

THE NEED FOR MEDIATION LAWS IN INDIA

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ABSTRACT

The concept of mediation is explored in this paper as a way to reduce pending cases in the traditional judicial system. This study identifies the challenges afflicting mediation in India after analyzing the notion of mediation and the existing regulatory framework governing it in India. It then goes on to look at how many of these issues can be solved by making mediation mandatory. It explores the advantages of mediation and attempts to address some of the concerns that have been raised about it.

Keywords: Alternate Dispute Resolution, Mediation, Mediation Law, Pendency.

INTRODUCTION

Each person faces various disputes in their life. There is no origin of dispute in anyone's life it can be because of a personal cause may be because of a professional cause. But not in every matter do we approach the court for solving the dispute. If the dispute is not of that nature for which we should approach the court, then we solve it by talking and settling it. In legal language, we can say that we meditate and settle down the dispute. The mediation process is not new in India, It is an age-old process although ADR i.e., Alternative Dispute Resolution is a new trend in India. Black's Law Dictionary has defined mediation as 'A method of non-binding dispute resolution involving a third party who tries to help the dispute resolution involving a third party who tries to help the disputing parties to reach a mutually agreeable solution.' The importance of mediation can understand by looking at the statement of CJI NV Ramana which was delivered by him at the inaugural event of the two-day national conference on "Mediation and Information Technology" in Gujrat. The statement of CJI was, "I would like to begin with the mythological story that I often refer to. It is the story of mediation undertaken by Lord Krishna to prevent the war of Kurukshetra. We all know the consequences of that failed mediation. Imagine, how much destruction would have been avoided; how many lives could have been saved, and how the kingdoms would have been prospered, had Krishna

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succeeded.”¹ Mediation can be seen as a future option for the redressal of the disputes quicker and with a low cost. As the Indian judiciary is facing the pendency of various cases. According to the data from the National Judicial Data Grid, the total cases (civil & criminal) pending across all courts in the country as of April 11, 2022, are 3, 59, 77,781. The courts can't tackle all these cases that's why ADR is looking like a future option as per the statement of CJI “Embedding effective ADR mechanism into the judicial process can reduce pendency, save judicial resources, and time, and allow litigants a degree of control over the dispute resolution process and its outcome.”²

MEDIATION & EXISTING REGULATORY FRAMEWORK IN INDIA

As already stated, the concept of mediation is nothing new it has existed since the Vedic age period. There is a significant culture of mediation in India, from Lord Krishna mediating between the Kauravas and Pandavas in the Mahabharat to family elders resolving internal matters to the resolution of disputes at the community level through Panchayats. Statutes that comprise the mediation are the following: -

Section 89 read with Order X Rule 1A of C.P.C, 1908: The enactment of section 89 of the CPC, 1908 marked a major step toward institutionalizing ADR through its incorporation into the civil procedure. As per section 89 read with Order X Rule 1A of CPC, after recording the admission and denial of documents, the court shall direct the parties to the suit to opt for any of the modes of the settlement outside court as specified in section 89(1) of the Civil Procedure Code (C.P.C.), 1908.³ In India, Mediation got its causation due to the Supreme Court's judgment in the case of Salem Advocate Bar Association v. U.O.I. AIR (2005) SC 3353 In this case, the Supreme Court established a committee to ensure that section 89 is properly implemented by ensuring that justice is delivered more quickly. The group created the Model Guidelines of Mediation in 2003, which were used as a template by several high courts when they drafted their own mediation rules.

¹ <https://livelaw.in/top-stories/cji-nv-ramanacourts-must-make-mediation-negotiation-mandatory-as-part-of-case-management-196241> last visited at 13/04/2022.

² Ibid.

³ Gitanjali Sethi, India: Mediation: Current Jurisprudence and the path ahead; see at: <https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead> last visited at 19/04/2022.

Section 4 of the Industrial Disputes Act, 1947: The conciliators chosen under this provision are given the task of mediating and promoting the settlement of industrial disputes.

Alternative Dispute Resolution and Mediation Rules, 2017: This is the latest legislation in the field of mediation. It describes the ethics of mediators, appointment, role, removal, the time limit for completion of mediation, etc.

Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006: Section 18 of the aforementioned Act stipulates that any party to a disagreement regarding any amount owed under Section 17 (disputes involving the payment of the amount to MSMEs) should contact the Micro & Small Enterprises Facilitation Council. When the Council receives a referral, it must either conduct conciliation itself or seek the assistance of any institution or center providing alternative dispute resolution services by referring the matter to that institution or center, and the provisions of Sections 65-81 of the Arbitration and Conciliation Act, 1996 will apply.

Section 14 (2) of the Hindu Marriage Act, 1955, and Section 29(2) of the Special Marriage Act, 1954: In deciding any application under Section 14 for leave to present a petition for divorce before the expiration of one year from the date of marriage, the court shall have regard to the reasonable probability of reconciliation between the parties before the expiration of one year, according to Section 14 (2) of the Hindu Marriage Act, 1955. As a result, the legislators want the court to undertake mediation between the parties in the first instance.

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Section 29 (2) of the Special Marriage Act of 1954 contains a similar provision.

Section 32 (g) of the Real Estate (Regulation and Development) Act, 2016

The Authority's functions for the promotion of the real estate industry are outlined in Section 32 of the aforementioned Act. The Authority shall facilitate the growth and promotion of a healthy, transparent, efficient, and competitive real estate sector by making recommendations to the appropriate Government or competent authority, as the case may be, to facilitate amicable conciliation of disputes between promoters and allottees through dispute settlement forums established by consumer or promoter associations.

129th Law Commission of India Report: The aforesaid Law Commission Report recommends courts refer disputes for mediation compulsorily.

Section 12A of the Commercial Courts Act, 2015: Pre-Institution Mediation and Settlement is covered under Section 12A of the aforementioned Act, which is part of Chapter IIIA. The 2018 revision to the aforementioned Act added Chapter IIIA. Litigation that does not envisage any urgent interim relief shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in the manner and procedure established by rules made by the Central Government, according to Section 12A. As a result, parties must exhaust the Act's pre-institution mediation option before filing a lawsuit.

The Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018: The Central Government has framed and thereafter notified these Rules on July 3, 2018, in the exercise of its powers conferred by sub-section (2) of Section 21A read with sub-section (1) of Section 12A of the Commercial Courts Act, 2015.

Sections 37-38 and Chapter V of the Consumer Protection Act, 2019: The aforesaid provisions provide for disputes covered under this Act to be first referred to as mediation. It has been provided under Section 37 (1) of the aforesaid Act that at the first hearing of a complaint after its admission or any later date, if it appears to the District Commission that there exist elements of a settlement that may be acceptable to the parties, it may direct the parties to give in writing within 5 days, their consent to refer the matter to mediation and the provisions of Chapter V of the Act shall apply. India signed the United Nations Convention on Mediation (Singapore Convention) in 2019, making international commercial mediation agreements binding in the country. However, the concerns about enforcement can only be fully addressed after a new mediation statute is established.

PROBLEMS WITH THE EXISTING FRAMEWORK GOVERNING MEDIATION LAWS

The enactment of section 89 of the CPC, 1908 marked a major step towards institutionalizing ADR through its incorporation into the civil procedure. However, Due to the lack of one proper law for mediation, there is confusion in the interpretation and implementation of mediation provisions. And, the Supreme Court highlighted some glaring drafting errors in Section 89 in its landmark judgment in the Afcons Infrastructure Ltd. case. These include the mixing up of definitions of the terms 'judicial settlement' and 'mediation' in Section 89 and the lack of clarity as to the procedure to be followed by the court while referring matters to mediation under Section 89. Section 89 was examined by the Law Commission of India in its 238th

Report wherein it recommended substituting Section 89 with an amended provision that would bring it in line with the judgment in Afcons Infrastructure Ltd. The recommendations included specifying the stage at which the court should refer the matter to the various ADR processes mentioned in Section 89 and interchanging the definitions of mediation and judicial settlement. However, this Report has not been implemented so far.⁴

CHALLENGES & RECOMMENDATIONS⁵

Lack of Codification: - In the case of MR Krishna Murthi v. New India Assurance Co. Ltd., the Supreme Court of India highlighted the urgent need for universal mediation legislation in India in January 2020. In support of this, the court established a group to create legislation that will aid in bestowing loyal sanctity to mediation-resolved issues. And, in this connection, a bill titled The Mediation Bill, 2021 was drafted, and it was introduced in the Rajya Sabha in December 2021 during the winter session of the parliament, and afterward referred to the standing committee on Law & Justice, headed by Mr. Sushil Kumar Modi, for consideration.

