context=faculty_scholarship). (Last Visited: 12-03-2017 at 22:35)

<sup>5</sup> Nadir Modi, “Child Custody: Mother or Father” 2 SCC (jour) 1 (2000), available at: <http://www.ebcindia.com/lawyer/articles/94v3a3.htm> (Last Visited: 17-01-2017 at 21:38)

<sup>6</sup> Afcons Infra. Ltd. v. Cherian Varkey Constn., (2010) 8 SCC 24, para 8

<sup>7</sup> Mediation is here to stay, available at: [http://www.arbitrationindia.org/pdf/mediation\\_tostay.pdf](http://www.arbitrationindia.org/pdf/mediation_tostay.pdf) (last visited: 6-10-17 at 12:15)



hostilities among the parties<sup>8</sup>. Mediation not only brings about co-operation and communication among parties but it also leads to a formation of post-divorce dispute plan according to their circumstances<sup>9</sup>. As parties are best aware of their needs and emotions, mediation helps to reach a solution that best suits their situation.

The apex having very aptly describes the meaning and aims of mediation in the case *Saleem Bar II*<sup>10</sup>. The court held “that mediation is a process where mediation, either appointed by court of or parties, helps parties in mediating their dispute”. The court further held that “mediation helps in discussions among the parties, help parties in identifying their problems and reducing misunderstandings. It brings clarity of issues and problems and helps in exploration of ideas and ways of resolution. It further emphasis that parties should make an effort to reach a solution on their own that is tailored to their needs”. It is submitted that the author is in agreement with the purpose explained by the apex court.

Recently the importance of mediation in family matters have been emphasised by apex court in *K. Srinivas Rao v. D.A. Deepa*<sup>11</sup>. The court held:

“That in reality the reason behind many matrimonial disputes is very trivial and can be easily sorted out. Since the mediation in family matters has now got legal recognition the courts must make an effort for the same. 10 to 12% of these disputes get resolved through mediation centres when rightly referred. Therefore, the courts must send the parties for mediation at early stage of dispute, i.e. at the first instance. And disputes especially relating to child custody and maintenance are apt for mediation”.

## **LEGAL FRAMEWORK OF MEDIATION: INDIA**

The option of mediation was provided by legislators through an amendment of 1999 to the Civil Procedure Code, 1908. The amendment increased the scope of Section 89 and gave an option of

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<sup>8</sup> Daniel J. Guttman, “For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation”, 1996 12 Ohio St. J. on Disp. Resol. 175, available at: [https://kb.osu.edu/dspace/bitstream/handle/1811/79767/1/OSJDR\\_V12N1\\_175.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/79767/1/OSJDR_V12N1_175.pdf) (last visited: 10-08-2018 at 11:16)

<sup>9</sup> Terri Garner, “Child Custody Mediation: A Proposed Alternative to Litigation”, 1989 J. Disp. Resol. (1989), available at: <http://scholarship.law.missouri.edu/jdr/vol1989/iss/8> (last visited: 20-08-2018 at 23:04)

<sup>10</sup> Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344

<sup>11</sup> AIR 2013 SC 2176

mediation to parties of dispute. The only option of arbitration was expanded to other forms of alternate dispute resolution methods, adding mediation to it. The section although doesn't define the term but it simply empowers the court to provide the parties with option of mediation. It says that where there appears to be scope of settlement between the parties, the court may formulate the terms of settlement and according to response of parties, can refer their dispute for arbitration, conciliation, judicial settlement (including settlement through Lok Adalat), or mediation<sup>12</sup>. It also empowers the court to reformulate the terms of mediation agreement if parties wish some amendments. It is submitted that the power of the court to reformulate the suggested terms of the agreement according to wish of parties, represents the real motive aimed to be achieved by mediation.

The fact that family matters should be resolved by parties with least intervention of courts is reflected from the fact that a specific Order was introduced by way amendment to civil procedure code which specifically deals with mediation of disputes relating to family matter<sup>13</sup>. Order 32A provides that courts should guide parties to resolve their disputes through mediation. Rule 1 of the Order specifically provides that suits relating to child maintenance and child custody should be resolved at first instance through mediation. It also empowers the court to adjourn the proceedings and encourage the parties to amicably settle their dispute even at the later stage of the suit. The Order also empowers the court to take help of a welfare expert to resolve the issues.

On similar lines with civil procedure code, the Family Courts Act, 1984 also provides for mediation of disputes relating to divorce and child custody through mediation. Section 9 of the Act provides that the court is duty bound duty to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. Further, the Family Courts have also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to effect settlement if there is a reasonable possibility of the same.

