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Mediation: An Indian Perspective

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Indian culture has a long history of resorting to alternative dispute resolution methods but it was still not recognized by the Indian judicial system until 1947. This article discusses all the active efforts made by the Indian legislature and judiciary to make people aware of this party-friendly, time-saving, and hassle-free adjudication process. At all levels the judiciary is trying to push the Alternative dispute resolution process as the first resort by the parties to a dispute by way of forming certain forums, formulation of rules, mandating the parties to seek a remedy through it, and making people aware.

Keywords: *mediation, judiciary, civil procedure code, arbitration, transparency, neutrality.*

INTRODUCTION

Mediation is an age-old dispute resolution process by the disputing parties mutually. It is preferred by the people for out-of-court settlement of the issue amicably and to keep it private (especially family issues, and divorce matters). But the scope of mediation is not limited to such matters only and has gained recognition in commercial, civil, contracts related matters as well because of its party-friendly features i.e. consensus, flexibility, cost-effective, time-saving, active participation of the parties to the dispute, severability, quick, fewer hassles, party-centric. Traces of mediation, practices by various tribes, cultures, and religions, can be seen

in India but it has been recently been recognized as a proper dispute redressal process along with the conventional court system. The active initiatives taken by the Indian legislature, judiciary, and executive authorities have helped in making it an established legal procedure, with enforceability, in the country. Both courts referred to mediation (section 89[1] of Civil Procedure Code, 1908) and private mediation (part III[2] of Arbitration and Conciliation Act, 1996) are warranted under the Indian legal system. For the purpose of the Mediation, a facilitator (mediator) party is appointed to direct the parties in order to bring them to an understanding. It is an independent party, with no interest in the disputing parties, who acts as a buffer and manages the process; promotes communication; reduces the altercation, and motivates them to reach a conclusion amicably as per their needs. The appointment of a mediator is fully governed by the various rules and regulations sanctioned by the legislature and courts.

A revered Indian Jurist Patanjali said *"Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong"*

Mediation has significantly gained popularity in this world of reaching a convention court as a first remedy because of its party-centric features and legal recognition. Litigation is a blame game in which each party fights for their claim and the court in the end imposes the solution. Rather the settlement of a dispute is made through negotiations, considering the demands of the parties and their agreed-upon terms. A lot of emphasis on the adoption of the Alternative Dispute Resolution processes by the institutions of the Government is because it works both ways, it reduces the burden of the pending disputes on the judiciary and helps to resolve the issues of the people in a quick and amicable way.

HISTORY OF ADR

Our India, regarding the evidence of the practice of informal dispute resolutions, has not been documented so well but it is believed to be practised across all the tribes, communities, and cultures. It is still being practised by various tribal communities as a primary dispute redressal

[1] Civil Procedure Code, 1908, s 89
[2] Arbitration and Conciliation Act, 1996, Part III

mechanism, that is aloof from current legal developments. The early Aryans, around 4000 B.C., first invoked the philosophy of mediation based on wisdom, reason, and prudence. They first propounded the theory of divine law (that governed heaven and earth) and based on which the people co-existed for centuries. Over time the philosophers started legal debates as to the means of dispute resolution, laws in force, jurisprudence, and various other topics around the law. The invasion of Afghans by, the British has caused racial, religious and cultural differences in the past 1000 years, but each era provides proof of mediation as a process of dispute resolution method. Gautam Buddha said, "*Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom*". It is also can be seen as a practice followed in the Mughal rule. The practise continued till recent times in the form of village panchayats (a five-member body of wise people), who helped parties to settle disputes based on the cultural practices of the society. With the growth in size and complex structures of the societies, these regional and cultural methods of dispute resolution were outperformed by the formal and common justice delivery system. And societies need to first evolve a system of dispute resolution to cope with the forthcoming complexities of the growth in trade and commerce.

MEDIATION AS A TOOL TO OBVIATE PITFALLS OF LITIGATION

"*Justice delayed is justice denied*" in the words of *William.E. Gladstone*, it could be clearly understood that once you knock on the door of court then it becomes very hectic to come out of the vicious circle of lengthy court procedures, which causes ample amount of delay in getting justice.

The major pitfalls of our litigation which are a hindrance in the way of justice are-

- Protracted procedures of courts- The courts of our country work in compliance with the procedures that are prescribed by the laws, along with the substantive codes there are procedural codes that are to be followed while deciding a case like the Code of Criminal Procedure for criminal proceedings and Code of Civil Procedure for the civil cases. In a criminal case when a complaint is filed against a person, then there is a complete

investigation by the police where evidence is collected and a charge sheet is framed then eventually after months the proceeding start before a magistrate who then conducts an inquiry, examine evidence and witnesses, and after all the investigation the accused is acquitted or convicted, all these is not done within a day or month it takes years after years for the courts to dispose of a case, a person has to pay multiple visits to the court to seek justice, in the same way in civil cases the parties have to suffer a lot on the cost of lengthy procedures, in the cases of recovery of property the proceeding goes on from generation to generation without any outcome. The pendency of cases in India got growth by 2.8%[3] annually in a decade(2010-2020), According to National Judicial Data Grid, there are 1,07,94,455 civil cases and 2,74,13,117 criminal cases pending before the courts out of which 40,351 civil cases and 76,274 criminal cases are those which are under proceeding from 30 years.

All these numbers are evidence of the fact how much a person has to thrive in our country to get justice from the Indian courts.

