

MEDIATION: EXTRA JUDICIAL SETTLEMENT OF DISPUTES

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Introduction

Article 21 of the Constitution of India enshrined that no person shall be deprived of his life or his personal liberty except according to procedure established by law. Therefore, the Supreme Court of India in *Hussainara Khatoon (1) v. Home Secretary, State of Bihar*² rightly held the right to speedy trial as a part of right to life and personal liberty as guaranteed in article 21 of Constitution. Alternative Disputes resolution, as the name suggest, is an alternative to the traditional process of dispute resolution through courts. It refers to a set of practice and techniques to resolve disputes outside the Courts. It is mostly a non-judicial means or procedure for the settlement of disputes. There exist number of mechanism of resolving disputes outside the court; however, the choice of alternative dispute resolution mechanism to some extent depends upon the nature of the dispute and the relation of the parties inter se. Alternative Dispute Resolution was conceived of as a dispute resolution mechanism outside the courts of law established by the Sovereign or the State. In this sense, it included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR.³

According to Black's Law Dictionary mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.⁴ Mediation is a method of dispute resolution wherein a neutral person known as mediator brings the people who have a dispute, together and makes them to talk to each other. However, he makes no binding decisions on the contrary the parties to the dispute themselves ultimately determine whether the process results in a resolution of the dispute. The role of the mediator limited to help the disputing parties communicate with each other in the hope that they can find a

¹ I/c Principal

² 1980) 1 SCC 81

³ D. M. Popat, ADR and India: An Overview, The Chartered Accountant, December 2004, p. 749

⁴ Black's Law Dictionary , 8th Ed., p. 1003

way to work out their disagreements and differences. Mediation has been defined as a private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement.

In USA, mediation is the most popular form of ADR. Mediation is a process of dispute resolution focused on effective communication and negotiation skills. “Mediation is the process in which a neutral third party, the mediator, facilitates negotiations between the disputants and assists them to explore each other’s point of view, enabling thereby a settlement of disputes. The mediator merely acts as a facilitator or a catalyst and neither participates in the negotiation process, nor throws out suggestions for settlement of the dispute”.⁵

Mediation; Need of the Hour

In a developing country like India, where the burden on the courts is ever increasing, ADR can play a big role in reducing the dockets of the courts and to provide the business community for a quick and effective means of dispute resolution. It can be an effective aid to the courts. “We have to formulate effective Alternative Dispute Resolution Mechanisms to ease the present burden of judicial functioning. The backlog of cases is increasing day by day but criticizing judiciary for the same is a wrong practice. It must be noted that the backlog is a product of “inadequate judge population ratio” and the lack of basic infrastructure. The government has to play a pro-active role in this direction.”⁶

Mediation is not a new concept to India. In fact *Panchayat* system was in practice pre British era in India, wherein some respected members of the community used to assist in resolving disputes between the members of the community. In fact even today in rural areas, the *Panachayat* system is being followed. In pre-British India, mediation was popular among businessmen. Impartial and respected businessmen called *Mahajans* were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration.⁷ “Any conflict is like cancer. The sooner it is resolved the better for all the parties concerned in particular

⁵ Justice B. N. Srikrishna, *An Idea Whose Time Has Come*, Halsbury’s Law, Vol.03, Issue 05 May 2009, p 22

⁶Praveen Dalal, *The Culture of ADR in India*, Retrieved on 26th April 2010 from <http://www.odr.info/THE%20CULTURE%20OF%20ADR%20IN%20INDIA>. Doc.

⁷ Anil Xavier, *Mediation: Its Origin & Growth in India*, HAMLIN JOURNAL OF PUBLIC LAW & POLICY, Vol. 27, p.1, http://www.arbitrationindia.org/pdf/mediation_india.pdf, accessed on 13/07/2015

and society in general. If it is not resolved, at the earliest possible opportunity, it grows at a very fast pace and with time and the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Hence, it is essential to resolve the dispute the moment it raises its head.⁸

