MEDIATION- WHETHER THE NEED OF THE HOUR IN THE PRESENT INDIAN LEGAL SCENARIO

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ABSTRACT

This paper focusses on the scope of mediation as a mode of dispute resolution in the present Indian scenario. It endeavors to understand the need for mediation by first scrutinizing the stumbling blocks faced by the Indian judiciary because of which a common man has no access to expeditious and effective justice. It further gives a picture as to the indispensable accompanying features of mediation that would make it a competent mode of dispute resolution with an overview of the manifold nature of cases that are suitable for mediation. To understand the compatibility of mediation in the Indian context, the paper analyses how mediation has been popularly imbedded in the dispute resolution process in India since time immemorial. It also gives a portrayal of the Indian legal provisions governing mediation and how these provisions are supplemented by various judicial pronouncements so as to comprehend whether they efficiently give legal recognition and authority to mediation or not. The paper concludes with a critical appraisal of the role of mediation by analyzing all the blemishes and by putting forth the statistics of cases that have successfully been resolved through mediation in various Indian states.

Keywords: Mediation, Indian Scenario, Legal provisions, Cases suitable, Success rate

INTRODUCTION

The Indian Judiciary has been tormented by innumerable stumbling blocks because of which a common man has no access to expeditious and effective justice. Mediation, one of the modes of Alternative Dispute Resolution, has played an impressive role in overcoming these loopholes to a great extent. Mediation is a system which requires the use of non- adversarial techniques for dispute resolution and through these techniques a neutral third party assists the disputing parties to resolve their disputes. Mediation is tend to be preferred over litigation because litigation is focused only on the past and merely revolves around establishing liability where in the result is a win- lose situation. On the contrary, mediation emphasizes on the future and focusses only on cooperation where in it is a win- win situation for both the parties. The litigation process is rigid, binding on the parties and is not always voluntary whereas mediation is informal, voluntary, non- binding, in short, a party friendly process. Thus, the role of mediation is gaining momentum all over the world.

NEED FOR MEDIATION IN INDIA

The Indian Legal System is regarded as one of the oldest legal systems all through the world which has continuously undergone the process of altering and developing over the past decades. Accompanying features of the Indian Legal System are heaps of cases pending due to the complex judicial proceedings intertwined in the technical jargons to which the Andhra Pradesh High Court judge, Justice V.V. Rao, while delivering the keynote address on E-Governance in Judiciary, stated that “It will be 2330 by the time Indian courts, working at the

current pace, clear the backlog of 31.28 million cases pending in various courts today."[1] Another prominent pitfall is the shortage of judges. As against the sanctioned strength of 17, 641 judges, India only has a total of 14, 567 judges which comes down to 10.5 judges per million population as against 50 judges per million population as suggested by the Supreme Court of India.[2] In addition to this, the 'climb- up' of cases where in cases are seldom resolved at the court of first instance but are appealed to the higher levels of the judicial hierarchy, lack of expertise and technological penetration in the judiciary, prohibitively expensive judicial proceedings, improper administration add up to the inefficiency of the Indian legal System.

Thus, the need of the hour is coming in of a radical innovation to the conventional mode of dispute resolution to reduce the burden on the court and deliver justice efficiently. Here comes into the picture the role of Alternative Dispute Resolution as a mechanism which would not overpower the Courts but run parallel and assist the Courts in its functioning. The probing in of this mechanism is an effect of Article 21 of the Constitution of India, 1950[3] which provides to us the Right to Life and one of the most essential facets of it being the Right to Speedy trial.

The concept of Alternative Dispute Resolution is nothing new but has been a part of the volksgiest of India since ancient times. Mediation here is a species of the ADR genesis and in today's context has been regarded as an Appropriate Dispute Resolution mode. Ancient scripts of Yajnavalka and Narada refer to three types of popular courts such as Puga (for association of traders), Shreni (for internal disputes in business) and Kula (for disputes of family or tribe). Interest- based negotiation was the dominating feature through a neutral third party. Besides this, at the village level, the Panchayat System has also been a prevalent form of alternate

[1] "Courts will take 320 years to clear backlog cases: Justice Rao", *The Times of India*, (Mar. 6, 2010), https://timesofindia.indiatimes.com/india/Courts-will-take-320-years-to-clear-backlog-cases-Justice-Rao/articleshow/5651782.cms (Last visited on November 7, 2017)
[2] *Ibid.*
[3] "No person shall be deprived of his life or personal liberty except according to procedure established by law."

dispute resolution where the panchas, or wise persons resolved tribal disputes. Despite lacking the legal authority, mediation was regularly used and commonly accepted by Indian disputants.