Furthermore it is only recently that Himachal Pradesh high court, Bombay high court and Madhya Pradesh high court have approved or circulated for guidance of lower courts "Child Access and Custody Guidelines" and in these guidelines, courts have time and again emphasised the importance

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<sup>12</sup> CPC (Amendment) Act, 1999 with effect from 1/7/2002

<sup>13</sup> CPC (Amendment) Act, 1976

and resolution of dispute relating to interim relief, visitation rights through mediation<sup>14</sup>.

## **LEGAL FRAMEWORK CHILD CUSTODY LAW: INDIA**

For custody of minor law is provided, either under personal law of parties or under the specific legislations of the parties. For Hindus the law is provided under the Hindu Marriage Act, 1955 and the Hindu Minority and Guardianship Act, 1956. For Muslims the law is as provided by their personal law and the suit is also supported by the provision of the Guardians and Wards Act, 1890. For Christians and Parsis the law is as provided under The Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936, respectively.

Although the only condition important in deciding a custody matter is welfare of children<sup>15</sup> but still support of legislation is taken by parties to strengthen their case. The condition of welfare of child is so paramount that only that it is followed in every case irrespective of religion of child but also rights and feelings of parties are sometimes deemed inferior to this condition.

However, section 26 of the Hindu Marriage Act states that courts in their discretion can make provision for custody, education and maintenance during the trial or even after or along with when an application for any other relief is asked for under Act. Similar provision is made for Christians<sup>16</sup> and Parsis<sup>17</sup> under Act dealing with their respective community. Further a specific provision as regards guardianship and custody is provided for Hindus under Section 6, Hindu Minority and Guardianship Act, 1956. The section provides that for their legitimate children, person or property or both, the natural guardian is their father in first instance and after him it is the mother. It also gives a rider that a mother has a right to custody of minor till the child attains the age of five. It also provides that a Hindu will lose a right of guardianship if he ceases to be a Hindu or has finally renounced the world. The law of this section of religion is also supported the secular law as given under the Guardians and Wards Act. Under section 7 of the Act person is empowered to file an application to be appointed or declared as a guardian of minor, his person or property or both. Further under Section

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<sup>14</sup> Available at: <http://cja.gov.in/Important%20Instructions/Child%20Access%20&%20Custody%20Guidelines%2001.06.2015.pdf> (last visited: 05-10-17 at 13:53)

<sup>15</sup> See Section 13 of the Hindu Minority and Guardianship Act, 1956; section 17 of the Guardians and Ward Act 1890.

<sup>16</sup> Section 41 of the Act of 1869

<sup>17</sup> Section 49 of the Act of 1936



25 the guardian of minor is empowered to seek custody of minor, who has left himself or has been removed from guardian's custody.

The earliest law to provide for custody and guardianship of minor is as provided by Islamic prophets in their customary law. It provides that father is the natural guardian of child's person or property or both but mother is a custodian of person of minor until a specific age. The Hanafi School provides that it is the mother who will have custody of her minor till the minor boy attains the age of seven year and of her daughter till she reaches puberty. For the Shia school, mother is custodian of her son till he attains the age of two years and of her daughter till she attains the age of seven years<sup>18</sup>. Therefore, the law explicitly gives recognition to the custodial rights of the mother. The right is known as 'hiznat' under Islamic law. This law is also supported by Section 7 and Section 25 of the Guardians and Wards Act.

## **LEGAL FRAMEWORK FOR CHILD MAINTENANCE**

### **LAW: INDIA**

Another important decision to be resolved by courts as a consequence of divorce is that of maintenance of children of the marriage. Various legislations govern this part of law. The Hindu marriage act section 26 empowers the court to make order for maintenance and education of children, interim or after any other matrimonial relief is decreed under the Act. For Christian and Parsi children the provision is made under the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936, respectively on similar lines to Hindu Marriage Act. A specific legislation dealing with the matter is the Hindu Adoptions and Maintenance Act 1956. Section 20 of Act of 1956 provides that a Hindu is bound to provide for maintenance of his children during his/ her lifetime. This section bounds not only father but also mother to maintain their children during their lifetime. The minor can claim maintenance till the age of minority and in case of daughter it extends to until she gets married, in case she is unable to maintain herself.

Islamic law also recognizes a man's duty to support his wife and children. It provides that every man

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<sup>18</sup> Guardianship under Muslim law, available at: <http://sanamurtaza.blogspot.in/2012/11/guardianship-under-muslim-law.html> (Last visited: 19-01-2017 at 20:37)

is bound to maintain his legitimate children and grandchildren till the time of weaning. A Muslim is thus duty bound to maintain his minor children even after his divorce. The law also lays responsibility on mother to maintain her children if the father is unable to provide for the same. However, a father is not to maintain his children if they refuse to reside with him without any reasonable cause<sup>19</sup>. For maintenance of children a specific provision is also made under Section 3 of The Muslim Women (Protection of Rights on Divorce) Act, 1986. Clause 1(b) of the section provides that a mother is entitled to claim maintenance from father of the child, whether born before or after divorce, for a period of two years, starting from the date of their birth.