Apprehension towards mediation and lack of awareness: - Mediation has never gotten a warm welcome from the legal community. According to the Bangalore Mediation Centre, 31441 cases were referred for mediation between 2011 and 2015, accounting for 4.29 percent of all new cases filed in the Bangalore High Court (Vidhi Mediation Report 2016, 11). According to the Delhi High Court's Mediation and Conciliation Centre, 13646 cases were referred for mediation during the same period, accounting for 2.66 percent of the total number of cases in the Delhi High Court. Finally, data from the Allahabad High Court Mediation and Conciliation Centre shows that 11618 cases were referred for mediation between 2011 and 2015. These cases accounted for 0.85% of the new cases filed in the Allahabad High Court. It's clear from these statistics that judges aren't utilizing Section 89 to its full potential. This can be attributed to some things. First and foremost, judges are not incentivized to refer cases to ADR proceedings since data on Section 89 referrals is neither monitored for the National Judicial Data Grid nor included in their assessment reports. Furthermore, referral judges are required to be impartial when judging the likelihood of a settlement between the parties, but this objectivity may be compromised because judges are more familiar with the adjudicatory processes (Vidhi

⁴ Deepika Kinhal, Apoorva; Mandatory Mediation in India-Resolving to Resolve; Indian Public Policy Review 2020,2(2): 49-69. Accessed at <https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf> , last seen 13/04/2022

⁵ <https://cbcl.nliu.ac.in/contemporary-issues/mediation-in-india-challenges-recommendations-and-relevance-in-post-covid-scenario/> last visited on 19/04/2022.

Mediation Report 2016, 20). This is further aggravated by the fact that there is a lack of regular training sessions for judges to sensitize them about the benefits of mediation.⁶ Training sessions and seminars should be held to educate judges on the benefits of mediation as a conflict resolution method to promote it as a viable option. This will contribute to the growth of mediation in India by creating a favorable climate.

INCONSISTENCY BETWEEN EXISTING LAWS ON MEDIATION

The Supreme Court in *M/s Afcons Infra. Ltd. & Anr. v. Cherian Varkey Construction Co. Pvt. Ltd* stated that the terms 'mediation' and 'conciliation' are interchangeable with each other. In contrast, the language of Section 89 of the CPC demonstrates that the section's legislative objective was to distinguish between mediation and conciliation. As a result, the current uncertainty has resulted in a great deal of ambiguity in the mediation process. The newly enacted Section 12A of the Commercial Courts Act is another source of confusion within the present system. To settle the case outside of court, it calls for a mandatory mediation process. However, in circumstances where an "urgent interim remedy" is requested, the clause allows for an exemption. Because lawyers do not trust the mediation process, they take advantage of this exemption by admitting even the most frivolous cases. As a result, to address the disparities in current legislation, unified legislation is required.

THE MEDIATION BILL, 2021:

With the pendency of cases crossing the 45-million mark, burdening the three-tier justice delivery system, Chief Justice of India (CJI), Justice NV Ramana, in his address at the inaugural Singapore-India Mediation Summit, 2021, stated that mediation should be made mandatory as the first step for dispute resolution and a law should be framed in this regard. The demand for a separate mediation law has led to the formation of the Mediation Bill, 2021, which intends to provide sanctity to the process as well as provide a common platform for its practice and remove inconsistencies between existing legislations.⁷

SALIENT FEATURE OF BILL

⁶ Supra Note 4.

⁷<https://www.hindustantimes.com/opinion/understanding-the-mediation-bill-101641230985397.html>

Last visited on 14/04/2022.