WHAT IS MEDIATION?

A typical understanding of Mediation could be a neutral third party assisting disputing parties so as to resolve the conflict through the use of a structured and interactive process involving specialized communication skills and negotiation strategies. It primarily is a 'party centered' process which revolves around the needs, desires, interests of the parties and the third party, the mediator, is merely a facilitator who through usage of various techniques guides the process in a constructive direction and aids the parties by helping them reach a solution which would be most favourable to both of them.

CHARACTERISTICS OF MEDIATION MAKING ITS ROLE EFFECTIVE IN DISPUTE RESOLUTION

Certain characteristics of mediation make its role in dispute resolution effective. These characteristic features are analyzed below to comprehend the efficiency of mediation.

1. Flexible

Mediation is a very flexible process which can work in disputes at any stage. In India, court-referred mediation is adopted when the dispute is pending before the court and the court would then refer the matter to mediation by virtue of Section 89 of the Code of Civil Procedure, 1908.[4] In the case of *M/S. Afcons Infra. Ltd. & Anr v. M/S Cherian Varkey Construction*[5], the Supreme

[4] Code of Civil Procedure, 1908 (Act No.5 of 1908), S. 89 and Order X Rule 1A require the court to direct the parties to opt for any of the five modes of alternative dispute resolution i.e. Arbitration, Conciliation, Judicial Settlement, Lok Adalat or Mediation.
[5] 2010 (8) SCC 24

Court while referring to Section 89 said that, "The court has the discretion to opt for any of the five methods and the consent of parties is not required in case of Court- referrals. It is assumed that Section 89 enables the civil court to refer a case to the alternative modes even in the absence of any pre- litigation agreement." The parties may also agree for a pre- litigation mediation wherein they agree to opt for mediation without initiating any formal judicial proceedings. It may also take recourse after the court proceedings have started or even at the appellate stage, post-trial. In the latter two modes, mediation is wholly voluntary and is opted only with the consent of the parties.

2. Informal

Mediation is also an informal process which is not governed by any procedural law or laws of evidence in toto which makes it convenient. The parties here decide the terms of the settlement and the ground rules relating to the session are determined by the mediator. However, it is not a casual or an extemporaneous process but is formal and structured, with clearly identifiable stages which are- convening the mediation, opening session, communication, negotiation and closure.

3. Party- centered

On top of this, what also makes mediation convenient is it being a party- centered process. The parties decide the terms, location and duration to a considerable extent. They are not imposed upon with any judgment but they are the judges of their own case who with the aid and assistance of the mediator negotiate and come down to a solution compatible with both the parties. Also, ending of a conflict depends purely on the parties. A dialogue between the parties is regarded as the best way to reach a solution. Only when the parties are willing to communicate, come down to a solution together, honestly describe the events that led to the

conflict, will there be no misunderstanding as most of the misunderstandings spring from lack of communication and this would then help the parties find a common ground to allow their joint action.

4. Confidentiality

Another plus point of mediation is that confidentiality is an accompanying feature unlike the Courts where in public can anytime witness the tragedy of another individual. Section 8(1)(i) of the Right To Information Act, 2005 exempts the disclosure of the mediation process. Also, the case of *Moti Ram (D) Tr. LRs and Anr. v. Ashok Kumar and Anr*[6] has helped assuage concerns regarding confidentiality revolving around the process of court-directed mediation wherein Justice Markanday Katju held that, "In the event mediation is successful, the mediator should simply send the executed agreement between the parties to the court and doesn't have to send what transpired during the proceedings. In case the mediation was unsuccessful, he only needs to send the report stating 'Mediation has been unsuccessful' ". Any material furnished by the parties and any document produced for/during mediation is not admissible in the courts and the courts cannot ask for its discovery. Another bonus to the confidentiality feature is that the dispute is resolved with civility, dignity and mutual respect. There is no social stigma attached to mediation like that attached to court proceedings and this further boosts the parties in bringing up their issues so as to work them out.

