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The Saga of Mediation Bill, 2021

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The Centre introduced The Mediation Bill, 2021 in the Rajya Sabha in the late December of 2021 and was referred to the Parliamentary Standing Committee to assess and analyse the provisions of the Bill in order to rectify the red flags raised by the professionals on the subject matter. Mediation is a form of Alternate Dispute Resolution system where parties decide to resolve disputes outside court judgements. As such, the Bill has envisaged facilitating and promoting mediation in India, particularly institutional mediation for the resolution of disputes. It aims at encouraging community mediation and making online mediation an acceptable and cost-effective process. The bill proposes codifying mediation laws and enforcing settlement agreements reached through mediation. This article tries to shed some light on the lacuna of the Bill. Furthermore, it discusses the recommendations made by the Standing Committee and the steps forward for India in terms of Mediation.

Keywords: *mediation, standing committee, alternate dispute resolution, settlement agreement.*

INTRODUCTION

The word Mediation is usually confused with other forms of Alternative Dispute resolution systems, nonetheless, they are of similar nature in the way that they are settled outside the judicial system. It is a system envisaged to strengthen and assist the judiciary in lessening the crores of cases. Various countries including Australia, Singapore, and Italy have standalone laws on mediation. Numerous bodies have suggested enacting separate mediation legislation

in India, including the Supreme Court (2019) and a High-Level Committee (2017) that reviewed the institutionalisation of arbitration mechanisms.¹ Additionally, a Supreme Court committee formed in 2020 recommended and prepared a draft umbrella legislation to protect mediation as a form of dispute resolution.² The Mediation Bill, 2021 seeks to promote mediation, particularly institutional mediation, and provide a mechanism for enforcing mediated settlement agreements. The Bill after introduction in Rajya Sabha has been referred to the Standing Committee on Personnel, Public Grievances, Law and Justice.

HISTORY OF MEDIATION IN INDIA

Mediation is nothing new for a vast country like India. It existed even before the commencement of the Indian Constitution but just not on paper. As Panchayati systems prevailed before the Constitution, the mediation system too existed before. Mediation was practised in Panchayati Raj systems where the same process of mediation was undertaken by the sarpanch or by other senior members of the locality. All in all the aim is to achieve a win-win situation for the parties. Now, this system is made into a formal form of dispute resolution, and the Indian Parliament by amending the Civil Procedure Code, 1908 has started governing the ADR functioning in India. With the amendments of 1999, and 2002 and the enactment of the Arbitration and Conciliation Act, the ADR system has become more resilient and is seeing country-wide results. This ADR system includes mediation, arbitration, conciliation, negotiation, and Judicial settlement through LokAdalats.

BACKDROP OF MEDIATION BILL, 2021

The institutionalisation of the ADR mechanisms started with Hong Kong and Singapore, the first countries to be globally recognised for their laws and rules on ADR mechanisms. After the United Nations Commission on International Trade Law (UNCITRAL) Model on Commercial International Arbitration was adopted in 1985 India came up with an act for Arbitration in India. The act solidified the structure and foundation of the Arbitration system. Yet there were

¹ *M.R. Krishna Murthi v New India Assurance Co. Ltd.*, (2019) Civil Appeal No. 2476/2019

² NITI Aayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India, 2021' <<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>> accessed 18 July 2022

few aspects out of the loop which led to the two amendments made in 1996 and 2002. These amendments, albeit made with the intention to ease the whole procedure, created more complications with the existing laws. These complications were further cleared by the Supreme Court in the case of *Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. (P) Ltd*³, which changed the course of ADR systems in India. This case effectively differentiates between the disputes which can be referred to as ADR, thereby providing an illustrative though not an exhaustive list of types of disputes applicable for ADR.

The applicability of the Bill under section 2 is found to be along the lines of this list. Furthermore, the Indian Judiciary has time and again referred to ADR systems as one of the faster and cheaper methods of dispute resolution. In his address to the India-Singapore Mediation Summit 2021, Hon'ble Justice N.V. Ramana emphasised the role mediation can play and the absence of mediation laws in India. India does have an Arbitration and Conciliation Act. And the mechanism of mediation till now has existed passively through other legislations like Civil Procedure Code, 1908, Companies Act, 2013, Arbitration and Conciliation Act, 1996, and Commercial Courts Act, 2015. In this background, the introduction of the Mediation Bill, 2021, in the Rajya Sabha is an appropriate measure in the right direction but the anomalies the Bill has attracted have to be looked into before going ahead with the Bill.

MEDIATION BILL, 2021- A GLIMPSE

With the advent of modern technological solutions brought to light in the COVID Pandemic, there has been a rise in awareness for ADR solutions across India. As per data published by the National Legal Services Authority for the year 2021-22, India had 464 ADR centres (397 functional), 570 mediation centres, 16,565 mediators, and nearly 53,000 cases were settled through mediation. This coupled with rising civil cases which are over 4.4 crore pending cases as of September 2021, signifies the need for a solid-fool-proof framework for mediation. As such, the Government has come up with a Bill specifically for Mediation in order to tighten the framework and functioning of the process.

³ *AFCONs Infrastructure Ltd. and Ors. v Cherian Varkey Construction Co. (P) Ltd.*, (2010) Civil Appeal No. 6000/2010

KEY ELEMENTS BROUGHT IN BY THE BILL

Pre-litigation mediation: Before approaching any court or certain tribunals, parties **must** attempt to settle disputes through mediation. Regardless of whether the parties were able to reach a settlement through pre-litigation mediation, a court or tribunal may still refer them to mediation if they request it.⁴

Disputes are not fit for mediation: The Bill lists certain types of disputes not fit for mediation. These include disputes: (i) relating to claims against minors or persons of unsound mind, (ii) involving criminal prosecution, and (iii) affecting the rights of third parties. The central government has the power to amend this list.⁵

Application of Bill: The Bill will apply to mediations conducted in India (i) involving only domestic parties, (ii) involving at least one foreign party and relating to a commercial dispute (i.e., international mediation), and (iii) if the mediation agreement states that mediation will be as per this Bill. If the central or state government is a party, the Bill will apply to (a) commercial disputes, and (b) other disputes as notified.⁶

Mediation process and mediators: During the mediation process, all proceedings will remain confidential,⁷ and the process must be completed within 180 days (as extended by the parties). After two sessions, a party may withdraw from mediation.⁸ In court-annexed mediations, the rules outlined by the Supreme Court or High Court must be followed. Mediators shall be appointed either by the parties to the agreement or by a mediation service provider.⁹ In case there is a conflict of interest among these mediators, it shall be notified and the parties will have the freedom to choose a new mediator.

Mediation settlement agreement: Mediation agreements include written and signed agreements formed between the parties of mediation settling their disputes. Mediation

⁴ Mediation Bill, 2021, s 6

⁵ Mediation Bill, 2021, s 7

⁶ Mediation Bill, 2021, s 2

⁷ Mediation Bill, 2021, s 23

⁸ Mediation Bill, 2021, s 21

⁹ Mediation Bill, 2021, s 10

agreements (other than community mediation) will have the same legal effect as court judgments. They will be final, binding, and enforceable to the same extent as court judgements.¹⁰ They may be challenged on only or all of the following grounds: (i) fraud, (ii) corruption, (iii) impersonation, or (iv) disputes/matters not fit for mediation.¹¹

Community mediation: Disputes likely to affect the peace and harmony among local residents may be resolved through community mediation. It will be conducted by a panel of three mediators which may include prominent members of the community and representatives of resident welfare associations. This is an innovative step taken to achieve communal peace and harmony in the country, the functioning and benefits of such a step would be an interesting development.¹²

Mediation Council of India: The central government, under this Bill, is empowered to establish the Mediation Council of India. The Council will consist of a chairperson, two full-time members (with experience in mediation or ADR), three ex-officio members (including the Law Secretary, and the Expenditure Secretary), and a part-time member from an industry body. Powers and functions of the Council include (i) registration of mediators, and (ii) recognising mediation service providers and mediation institutes.¹³

ISSUES WITH THE BILL

1. Pre-litigation, the act makes it mandatory for the parties to take up pre-litigation mediation for at least 2 sessions. Though it was made to reduce the burden on the judiciary, the process of mediation is supposedly voluntary in nature where both parties have to consent to initiate the process.¹⁴ And forcing parties to stay in mediation might arise more litigation and increase delays in case resolution.