- Section 6 of the bill makes it mandatory for the parties to settle their civil or commercial dispute through pre-litigation mediation before approaching the court of law.
- The bill listed the matter which is not fit for the mediation under the first schedule.
- The Mediation Bill, 2021 talks about the conduct of online mediation.
- There would be given 180 days for completion of the mediation process and can be further extendable after the mutual consent of both the parties up to a maximum of 180 days.
- The mediated settlement will be final and binding in the same manner as a decree or a judgment of a court and will be enforceable by the Code of Civil Procedure, 1908.
- Toor promotes mediation and develops India into a robust center for domestic and International Mediation there will be the establishment of the Mediation Council of India.

However, the bill is in the right direction although there are certain loopholes in the legislation that need to be addressed: There is no mention of the qualification of a trained mediator nor any reference to the 'capacity to mediate'. Mandatory mediation will take away the right of the parties who are unwilling to mediate. The consequence of the non-registration of a Mediated Settlement Agreement has not been mentioned under the Draft Bill.

UNDERSTANDING THE NEED FOR MEDIATION IN INDIA

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Mediation is different from other forms of ADR such as arbitration, conciliation, and settlement. Unlike litigation and arbitration, which are adversarial, mediation is founded on pillars of cooperation and trust and is similar to negotiation. A mediator acts as a facilitator between the parties to arrive at a solution, without dictating the settlement terms.⁸ The overburdened Indian courts and their backlog of ongoing cases are constantly a source of concern. As a result, mediation is a cost-effective method of resolving disagreements amicably within a pre-determined time range. Mediation allows the parties to choose the method and procedure for resolving their disagreements based on the nature of the issue and the parties' relationship to arrive at a custom-made solution.

When arguments occurred following the viral outbreak over the nature of the interpretation of the force majeure clause, material adverse effect clause, and termination terms, it was not

⁸ <https://www.scconline.com/blog/post/2020/06/25/mediation-the-future-of-dispute-resolution/>
Last seen on 14/04/2022 at 01:04 A.M.

advisable to go to court to seek justice since essential clauses were absent or poorly constructed. There was an immediate sense that the way commercial disputes are or will be settled is altering, with a greater reliance on mediation. The effectiveness of mediation is clearly shown in the data from 2015-to 2021, out of the 109,869 cases referred to mediation by the Family Court, Tis Hazari Courts, Delhi, a total number of 95,102 were successfully disposed of, resulting in a disposal rate of 86.56 percent in that court.⁹

CONCLUSION

In this paper, I have explored the need for meditation in our judiciary system to help them out in solving disputes in less time so that the burden of the judiciary will be overcome. I have explained the concept of mediation its present legal framework and the problems associated with the present legal framework. Next, I explained the mediation bill, 2021 which is a way forward toward the mediation laws in the country. And, in last the understanding of the need for mediation and why is it important? While mediation has a big future, it should not be viewed as a cure for a broken and overburdened legal system. Instead, it should be viewed as another reform to improve our legal system's general health and it must do so in parallel. Mediation necessitates a shift in how we think about the legal system. Courts should not be viewed as the first stopover for dispute settlement, but rather as the last step when all other possibilities have failed.

PATH FORWARD

People are prone to the adversarial process by default due to a lack of public understanding regarding non-adversarial ways of dispute settlement. When the Arbitration and Conciliation Act of 1996 was passed, this altered in the event of arbitration. Because of a special statute on the subject, India now has a considerably better arbitration culture than it did in 1996. A mediation-specific regulation could also make India more receptive to resolving conflicts through mediation. Even though many statutes have provided parties the autonomy to resolve their conflicts through mediation and there are court-referred as well as private mediation options, there is a lack of clear procedural advice on this topic. Given current jurisprudence, mediation is regarded as one of the Alternative Dispute Resolution techniques. The need of the hour is to use mediation as a Primary or First Dispute Resolution mode, rather than as an Alternate Dispute Resolution option. Encouraging mediation may be the best approach to

⁹ Delhi Courts, <https://delhicourts.nic.in/dmc/statistical.htm>.

ensure that justice is delivered quickly. The Hon'ble Supreme Court of India's suggestion of an "Indian Mediation Act" is a promising proposition for India.