5. Role of a mediator

The next essential feature of mediation can be accredited to the role of a mediator in the dispute resolution process. Mediator is a neutral third party who does not adjudicate the dispute by imposing any decision on the parties but works with the parties to facilitate the process. He has

[6] [2010] 14 (ADDL.) SCR 809

a twofold role i.e. both facilitative and evaluative. For a successful meditation, the mediator's skills play an essential role. He ought to employ certain specialized communication skills and negotiation techniques so as to aid a productive interaction between the parties where by they can find mutually acceptable solutions by overcoming negotiation deadlocks. He is also obligated to remain impartial whereby his personal perceptions should not have any bearing on the mediation process and the end result should be decided solely based on the bargaining between the parties. If the dispute in question is that of a technical nature of which the mediator is not well- informed, the parties have a choice of appointing a specialist who could come to the aid of the parties. This makes the process all the more effective.

6. Mediation Award

The decision or the result of the mediation is not binding on the parties, unlike arbitration, but has the same value as of the decision of a court and the court can wholly pursue to the settlement. Finality on any kind of mediation award can be achieved by sending a Memorandum of Understanding, based on the terms settled, to the Courts to obtain a 'decree' just like in cases of normal legal proceedings. Also, the decision here is creative and profitable to both the parties as the parties are not cribbed and cabined in the limits of the traditional modes of dispute resolution. They are free to decide purely in their mutually beneficial interest without laying much emphasis on the public interest, unlike in the case of judicial proceedings.

7. Speedy and Less Expensive

Final but the most essential characteristic which lets mediation strongly overpower litigation is it being speedy and less expensive. This process is speedy because of its informal nature which neither requires the mediator to prepare as much as for trial or arbitration nor does it call for following the unnecessarily long procedural laws. Collection and presentation of

unnecessary evidences, continuation of the session even though it doesn't appear to be heading in a fruitful direction, can also be avoided which would save a lot of time. In addition to this, mediation largely lasts for not more than a few hours unlike the legal proceedings which often go on for decades. In addition to it being speedy, all of these factors contribute to it being less expensive as well.

Within a few years of establishment of mediation centres in Delhi (2005) and Bangalore (2007), roughly 30,969 cases have gone through the mediation process, and 60% of these cases have been resolved since then. This has resulted in 18,581 cases being settled in a time of two months each rather than years of fighting in the court[7]. Since its establishment in year 2006, the Allahabad High Court Mediation and Conciliation Centre has shown an effective implementation of this process and has successfully settled more than 6000 cases till date which evidently shows that these centres have very well achieved the purpose for which they were established.

CASES SUITABLE FOR MEDIATION

The role of mediation in resolving disputes is not effective in cases of all nature. When the disputing parties have a relation that they would want to preserve come what may, and when emotions obstruct the resolution, mediation as a mode of dispute resolution would be germane. These relations generally are those shared by family members, friends or business partners. Besides this, if the relation is such that one party is in a position to overshadow the other, mediation may not be yielding.

[7] Nilofer D'Souza, Mediation in Indian Courts, *Forbes India*, (Sept. 28, 2010), https://www.forbes.com/2010/09/28/forbes-india-judiciary-encouraging-mediation-reduce-baclog.html (Last visited on December 5. 2017)

The Apex Court in the case of *M/S Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.*[8] laid down categories of cases which could normally be considered suitable and unsuitable for ADR process.

"The excluded category not to be referred for ADR are:

1) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
2) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.)
3) Cases involving grant of authority by the section after enquiry, as for example, suits or grant of probate or letters of administration.
4) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
5) Cases requiring protection of sections, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.
6) Cases involving prosecution for criminal offences.

The Supreme Court also stated that all the other suits and cases of civil nature which falls under the following categories, whether pending in civil courts or any tribunals, can be referred for ADR Process.

1) All cases relating to trade, commerce and contracts (includes those relating to specific performance also);

[8] *Supra* note 5 at 7.

2) All cases arising from strained relationship, such as matrimonial cases[9] (includes those relating to matrimonial causes, custody of child[10], maintenance, partition, partnership, domestic violence[11]);
3) All cases where there is a need for continuation of the pre-existing relationship (including those relating to disputes between neighbour and members of societies);
4) All cases relating to tortuous liability (including those relating to motor accident claims/ compensation); and
5) All consumer disputes."

All of these above mentioned enumerations are not exhaustive. Certain exceptions and additions can meticulously be made to the list by the court or tribunal having jurisdiction to declare so.

From this list bestowed by the Supreme Court, it is evident that mediation is mostly available for non- criminal matters barring a few cases like criminal non- violent matters, dowry[12], cruelty, dishonor of cheques, etc. This observation can firmly be backed by the fact that the procedural law governing criminal matters i.e. the Code of Criminal Procedure, 1973, contains no express provision which empowers the criminal courts to refer the parties to the forum of Mediation.[13]The Apex Court strictly interpreted the same in a recent case of *State of M.P v. Madanlal*[14], where it held that, "Any kind of liberal approach or thought of mediation in a case of rape or attempt to rape is thoroughly and completely sans legal permissibility."