- Expense - *"Legal systems are geared in favour of rich and powerful"- Justice Deepak Gupta.* It is very unfortunate that a person who has the hand to mouth survival strives to pay hefty fees to his lawyer, the huge cost of litigation is depriving indigent and destitute people of getting justice, we need to understand that people in our country do not have sufficient means to attend the courts multiple times throughout the year. The people who have sufficient resources walk out of the courts and the poor people are exploited under the facade of getting justice.

Mediation being a structured process obviate the rigidity of litigation because the mediator is not bound to follow the long process of courts, under Rule 10[4] of Alternate Dispute Resolution 2003, he could opt for the procedure which is best suited for the interest of the parties,

[3] 'Pendency and Vacancies in the Judiciary' (*PRS Legislative Research*) <https://prsindia.org/policy/vital-stats/pendency-and-vacancies-in-the-judiciary#:~:text=As%20of%20September%2015%2C%202021%2C%20over%204.5%20crore%20cases%20were,and%2012.3%25%20in%20High%20Courts.&text=Between%202019%20and%202020%2C%20pending,and%2013%25%> accessed 24 April 2022

[4] Alternative Dispute Resolution and Mediation Rules, 2003, r 10

moreover, under Rule 11[5] of Alternate Dispute Resolution 2003, mediation does not require to follow the rule of evidence, so the parties need not thrive to bring relevant evidence unlike the proceeding in the court where it is necessary to produce evidence in order to shift the burden of proof on other parties, so if the evidence could not be presented before the court then case will not proceed and hence it elongates the procedure to an undesirable time.

LEGAL RECOGNITION OF MEDIATION IN INDIA

Though mediation being practised for a time since immemorial, the formal recognition of the mediation was not until 1947. It got its legislative validation by way of the enactment of the Industrial Disputes Act, 1947. The Act provides a comprehensive set of tools for conciliation. Section 4[6] of the Act appoints conciliators who are "charged with the duty of mediating in and promoting the settlement of industrial disputes". The dispute resolution process of Arbitration was first acknowledged in 1879. The original statute of the Civil Procedure Code of 1908 had the provision for arbitration (section 89)[7] but was scrapped after the Arbitration Act 1940 was passed. However, section 89[8] of the Civil Procedure Code was later revived by the Civil Procedure Code (Amendment) Act, 1999. This section deals with court-annexed mediation.

The National Legal Services Authority was formed by the legislature by way of enacting The Legal Services Authorities Act, 1987. The Chief Justice of India was made the patron-in-chief with the objective of encouraging the people to adopt the processes of Alternative Dispute Resolutions, to increase the awareness regarding ADR in schools, colleges, and universities. A special act was enacted by the legislature with the comprehensive procedures, rules, and remedies in 1996 i.e. Arbitration and Conciliation Act. Part III of this act also recognizes private mediation. Mediation is treated as a primary remedy in commercial disputes. Section 12A[9] of the Commercial Courts Act, 2015 makes it mandatory for the pre-exhaustion of the mediation before the litigation. Other than providing a remedy for the civil cases it is treated

[5] Alternative Dispute Resolution and Mediation Rules, 2003, r 11
[6] Industrial Disputes Act, 1947, s 4
[7] Civil Procedure Code, 1908, s 89
[8] Civil Procedure Code (Amendment) Act, 1999, s 89
[9] Commercial Courts Act, 2015, s 12A

as primary redressal in trade-related cases. The Supreme Court of India has formed a Mediation & Conciliation Project Committee to discuss and brainstorm the ways to promote the Alternative dispute redressal methods instead of approaching the conventional courts. The committee has held regular sessions in various cities in India i.e. Lucknow, Jammu, Bangalore, and Mumbai. This committee devised a comprehensive training manual for mediators i.e. Mediation Training Manual of India. The government has provided exhaustive rules through an official gazette to govern the Arbitration in India such as The Commercial Courts (pre-institution Mediation & settlement) rules 2018, Civil Procedure Alternative Dispute Resolution & Mediation Rules, 2003, Alternative Dispute Resolution and Mediation Rules, 2002, The Companies (Mediation and Conciliation) Rules, 2016.

STEPS NEED TO BE TAKEN TO MAKE MEDIATION AS FIRST RESORT

There is a need to make mediation much more effective by filling the gaps in the underlying mechanism so that it could be brought into the mainstream. There is a need of making pre-litigation mediation a mandatory process, this issue was addressed by Honorable CJI N.V. Ramana at India Singapore Mediation Summit 2021, where he said that laws shall be framed and enforced so that parties are bound to move to a mediation centre before going to the courts. As of now, there are 839 mediation centres in India with 6480 mediators, however, there is no statutory body that provides for the qualification of mediators, and also there is no accountability for their work. So there shall be a regulatory body for the appointment and accountability of mediators. The mediation bill of 2021, drafted on the same lines seeks to achieve the objective of promoting, encouraging, and facilitating mediation, this bill also mandates the disposal of cases within 180 days, and even then if parties could not settle their issues it could be extended to next 180 days, moreover, it provides for the establishment of Mediation Council of India to regulate mediation throughout the country. This bill if enacted would make mediation an even more reliable and desirable option for the parties to settle their dispute outside the court.

CONCLUSION

With the Indian judiciary at its own level trying to create an ADR-friendly environment and the Indian legislature enacting statutes and rules to give it a proper legal sanction, India as a whole is trying to popularize the mediation. However, there exist some discouraging factors or barriers to the success of the mediation in India. The problems are the time limit of a mediation case; transparency, neutrality, and credibility of the mediator, as mediation is a private process and is not watched by any authoritative body directly. Addressing these problems is necessary & the sole purpose of this is to eliminate these flagging concerns and not to discourage mediation as a dispute resolution method.