Mediation is absolutely consensual. Apart from reference of disputes to mediation by the parties voluntarily, discretionary power is conferred upon the court under section 89 of Civil Procedure Code⁹ to refer parties to arbitration, conciliation, mediation etc., where it appears to the court before the suit is filed that there is a chance of settlement which may be acceptable to the parties. In mediation, the mediator simply assists the parties to negotiate their own settlement and sometimes if the parties agree, he may express his views which help the parties to achieve the fair and reasonable settlement amicably. The time required to complete mediation varies according to the complexity of the issues being discussed. It can take less time if the parties are well prepared and understand their rights and obligations. If fewer issues are being discussed in mediation it can take less time. However, mediation can also take longer if the parties are highly emotional, do not understand their rights and obligations or simply need to discuss the issues at a slower pace in order to understand them more clearly. Because of the flexibility of the process, the mediator can accommodate all of these differences and move the mediation along at a pace with which the parties can be comfortable.¹⁰

Role of Mediator

The mediator is not an adjudicator; he is a neutral third party selected by both the parties mutually to help them to settle a dispute. A mediator plays multiple roles of facilitator, referee, guide and communicator as well. Both parties mutually select the mediator. A mediator need not necessarily be from legal background but it desirable to be an expert in the field in which the parties are

⁸ Prof. Anurag K. Agrawal, *Strengthening 'Lok Adalat' Movement in India*, AIR JL. Section, Vol. I, March 2006, p. 33

⁹ CPC section 89- 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.

¹⁰ Mr. Sameer Chaudhary Rajat Jariwal, *Alternate Dispute Resolution - An Idea The Time For Which Has Come*, [http:// articles manupatra .com Alter—28/03/2011](http://articles.manupatra.com/Alter-28/03/2011)

claiming a dispute. Mediator is not adjudicator like arbitrator and plays a facilitative role to develop an environment in which parties are facilitated towards resolving the dispute and reaching at amicable settlement voluntarily. Mediator creates a healthy atmosphere to resolve the differences of the parties voluntarily keeping in view the respective interest of the parties. As a facilitator mediator helps parties to understand position of other disputing party and evaluate their own interest.

Mediator shows parties not only their strengths but their weakness also which makes them to examine their alternatives to a negotiated agreement. It gives the parties the freedom to suggest options for settlement. Mediation is a voluntary process where the decision-making rights is retained by the parties and are bound only when they enter into a written agreement concluding the mediation. “They are those who have been trained to work with people in these situations. Mediators, as the name implies, mediate between two people or groups of people and help them to reach a solution which works for everyone involved. Through the confidential private meetings with the parties, the mediator is able to understand the needs of the party and the mediator assists the parties to arrive at a win-win situation with an agreement in which the solution to the dispute is favorable to both parties and thus not only resolves the problem but also strengthen the relationship among them by giving a more humane verdict.”¹¹

Advantages of Mediation

In USA, mediation is the most popular form of ADR. Mediation is a process of dispute resolution focused on effective communication and negotiation skills. The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement. Since the parties have more control over the final resolution, *mediation* is a much quicker process than litigation or arbitration. “Mediation is just negotiation facilitated by a non-judicial, experienced, neutral, and acting at best, as a catalytic agent. Its legal consequences are the same as those of a negotiated settlement. In essence, it is a form of ‘shuttle diplomacy’, whereby each party is encouraged to convey the issue of concern and his bottom line

¹¹ ANIL XAVIER, Mediation is here to stay! - Part I, The Indian Arbitrator Val.2 Issue 3 March 2010(Publisher IIA&M,http://www.arbitrationindia.org/pdf/tia_2_3.pdf 24/06/2010.

to the mediator in private, and the mediator can isolate the real areas of dispute and the practical considerations.”¹²

The proceedings are instituted at the written behest of both parties; however, a party is at liberty to opt out of the proceedings at any time. Mediator is bound to maintain confidentiality of the information submitted to him by the parties. There is an absolute prohibition on disclosure of all the matters relating to the proceedings either by conciliator or by the parties to a third party.¹³ Therefore, parties are not exposed to any risk of using the information furnished by them in any proceeding before court if mediation fails and thus it creates a healthy and amicable environment for facilitated negotiation. “Mediation permits a neutral to learn intimate facts from both sides that they would never have shared with each other in the course of trial preparation. By building on the parties' trust in the mediator, the process thus allows the parties to explore workable options. With the knowledge that he gains, the mediator can learn how far apart the parties are and devise ways of bridging the gap.”¹⁴