[9] *B.S. Krishnamurthy v. B.S. Nagaraj*, S.L.P. Civil) No(s).2896 OF 2010
[10] Law Commission of India, 257th Report on Reforms In Guardianship And Custody Laws In India, (May, 2015)
[11] *Dr. Jaya Sagade v. State Of Maharashtra*, SOM.PIL.104/2015-DB
[12] *Sandeep Singh v. State of Punjab*, CRM-M-38993 of 2013 (O&M)
[13] *Dayawati v. Yogesh Kumar Gosain*, CRL.REF.No.1/2016
[14] SLP(Crl) No. 5273 of 2012

LEGAL RECOGNITION OF MEDIATION IN INDIA

Any act once legally sanctioned automatically becomes effective and efficient. Though there is no particular legislation which governs the process of mediation in general, there are certain provisions recognized by various laws which makes its role in dispute resolution efficacious. Not only legislations, customs also play an eminent role in giving effect to any act as people being habituated to follow customs, inevitably obey laws in confirmation with customs.

Mediation as a mode of dispute resolution has been popularly imbedded in the dispute resolution process in India since time immemorial. The ancient Indian Jurisprudence demonstrates the same. To start with, the infamous epics like the Ramayana and the Maharbharatha, ancient sacred texts, bear a strong testimony about the existence of mediation as a dispute resolution technique. The Indian Panchayat System, popular since ancient times, is also based on the principles of mediation which established a permanent system of mediation in India.[15] Here, the village headman with a council of reliable villagers would act like mediators who would through discourse amongst themselves and the disputing parties arrive at a solution acceptable to both the parties.

A threat to this traditional mode probed in with the advent of the Britishers who imposed on the Indians codified statutory laws. Few lacunae in this imposition by the Britishers were that the understanding of the British officials of these laws were of a very high standard who couldn't thus familiarize themselves with the basic indigenous legal system prevailing in India which boosted the role of mediation. In addition to this what also boosted the role of the Panchayat System in dispute resolution was its due recognition by champions of the Indian freedom struggle like Gandhi who quoted that, "I realized that the true function of a lawyer

[15] http://delhimediationcentre.gov.in/history.htm (Last visited on December 9, 2017)

was to unite parties given 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 hundreds of cases. I lost nothing thereby-not even money; certainly not my soul."[16]

There is no legislation which governs the process of mediation particularly. While arbitration and conciliation have been given statutory backing, mediation is yet to get that status. Mediation was for the first time legally recognized in India by the Industrial Disputes Act, 1947. Conciliator was appointed by virtue of Section 4 of this Act who was obliged with the duty of mediating and encouraging settlement of industrial disputes. Other laws governing ADR before 1996 in India were Arbitration (Protocol and Convention) Act, 1937; Indian Arbitration Act, 1940 and Foreign Awards (Recognition and Enforcement) Act, 1961 but these were inadequate to address the concerns of people in the newly independent India.

In order to modernize these outdated Acts, the government enacted the Arbitration and Conciliation Act, 1996. The 1996 Act is a comprehensive law modelled on United Nations Commission on International Trade Law (UNCITRAL) Model Law which governs and regulates the process of Arbitration, Conciliation and Mediation in India with major focus on the former two. The provisions of the Act provided for the commencement of conciliation proceedings, admission of conciliators and help from suitable institution in recommending the names of the conciliators or even admission of the conciliators by these institution, submission of statements to the conciliator and the role and duty of conciliator in helping the parties in negotiation settlement of disputes between the parties. The loophole to this Act is that major focus here is on arbitration and conciliation and not wholly on mediation. Many a time's

[16] Mahatma Gandhi, *An Autobiography: The Story Of My Experiments With Truth*, 134 (6th ed. 1965).

mediation is equated to conciliation but the Supreme Court in the case of *M/S Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors*[17] clarified the key distinction between mediation and conciliation.[18] Thus, this Act would not count as a solid legislation governing mediation.

After a couple of years, the Indian Parliament enacted the CPC Amendment Act of 1999 adding Section 89 in the Code of Civil Procedure 1908, which provides for transfer of cases pending in the Courts to ADR. This Amendment was brought into force with effect from 1st July 2002.

