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## Need of Mediation Laws in India

Neha Lakra<sup>a</sup>

<sup>a</sup>Jagran Lakecity University, Bhopal, India

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*The term "mediation" generally refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that are lacking "ordinary" negotiations. The process is private and confidential and may be enforced by law. Participation is usually voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation often improves understanding between the parties in an ongoing relationship. Compared with going to court, mediation is: less expensive quicker more informal less stressful Mediation is voluntary. The parties and the mediator have the right to withdraw at any time, although this is rare. Mediation is a flexible process that can be adapted to suit the parties and the circumstances. Mediation is purely facilitating: the mediator has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work towards practical and lasting solutions. Mediation often improves understanding between the parties in an ongoing relationship. Compared with going to court, mediation is: less expensive, quicker, more informal, less stressful, Mediation is voluntary. The parties and the mediator have the right to withdraw at any time, although this is rare.*

**Keywords:** *mediation, dispute, agreement.*

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## INTRODUCTION

Mediation is one of the methods of alternative dispute resolution in which a neutral third party who is known as a mediator assists parties to resolve the dispute through an acceptable

and voluntary agreement. The purpose of mediation is to reduce animosity and self-importance between the parties and enable them to realise and understand their priority and interest and then help them to find a self-determined and mutually acceptable resolution. Likewise, the mediator induces and facilitates the parties to enter into a positive dialogue, attends to break the impasse, and enables them to visualise their own solutions in a pragmatic manner. Mediation is a process, in which parties themselves resolve disputes, mutually agreed solution, mediator assist parties to resolve their dispute, this process includes.

**Step 1: Appointment of Mediator:** Both the parties consensually appoint a neutral mediator who is usually not essentially a lawyer but of course an expert and experienced person in this field.

**Step 2: Opening Statement:** Primarily, the process starts with the opening statements given by the mediator. In his or her opening statements, the mediator first briefs the party about the purpose, benefits, and of course rules of the mediation. A mediator also explains his or her role and other details of the mediation process. Likewise, the objective of the opening statement by the mediator is to make parties feel comfortable and the integrity of their presence and try to develop credibility and trustworthy relationships among the parties as well as reliable bonding between the mediator and the parties.

**Step 3: Joint Session:** Just after opening statements, a joint session commences. So, it can be said that it is in continuation of the opening statement. In the joint session, both the parties, in the presence of a mediator keep their points or issues one by one. There is as such no time limit, parties are given sufficient time to put their points in detail. Such discussion and dialogue are extremely significant for settling the issues in an amicable manner. In fact, such dialogue and exchange of information help the mediator to understand the issue with parties' emotions and perceptions comprehensively. However, the mediator needs to ensure that both the parties have been given sufficient time to express their concern and no one feels dejected there. Secondly, the mediator also needs to ensure that the parties are maintaining the decorum of the process so that the discussion does not break down. Besides, mediators must

not permit any rigid adversarial elements to enter in any physical or even verbal arguments so as to prevent the derailment of the mediation process.

The mediator should utilise this time as an opportunity to understand the parties, issues, and interests, and of course the priorities. Here, he or she can understand the close gap between the facts and the party's differing perceptions, as it will ultimately help parties to understand positive aspects of the relationship and the final wishes and goals of the disputants, which ultimately will help to resolve the dispute. Moreover, the extremely important point is- at this moment, mediators should not arrive at any decisions or make any conclusion or even suggest anything to either of the parties instead focus only on understanding the genesis of the dispute.

**Step 4: Caucus (Individual session):** After the Joint session, the mediator, for better understanding and also giving more space to each party, calls each party for separate meetings, which take place on different dates. The purpose of such a one-to-one meeting with each party is to encourage parties to share all other information that normally he or she cannot share in the presence of another party. So, meeting privately gives a chance to parties to open up and express every concern. On the other hand, such a step gives an opportunity to the mediator to further explore the issue in detail. At this stage, the mediator encourages the party to speak up about everything through questions or by counseling. But, the information shared by each of the parties is not to be shared or disclosed with the opposite party in any given condition; however, he or she can use that information ingeniously and resourcefully to settle down the dispute in an effective and amicable manner. Not essentially, but depending upon the case, the process of the caucus may be repeated; or in other words, mediators may conduct two or even three sessions with each party separately.

**Step 5: Agreement and Settlement:** Settling the case through a mutually agreed agreement is the final stage of successful mediation. So, in this stage, Mediator, as agreed by the parties, mixes the mutually acceptable agreement. The settlement agreement is pretty comprehensive and enlists all the points that serve the effective solution along with the respective terms and conditions.

So, it includes every aspect of the dispute leaving behind no scope for further confusion neither in respect of the dispute nor in respect of the enforcement of the settlement. And, finally, this settlement agreement will be valid only when both the parties duly signed over it.

## **CURRENT SCENARIO OF MEDIATION IN INDIA**

In India, there is no law or act that particularly deals with mediation. Mediation in India is not popular among the population and therefore people go for litigation for all the small matters, which increases the burden of the court and this is one of the reasons for pending cases in the court. Mediation has the capability to resolve all private matters and civil matters peacefully without even revealing the facts or issue to the public or any other person except the mediator. The mediator after listening to the dispute and issue of the parties provides a road map for settling aside the differences and to unite them and maintain cordial relations between the parties. It can prove to be speedier, more effective, and economical than the other adjudicative process.

Still, people hesitate to go for the mediation process. The reason might be there is no law for mediation or for the governance of the mediator, which doesn't give them the confidence or might not feel safe to go for mediation. There is no specific law to deal with mediation but there are certain statutory provisions that deal with the mediation.

- Under section 4 of the Industrial Dispute Act, 1947<sup>1</sup> conciliator is appointed to mediate and promote settlement of industrial disputes, this is the cheapest and quickest way to resolve the problems between parties but unfortunately maximum of the disputes are pending in courts.<sup>2</sup>
- Code of civil procedure, 1908<sup>3</sup> was amended in 2002. In this amendment section 89<sup>4</sup> with order X rule, 1A<sup>5</sup> provided for reference of cases pending in the court to ADR,<sup>6</sup> in

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<sup>1</sup> Industrial Dispute Act 1947, s 4

<sup>2</sup> *Ibid*

<sup>3</sup> Code of Civil Procedure 1908

<sup>4</sup> Code of Civil Procedure 1908, s 89

<sup>5</sup> Code of Civil Procedure 1908, order X, rule 1A

<sup>6</sup> *Ibid*

addition, Order XXXII-A<sup>7</sup> recommends mediation for the sensitive matters of personal relationships.<sup>8</sup>

- Section 42 of Companies Act, 2013<sup>9</sup> with companies rule, 2016,<sup>10</sup> provides for referral of a dispute to mediation by National Company Law Tribunal and Appellate Tribunal.<sup>11</sup>
- Micro, Small, and Medium Enterprises Development Act, 2006<sup>12</sup> mandates conciliation on disputes related to the payments.<sup>13</sup>
- Hindu Marriage Act, 1955<sup>14</sup> and Special Marriage Act, 1954<sup>15</sup> require the courts to first provide mediation between parties.<sup>16</sup>
- Section 32(g) of the Real Estate Act, 2016<sup>17</sup> provides for amicable conciliation of disputes through dispute settlement forums, set up by consumer and promoter associations.<sup>18</sup>

Even the 129th Law Commission of India Report recommends courts to refer disputes for mediation compulsorily. And in the case of *Afcon Infrastructure Ltd. v Cherian Varkey Construction Co. (P)Ltd*,<sup>19</sup> Supreme Court observed that all the cases related to trade, commerce, consumer dispute, tortious liability, and contracts can be solved by mediation instead of filing litigations. Despite these provisions, mediation has not achieved success in India and the same Supreme Court formed a Mediation and Conciliation Project Committee in April 2005 for the implementation of mediation and to make sure that mediation grows as an effective mode of dispute resolution and not as an alternative mechanism.<sup>20</sup>

Since there is no provision and rules that define the proper meaning of mediation; therefore, it is less formal and less binding on the parties. Since the execution of the decision is not binding

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<sup>7</sup> Code of Civil Procedure 1908, order XXXIIA

<sup>8</sup> *Ibid*

<sup>9</sup> Companies Act 2013, s 42

<sup>10</sup> Companies Rule 2016

<sup>11</sup> *Ibid*

<sup>12</sup> Micro, Small, and Medium Enterprises Development Act 2006

<sup>13</sup> *Ibid*

<sup>14</sup> Hindu Marriage Act 1955

<sup>15</sup> Special Marriage Act 1954

<sup>16</sup> *Ibid*

<sup>17</sup> Real Estate Act 2016, s 32(g)

<sup>18</sup> *Ibid*

<sup>19</sup> *Afcon Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* Civil Appeal No 6000/2010

<sup>20</sup> *Ibid*

in every effective way, so it is less trustworthy, mediation is not known to many people of the country and these are the reasons why mediation is not successful in India and people go for filling litigations in the courts irrespective of a large sum of money and time they have to spend.

## NEED OF MEDIATION LAW

As discussed above, due to lack of mediation law, parties or people don't find mediation reliable and take it as an alternative or as the last resort, despite the fact how feasible, simple and flexible it is. Implementation of mediation law will ease the work of courts and disputes will be resolved effectively and efficiently and the decision will be not in the favour of one party but will support or in favour of both the parties because it will be based on the negotiation by both the parties.

Mediation has a number of advantages like:

- **Simple and Flexible** - The process of mediation is pretty simple, less formal, and flexible, as parties can customise as per their convenience.
- **Economic and Less Expensive** - Mediation is a very less expensive method of dispute resolution that saves money in a number of ways.
- **Effective and Time-Saving** - The mediation process is effective in the sense that it gives the opportunity to parties to resolve the dispute by themselves and make it possible in a couple of weeks or in a month.
- **Gives Creative Solution** - Mediation facilitates parties to devise a creative way or even customise the method and decision in their own ways, as in this method, parties retain full control over it.
- **Maintaining Confidentiality** - Mediation is an entirely closed-draw and private method of dispute resolution which guarantees the confidentiality of the process, disputes, issues, and final outcomes.
- **Preservation of Relationship** - This one is one of the biggest advantages that mediation preserves the party's friendly relationship by giving the opportunity to both the parties

to resolve the dispute by themselves. In fact, mediation encourages transparent communication, participation, and collaboration with each other and understanding each other's issues and interests in a composed and friendly environment. It focuses on long-term bonding and fosters healthy and everlasting mutual understanding.

- **Win-Win Situation** - Last but not least, since it promotes mutually acceptable resolution; hence through this process, both the parties win the case and no one, in fact, loses the case.

A legislative framework on mediation and its practice is the only way for the success of mediation in India. As it will restore the faith of people in the mediation and will ensure that ethical practices are followed in the mediation process. This framework will not only encourage people to opt for mediation but also help in the fast disposal of issues by bringing parties on the same ground and helping them in the best possible manner.

#### **INDIA'S PROPOSED MEDIATION LAW**

There is no legislation currently in India, there have been proposed legislation which has been put in the effect itself put in proposed legislation there is one bill pending in the parliament which will hopefully see the light of waste soon and bring about very substantial and very needed changes to regulate this currently unregulated system of dispute resolution. The legislation that we have is with respect to litigation, with respect to arbitration and conciliation but nothing related to mediation as of now. And yet mediation has been going as far as the corporate sector many litigated cases concerned to move in the process of mediation.

Proposed legislation to bring in India by two things happened recently to bring about in India accelerated the need for this kind of change. First of all, like most of us have suffered covid-19 because of a covid-19 legal system actually the most devastating hate. A legal system completely shut down for a period of time in order to figure out processes for transferring all the physical hearings that were taking place online. Now, at High Court and Supreme Court where this is still doable if they have finance, they have their budget, they have possibly more financially well off parties litigation who can a for lawyers all of these can come together very

easily at Supreme Court and high court level. But, at the lower court level, it becomes very difficult to establish this kind of system where we are talking about countries in which we do not have internet access available in a very large part of the country. To have a dispute resolution mechanism of litigation that is completely relying on external resources like the internet makes it very difficult to be accessible for the general public. Now in that way, alternative dispute resolution mechanisms like mediation have really picked up and we both think by 2030, mediation will become the second most used form of dispute resolution after litigation, any other form of dispute resolution will be the backbone of dispute resolution mechanism in India.

In fact, it should be going parallel hand-in-hand litigation. Secondly, the Karnataka High Court decision set an alarm Bell among the legal fraternity that the court should not seek permission to put the matter in mediation. The concept of mediation as a system is a voluntary mechanism for dispute resolution which basically means there is a party A and B who are having a dispute and nobody can force them to come to mediation. Now, when it comes to cold and this was in the context of court and mediation wherein the matter was before the court and Karnataka High Court said that this matter will be referred to mediation and we do not seek the permission of parties to refer the matter in mediation. This similar kind of approach also there in some legislation commercial act amendments have been made which mandate pre-litigation mediation, a system which basically ensures that the litigation is not a first option which is present before the parties as soon as a dispute arises. The act itself suggests going for mediation if mediation fails then use litigation as the alternative to resolve your dispute but immediately not in the door of courts.

## CONCLUSION

Mediation is one of the fastest and most reliable ADRs because of its nature of negotiating on the same grounds and not imposing one's decision on parties. Mediation has the capability to protect the facts and issues of the parties by not disclosing it to the public and only with the mediator, who will be selected by the parties to reach a conclusion which is in favor of both of them, it will set aside the differences and unite them and maintain cordial relation between

parties. There are numerous statutory provisions that promote mediation but due to lack of law dealing or regulating mediation, people don't have faith in it and they take it only when the party doesn't have another option. In fact, a large population doesn't even know what mediation is and how it's been done. A statutory framework will not only regulate mediation and its process but also encourage people to opt for mediation. Mediation allows people to solve their problems in less time than without spending big amounts, maintaining confidentiality, and protecting the relationship between parties. And it will definitely save a lot of time for the public and will decrease the burden of courts as maximum problems of civil matters can be solved easily through mediation without going to court.