Apart from these specific laws, a provision applicable to party of any religion is also made under Section 125 of Criminal Procedure Code, 1973. However, this section is talking about the duty of the father only to provide for maintenance. The section empowers a mother to file for suit of child maintenance where he has refused or neglected to pay them<sup>20</sup>. The right of maintenance is extended even after attainment of majority if the child is unable to maintain himself on ground of any illness or disability<sup>21</sup>.

## **CHALLENGES: MEDIATION VIS-A-VIS CHILD CUSTODY AND MAINTENANCE**

### **Perspective of Mediator**

Marriage is considered a sacramental, eternal union. That is why when a marriage is on the verge of breaking a lot of efforts are put into reconciling the parties. And these efforts are even more intense when couple have children. But despite all the efforts of reconciliation if parties decide to separate/divorce, the focus shifts from saving the marriage to drawing a mutually agreeable post-divorce agreement. And this is possible if the mediator has a quality of handling the situation well, taking care of what right solution the situation demands and without bias. But in some circumstances mediator loses track and ends up drawing a plan which their situation doesn't demand. The point has been illustrated by two reports. In a study conducted by NWC in 2002 it was pointed out that despite

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<sup>19</sup> Diva Rai, "Aspects on Maintenance of Children under Muslim law", Available at: <https://blog.iplayers.in/aspects-of-maintenance-of-children-under-muslim-law/> (Last visited: 19-08-2018 at 12:30)

<sup>20</sup> Section 125 (1b), The Criminal Procedure Code, 1973

<sup>21</sup> Section 125 (1c).

whatever is the situation of family or women, many judges' emphasised reconciliation rather than separation<sup>22</sup>. In another study conducted by EKTA it was pointed out that in child custody disputes, counsellors mostly presume that since the welfare of the child is with the mother, the custody should be with her<sup>23</sup>.

### **Role of Counsellor in Mediation**

To reach a mutually agreeable plan it is also very important that parties are counselled well. Counselling plays a very important role in successful mediation between parties<sup>24</sup>. A good number of cases can be resolved by way of proper counselling. In spite of the important role of the counsellors, it has been observed that some of the family courts do not even have any counsellors, and in good number of courts the counsellors keep on changing frequently<sup>25</sup>. For example, in Tamil Nadu, it was reported that the marriage counsellors kept changing every three months, and each time the woman meets a new counsellor she has to explain her problems all over again, with no continuity in discussion<sup>26</sup>. Or at times many of the counsellors are just part-time; who are not even properly trained for the counselling services<sup>27</sup>. Therefore, where there are such infrastructure lags it affects the impact of mediation services, which totally negates the purpose of mediation.

### **Role of Advocates in Mediation**

Initiation of mediation proceedings, whether in family courts or civil courts, is not bound by formal rules of procedural and evidentiary code. Also especially, in family courts, during counselling proceedings the presence of lawyers is forbidden<sup>28</sup>. But still the proceeding has to be initiated by filing forms in prescribed formats. And for this the litigant has to heavily rely on advice and help of

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<sup>22</sup> Available at: <http://ncw.nic.in/pdfreports/Working%20of%20Family%20courts%20in%20India.pdf> (last visited: 26-09-17 at 13:47)

<sup>23</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-09-17 at 17:37)

<sup>24</sup> Available at: <http://ncw.nic.in/pdfreports/Working%20of%20Family%20courts%20in%20India.pdf> (last visited: 26-07-18 at 13:47)

<sup>25</sup> Marital Counselling in India: Perspectives from Family Court Counsellors, available at : [https://link.springer.com/chapter/10.1007/978-981-10-0584-8\\_10](https://link.springer.com/chapter/10.1007/978-981-10-0584-8_10) (last visited: 12-07-18 at 11:42)

<sup>26</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-08-18 at 17:37)

<sup>27</sup> Ibid

<sup>28</sup> Section 13, Family Courts Act, 1984



advocate<sup>29</sup>. Therefore, although not desired by the Act but role of lawyers comes into picture. And which is plagued by its own weaknesses. Firstly, since the courts are not equipped with any kind of legal help desk, this leaves litigants at the mercy of court clerks or peons to help them follow the complicated procedural rules<sup>30</sup>. Secondly, since the advocates are ignorant about the benefits of family mediations, they misguide the clients either not to freely talk during counselling sessions or of the fact that they can get better relief from the court or that if they participate in the proceeding it will un-necessarily prolong the case<sup>31</sup>.