The Supreme Court in the judgment of *Salem Bar Association vs. Union of India*[19] requested the Law Commission to prepare model rules for ADR as well as for mediation under Section 89(2)(d) of the Civil Procedure Code, 1908. In furtherance of this request, a committee headed by Mr. Justice Jagannadha Rao formulated the Mediation Rules, 2003 which in detail prescribe the appointment of the mediator, his qualifications, procedure of the mediation, guidelines about the parties, settlement agreement, fees, etc. however, even these rules would not have the same value as that of a comprehensive legislation.

[17] *Supra* note 5 at 7.

[18] Paragraph 27 "*……When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the Arbitration and Conciliation Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. ….*"

[19] (2005) 6 SCC 344.

In addition to this, there are various Provisions of the National Legal Services Authority Act, 1987, Hindu Marriage Act, 1955 and Special Marriage Act, 1954 which compromise a palpable reference to mediation.

Since the 1991 economic reforms in India and the acceptance of law reforms all over the world, the legal opinion leaders have opined that mediation should be a critical and first part of the solution to the profound problem of arrears of cases in the civil courts. Mandatory mediation ordered through courts now has a legal sanction backing it. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring civil matters to such centres. In Court-Annexed Mediation the mediation services are dispensed by the court as a part and transfer of the same judicial system as against Court-Referred Mediation, in which the court merely refers the matter to a mediator.

ADR services, under the control, guidance and supervision of the court will have more reliability and smooth acceptance. It would spread the feeling that mediation is complementary and not competition with the court system. If the reference to mediation is made by the judge to the court annexed mediation, the mediation process will become more expeditious and harmonized. It will also help in the transfer of the case between the court and the mediator faster and purposeful. This would thus enhance the role of mediation in dispute resolution.

CRITICAL APPRAISAL OF THE ROLE OF MEDIATION

Mediation, as discussed earlier, is presently the most appropriate mode of dispute resolution because of its features advantageous to the disputing parties. But like every coin has two sides, mediation too has its own set of hitches which effect its role in dispute resolution. Absence of a comprehensive legislation focusing purely on mediation is the casus belli of deficiency in the

mediating process. Other shortcomings that flow from this root cause are- lack of legal knowledge of the mediator, ignorance of legal provisions while settling disputes, not always with consent of the parties[20], fear of being exploited by the mediator or the other party if dominant, absence of putting forth the entire truth due to the informal setting, instability due to non- binding nature of the decision, inapplicability on cases of all nature, fear of resistance by judges or lawyers. Also, if the mediation is unsuccessful, the parties would again have to waste their time and money on legal proceedings which would add up to the existing burden on the Indian Judiciary.

CONCLUSION

Judiciary, the third wing of the world's largest democracy, has been suffering from umpteen blemishes and these blemishes to a great extent have been vanquished by ADR, precisely mediation. Encouraging mediation in India wouldn't be a tedious task as people are already acquainted with mediation as it has been followed since time immemorial, right from the ancient Vedic age. The current trend all over the world connotes that mediation is gaining momentum as a mode of dispute resolution and the same has also been strengthened through varied initiatives by the Indian Judiciary.[21] In addition to this, establishment of permanent institutions like the Indian Institute of Mediation, other mediation programs like the Bangalore Mediation Centre, Delhi Mediation Centre are all grand successes where in 30,969 cases have here been through mediation and about 60% have expeditiously been settled within few years

[20] Code of Civil Procedure, 1908 (Act No.5 of 1908), S. 89, imposes mediation on the parties, not necessarily with their consent.

[21] The Supreme Court of India has constituted a permanent committee of the judges to address the matters concerning mediation and is mandated to encourage and develop mediation as a dispute settlement mechanism. http://supremecourtofindia.nic.in/committees.htm (Last visited on November 25, 2017)

of their establishment.[22]As per 2013, 53% of the total cases referred to mediation cells all over the state of Maharashtra have been resolved.[23] This indisputably manifests the effectiveness of mediation and its pivot role in ameliorating the wretched plight of the Indian Legal System. Thus, mediation can in short be regarded as a prized weapon against cost, delay and injustice.

[22] *Supra* note 7 at 10.
[23] Shibhu Thomas, "*Success rate of mediation centres goes up in Maharashtra*", Nov 13, 2013 https://timesofindia.indiatimes.com/city/mumbai/Success-rate-of-mediation-centres-goes-up-in-Maharashtra/articleshow/25916737.cms (Last visited on November 25, 2017)