Flexibility of the process of mediation lies in the fact that it can be initiated to resolve the dispute before litigation, during the pendency of the litigation and even after the verdict of the court. “The biggest benefit of mediation is that each party goes home happy as there is a consensual settlement rather than a decision thrust upon them in cases of arbitration and litigation. It is more cost effective and less time consuming as mediation proceeding usually takes one or two days to resolve disputes as opposed to months or even years taken by arbitration or litigation. Moreover, in case of a complete breakdown of dialogue between parties, they still have the option to resort to arbitration or the judicial methods as the parties do not forfeit their rights to a traditional legal remedy as Mediation clauses, in contrast to arbitration.”¹⁵

¹² O. P. Malhotra, Indu Malhotra, *The Law and Practice of Arbitration and Conciliation*, 2nd ed., 2006, LexisNexis Butterworths, New Delhi India, p.[I]61-20

¹³ Arbitration and Conciliation Act, section 75- Notwithstanding anything contained in any other law for time being in force, the conciliator and the parties shall keep confidential all matter relating to the conciliation proceeding. Confidentiality shall extend also to the settlement agreement except its disclosure is necessary for purposes of implementation and enforcement.

¹⁴ Jethro K. Lieberman and James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, The University of Chicago Law Review, Vol. 53, No. 2 (Spring, 1986), p.428 <http://www.jstor.org/stable/1599646>, Accessed: 05/12/2009

¹⁵GARV MALHOTRA, A Comparative Analysis of Mediation vis-à-vis Litigation and Arbitration, http://arbitrationindia.org/pdf/tia_4_1.pdf Vol.4 Issue 1, January, 2012 accessed on 15/03/1012

The time required to complete mediation varies according to the complexity of the issues being discussed. It can take less time if the parties are well prepared and understand their rights and obligations. If fewer issues are being discussed in mediation it can take less time. However, mediation can also take longer if the parties are highly emotional, do not understand their rights and obligations or simply need to discuss the issues at a slower pace in order to understand them more clearly. Because of the flexibility of the process, the mediator can accommodate all of these differences and move the mediation along at a pace with which the parties can be comfortable. Furthermore, the mediator can ensure that the discussions continue to move forward and toward resolution of the issues.¹⁶

Conclusion

In Indian democratic society for protecting and enhancing the rights of the people, judiciary plays an important role besides legislative and executive body. Disputes must be resolved at minimum cost both in terms and in money and time so that more time and resources can be spread for constructive pursuits. Desire for quick and affordable justice is universal. The existing justice system is unable to cope up with the ever-increasing burden of civil and criminal litigation. The legislative sensitivity towards providing a speedy and efficacious justice in India is mainly reflected in the Arbitration and Conciliation Act, 1996 and by incorporating section 89 in the traditional Civil Procedure Code.

Mediation is a very effective means to avoid the litigation in case where internal preventive measure fails. In mediation an impartial third party brings the disputing parties together and helps them to negotiate a mutually satisfactory resolution. Justice should be speedy, simple, cheap, and effective and substantial. In fact, it should not be called alternate, rather additional dispute resolution mechanism.

In India, however, mediation has not yet been as popular as it ought to have been, like it is in USA. One of the reasons for its being not popular is that mediation is not a formal proceeding and it cannot be enforced by courts of law. Section 89 of CPC affords several modes of resolving dispute

¹⁶ Mr. Sameer Chaudhary & Rajat Jaiaswal, *Alternate Dispute Resolution – An Idea The Time For Which Has Come* <http://articles.manupatra.com> Accessed on 01/04/2011

and mediation is one of them. Order X Rule 1 A of CPC (Check) empowers the court to refer the parties to arbitration, mediation, conciliation etc. at the time of first hearing of the proceedings which usually takes place after filling of pleadings by the respective parties. This process is takes a lot of time and by the time parties must have already lost their interest in any sort of compromise. The researcher is thus of the opinion that such intervention by the court should be exercised at the earlier stage and need not to wait till the time of first hearing. In fact mediation should be made condition precedent to arbitration.