### **State of Infrastructure required for Conducting Mediation**

The courts suffer from unsatisfactory infrastructural conditions. It has been pointed out in empirical studies that judges do not have proper and hygienic place to work and sit<sup>32</sup>. Also, that the counsellors have to share rooms, which compromises with the clients privacy. Also there is no proper space allotted for the children to meet their separated parents<sup>33</sup>. Furthermore, as far as the appointment of counsellors is concerned, in most States, they are employed on contractual basis. Their remunerations are low and are based on the target case they achieve<sup>34</sup>. All these lacks discourage enthusiastic judges, counsellors, mediators from becoming a part of mediation system.

### **Discretionary Power of Judges to Determine Fit Case for Mediation**

Section 89 of Civil Procedure Code places a duty on the judge to determine whether the case at hand is a fit case to go for mediation and also empowers him to formulate to terms of agreement before even dispute goes to mediation centre. This means it is the discretion of the judge whether to send the case for mediation or not<sup>35</sup>. Thus, the question arises that on what basis the court will determine

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<sup>29</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-09-17 at 17:37)

<sup>30</sup> Marital Counselling in India: Perspectives from Family Court Counsellors, available at : [https://link.springer.com/chapter/10.1007/978-981-10-0584-8\\_10](https://link.springer.com/chapter/10.1007/978-981-10-0584-8_10) (last visited: 12-10-17 at 11:42)

<sup>31</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-09-17 at 17:37)

<sup>32</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-09-17 at 17:37)

<sup>33</sup> Marital Counselling in India: Perspectives from Family Court Counsellors, available at : [https://link.springer.com/chapter/10.1007/978-981-10-0584-8\\_10](https://link.springer.com/chapter/10.1007/978-981-10-0584-8_10) (last visited: 12-10-17 at 11:42)

<sup>34</sup> Available at: <https://archive.nyu.edu/bitstream/2451/33913/2/Family%20Court%20Ekta.pdf> (last visited: 26-09-17 at 17:37)

<sup>35</sup> Available at: <https://www.lawctopus.com/academike/alternate-dispute-resolution-code-civil-procedure/> (last visited: 15-09-17 at 12:01)

whether the case is a fit type to be sent to mediation and what terms are fit for settlement.

## CONCLUSION AND SUGGESTION

It is submitted that first efforts should be made to reconcile the parties and if that seems to be unlikely then the goal of mediator should be to try and calm the parties and make them reach an agreement that is beneficial not only for them but for the minor as well. This approach will not only benefit the spouses, as it preserves peaceful environment but will also help the child to cope up with new circumstances.

Keeping in view the above analysis the author suggests following amendments:

1. Mediation should be compulsory in all kinds of family disputes.
2. The mediation centre should move out of the court premises. It is so because as one hears about going to court the natural thought is of adversarial trial, communication with lawyer and fight tendency.
3. There should be a special mediation course for lawyers and mediators/counsellors who aim to pursue career in family dispute field.
4. There should be a legal help desk at mediation centres and in family courts, who guide the clients in filing documents.
5. Counsellors/Mediators should open up their minds to new child custody avenues and be unbiased. They should be sensitised about the new custodial jurisprudence, i.e. possibility of shared parenting.
6. Infrastructural lacks should be removed. They should be given permanent grade jobs, mediators should be well paid, well trained. There should separate rooms for counselling. There should be separate a children complex.

One State which boasts of most of these provisions is Maharashtra. The State has detailed and elaborate rules regarding the functioning of the family court as well as regarding the service conditions, recruitment, remuneration to counsellors and all other detailed rules regarding counsellors also<sup>36</sup>. Further, the counsellors are in the permanent service of the government and they are attached

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<sup>36</sup> Marital Counselling in India: Perspectives from Family Court Counsellors, available at: [https://link.springer.com/chapter/10.1007/978-981-10-0584-8\\_10](https://link.springer.com/chapter/10.1007/978-981-10-0584-8_10) (last visited: 12-10-17 at 11:42)

to the court. They are class-I government officers in the permanent service. Also, the mediators appointed have the essential qualification, i.e. Master's Degree in Social Welfare with minimum 2 years' experience in family counselling. With these trained people it is easier to settle the matrimonial disputes<sup>37</sup>.

In Mumbai family courts, there is a list of panel of such experts who are psychiatrists, psychologists, medical experts, sexologists to help parties<sup>38</sup>. The court also has maintained a panel or list of social organisations and welfare associations who are supposed to help the functioning of the family courts. They help in providing shelter for the women, provide them with employment, provide for the access to a place for the children, and provide them legal aid wherever necessary<sup>39</sup>.

A unique feature of the family court at Mumbai is a children complex. Family court children complex provides a place, a special meeting place for the parent and the children<sup>40</sup>. The court also have a centre for psychological services and stress management, which are given free of cost. The court also has a cash department where the maintenance amount is deposited<sup>41</sup>.

It is submitted that the reason to elaborate on these facilities is to emphasise that when such facilities can be created in one State; so it can be created in other States. And when such facilities are created it helps in achieving the goal of mediation.

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<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid