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Increasing Importance of Mediation

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This paper represents the two main aspects of mediation, which is a new buzzword in law. We see the reasons for people preferring mediation over litigation and changing provisions in law with time. In today's Indian judiciary the very problem which comes is the burden of cases. Alternative dispute resolution (ADR) is playing a vital role in the lightning burden. The paper discusses the benefits of mediation and why it's increasing in importance and the problems that our system is facing in mediation or why the mechanism is still on the way to success? And finally, help in recommending that India should introduce a modified version of that.

Keywords: *mediation, alternative dispute resolution, mandatory mediation.*

INTRODUCTION

The term 'Mediation' means it is a procedure for resolving disputes between two parties by a third neutral or impartial party called Mediator. Third neutral party assists disputants in arriving at a settlement. It is an informal way of solving disputes¹ (WIPO, n.d.). Mediation is an important mechanism of alternative dispute resolution, it is an alternate option over litigation, and it includes mediation, negotiation, conciliation, Lok Adalats, and more. In India

¹ 'What is Mediation' (WIPO) <<https://www.wipo.int/amc/en/mediation/what-meditation.html>> accessed 10 April 2022

according to the 2020 analysis the total no. of pending cases was 3, 59, 08, and 679 including civil and criminal matters. From this analysis, we can take an idea of a burden on the shoulders of the Indian judiciary. The matters which are not complex and not fully evidential like marital disputes, labor disputes, commercial issues, domestic issues, divorce-related or there is no provision on boundaries but the matters must be simple in nature, civil cases and criminal non-violent cases included. The mediator must possess specialized skills and requisite training. There are a few loopholes in the existing functioning of the mediation that is the reason for not getting the deserved heights and for making the public aware 'Mandatory Mediation'² has made but had many critics.

WHY MEDIATION IS PREFERABLE TO LITIGATION?

There are numerous benefits of choosing mediation. First, is affordability the mediation is very cost-effective over litigation the high fee of the advocates is not payable by everyone³ (Saxena, 2017,). Under the court-run -mediation scheme the mediation cells which are attached to the courts and cases from courts parceled there where services are usually free, the court pays an amount to the mediators. When disputes directly approach mediation to resolve their dispute not referred by courts, there is a fee for private mediation is 7000-30,000 per day, and parties pay equally.

Second, it is a time-saver. Many disputes in courts take years and the result after 10 or 20 years does not mean, mediation is speedier, many cases are solved in a half or full day⁴ (shah, n.d.). Third, the harsh formalities and procedure, in litigation consumes time, mediation is an informal way of solving disputes with zero formality. Fourth, is confidentiality the parties do not need to disclose everything if not comfortable in courts they have no options. In litigation, once the verdict passed is in your interest or not, no matter what you have to follow in mediation the parties are not bound by any law they are free to deny the settlement and can

² Aashna Reddy & Udai Nanda, 'Mandatory Mediation in India-A step forward?' (*Mediate India*, October 2021) <<https://www.mediate.com/articles/reddy-nanda-mandatory-mediation.cfm?setedition=IND>> accessed 08 April 2022

³ Cara O' Neil, Mediation: The Sixth Stage' (*Nolo*) <<https://www.nolo.com/legal-encyclopedia/mediation-six-stages-30252.html>> accessed 08 April 2022

⁴ 'Speech by Mr. Sameer Shah- Mediation: A Cost Effective Tool For Resolution of Disputes for MSMES' (*Bombay Chambers of Commerce and Industry*, August 2021) <<http://centre4mediation.com/speech-by-mr-sameer-shah-mediation-a-cost-effective-tool-for-resolution-of-disputes-for-msmes/>> accessed 08 April 2022

quit the mediation any time in mid. The free consent of both parties is the essence of the mechanism. In law, the one-party wins or another loses, in mediation, everybody is a winner no one loses. The final settlement belongs to the interest of both, the mediator does not have the right of discretion that who is right or wrong he assists them, and through discussion, parties get a solution themselves⁵ (Saxena, 2017,).

The settlement agreement is the only record of proceedings. Friendly resolution is an attractive component of mediation that preserves the interrelation of parties. Mediation conferences held at a mutually agreeable neutral place can be the office of the mediator. The steps of mediation are first after disputants are seated at a table, the mediator introduces everyone, explains the goal and rules of mediation, and cooperates with each side. In the second session, each party is invited to describe disputes and consequences while one person is speaking and the other is not allowed to interrupt then, in joint session mediators encourage the parties to respond directly then, both parties get a chance to talk privately with the mediator called 'Private Caucuses⁶ (NOLO, n.d.)'.

The mediator might bring back the parties together to negotiate directly, he did this only until a settlement is reached or the time allotted ends then the mediator prepares a written agreement of the terms they reach or ask the parties to sign and send it to the attached court for getting approved. In a conference, regarding awareness of mediation in Bangalore, jurists by keeping the benefits in their mind said that the future belongs to mediation. We need to use this mechanism as the first mode of resolution for civil disputes and call it an innovative and peaceful way of solving disputes. Mediation awareness drives over 65 cities of India by directly engaging with over 50 lakhs people across the nation in an Indian Mediation Week (IMW) successfully organized in three cities Kolkata, Delhi, and Bangalore. Now we see the laws regarding mediation in India.

⁵ *Ibid*

⁶ Cara O' Neil (n 3)

LAWS REGARDING MEDIATION IN INDIA

Mediation got its first light in the eyes of law in 1947 through the Industrial dispute act; 1947. It is increasingly being included in newer provisions.⁷ Chapter-5 of the Consumer protection act specifically deals with mediation. Section 74, 75, and 79 include mediation cells attached with the commission, empanelment of mediators, and procedure for mediation. Section 442 of the Companies Act, 2013 provides a mediation and conciliation panel to be maintained by the central government or national company law tribunal (NCLT), or National company law appellate tribunal (NCLAT)⁸. The panel disposes of the matters within 3 months from the date of reference. Mediators can be removed from the panel for misconduct or poor performances. We have two training courses for mediators one is a Basic training course which takes 40 hours and the second is an Advance training course which takes 20 hours. The first mediation training session was organized in Ahmedabad in the year 2000 by ISDLS, a non-governmental organization. The Chief justice of India inaugurated a mediation center in 2002 in Ahmedabad. The mediators shall not be liable for anything done by them in good faith. *Section 89 of the civil procedure code, 1908* empowers the courts for referring cases to the mediation and cost-free services to the litigants.⁹ Mediation was central to the discussion in a three-day event of the Global Pound Conferences series India held in Chandigarh on the theme 'Shaping the Future of Dispute Resolution and improving access to Justice. Commercial courts act, 2015 which was last amended in 2018 provides for pre-institution mediation and settlement. Section 12(a) of this act makes it mandatory for the disputing party to attempt mediation before filing a suit. Model Rule, 2003 allows professionals apart from legal practitioners to become mediators, this serves as a model in various High courts in framing their own mediation rules. Numerous provisions are also provided in dispute resolution clauses in contracts and Hindu or Special Marriage Act, Family court act, 1984, Arbitration and Conciliation act, 1996 part third, and more.¹⁰ In the recent covid pandemic Online Dispute Resolution (ODR) has also

⁷ Rachel Thomas, 'Statutory provisions relating Mediation' (*White Code Via Mediation & Arbitration Centre*) <<https://viamediationcentre.org/readnews/NTY=/Statutory-Provisions-relating-to-Mediation-in-India>> accessed 09 April 2022

⁸ *Ibid*

⁹ Code of Civil Procedure, 1908, s 89

¹⁰ Rachel Thomas (n 7)

been made, there is no legislation on ODR¹¹ in India yet. Now we see some drawbacks of this mechanism and which kind of steps we can take to make it a more healthy part of the legal system.

RECOMMENDATIONS AND PROBLEMS IN THE EXISTING FRAMEWORK OF MEDIATION

The existing mediation framework in India has not allowed for reaping its full potential. According to the analysis in 2011-15 in Bangalore, Delhi, or Allahabad only 4.29%, 2.66% and 0.85% cases of total pending cases have been transferred. This data is evidence that judges are not using Section 89 to its full potential. The main reason is that the judges are not incentivized to refer cases to ADR and lack regular training sessions for judges to make them understand the mediation benefits. There is a lack of clarity on the enforceability of its outcomes. For spreading awareness about mediation we need to include it as part of the legal education curriculum. Knowledge of mediation is sorely lacking among the general public.

Mediation is not treated as a separate profession, so there are hardly any courses at the university or college that students can take up to become mediators. Each party is waiting for the other to make the first move and does not want to be seen as weak. This is where Mandatory mediation comes into play, which is said to be a stepping stone but many authors suggest that mandating parties to simply attempt mediation would mean that it no longer remains voluntary which is the essence (Jayashima, 2021). Some also argued that mandatory mediation is ineffective if the parties to the dispute and their lawyers do not participate in the process in good faith and are only trying to obstruct the process. Sometimes clients express a desire to punish the opposition through litigation. One more obstacle is the unavailability of funds (Geetha, n.d.).

¹¹ Sibasish Mishra & Sambhavi Srivastava, The ODR Policy plan for India- Paving The Way To A Brighter Future For Dispute Resolution In India' (*Mondaq*, 14 February 2022) <<https://www.mondaq.com/india/arbitration-dispute-resolution/1161056/the-odr-policy-plan-for-india-paving-the-way-to-a-brighter-future-for-dispute-resolution-in-india#:~:text=A.K.,dispute%20containment%2C%20and%20dispute%20resolution.>> accessed 09 April 2022

CONCLUSION

In this paper, we have examined the need for mediation, one of the main components of alternative dispute resolution in the country. We have also tried to understand the mediation benefits and critics and come to know that if we did some changes in our system or vision then mediation is having the potential to handle an overcrowded court system. Finally, we have suggested a mediation model suitable for India.