¹⁰ Mediation Bill, 2021, s 22

¹¹ Mediation Bill, 2021, s 29

¹² Mediation Bill, 2021, s 44

¹³ Mediation Bill, 2021, Chapter VIII

¹⁴ *Jagdish Chander v Ramesh Chander & Ors.*, (2002) Appeal (Civil) No. 4467/2002

2. Under clause 8, the Bill talks about 'exceptional circumstances when the pre-litigation mediation rule can be skipped but the issue is that it does not mention what qualifies 'exceptional circumstance.' This, if not clarified, would amount to gross misuse by parties reluctant to take up mediation. The occurrence of this instance was seen in the implementation of the Commercial Courts Act, 2015.

3. The proposal for the establishment of a Mediation Council of India is one of the uncertain parts of the Bill. The aim is to promote mediation and to develop India as a robust centre for domestic and international mediation, it empowers the Central government to the utmost as it has the power to override the regulations issued by the Council. Furthermore, the composition of the council is also questionable. A person need not be a professional practising mediator, just the knowledge and experience of dealing with mediation and its laws is sufficient. It is also to be noted that the Expenditure Secretary has been made a member of the council, and the reason behind it is still not clear.

4. The mediators participating in pre-litigation mediation after the enactment of the Bill shall require four registrations from different authorities in order to take up and participate in the Mediation mechanism: (1) Mediation Council of India; (2) court-annexed mediation centre; (3) mediation service provider; and (4) Legal Services Authority. It requires all four registrations. It is rather elusive to understand the need for all four and not just one.

5. If the mediation is conducted in India, the Bill applies to international mediations of commercial disputes (i.e., where at least one party is foreign). There may, however, be instances in which mediation is conducted abroad involving an Indian party. In such cases, settlement agreements are difficult to enforce in India. According to the bill, mediated settlement agreements are enforceable like judicial judgments or decrees. This does not cover settlement agreements resulting from international mediation conducted outside India. Note that the Singapore Convention on Mediation provides a framework for cross-border enforcement of settlement agreements resulting from international mediation. On August 7, 2019, India became a signatory to this Convention but has not yet ratified it.

6. 'When the Legislature has spoken, the judges cannot afford to be wiser.'¹⁵ Clause 26 of the Bill is grossly rejected by the masses for it created a constitutional anomaly. Empowering the Judiciary to frame laws goes against the Constitutional provisions and creates an imbalance in the separation of powers.

It has to be noted that some areas of speedy disposal of litigation are suffering as we speak now, so any step taken further in the Mediation Bill has to be thoroughly fool-proof in order for it to work efficiently and not end up one among the many existing ineffective mechanisms. As such the Bill was referred to a Standing Committee for a closer examination and analysis of the bill. The Parliamentary Standing Committee submitted its report on July 13th and the recommendations made by it are extensive.

PARLIAMENTARY STANDING COMMITTEE REPORT

In a report submitted to Parliament on 13th July 2022, the Standing Committee on Law and Justice, led by BJP leader Sushil Kumar Modi, recommended substantial changes to the Mediation Bill, intended to institutionalize mediation and establish the Mediation Council of India. The Committee held 10 meetings covering over 17 hours and heard testimony from 125 witnesses. The Committee held extensive deliberations on the Bill with the Stakeholders which included the Secretary, Department of Legal Affairs, and other Senior Officials of the Ministry of Law and Justice. Along with this, the Committee approached the public in general, experts/ stakeholders/ organizations like the concerned citizens; lawyers; mediation experts; mediation institutions; Central and State Bar Councils; Supreme Court, High Courts, and State level Bar Associations; representatives from the Indian Industries and Commerce, Academicians and Academic institutions; serving and retired High Court Judges; organizations working in the field of law and public policy; Mediation and Conciliation Project Committee (MCPC) Supreme court and some Mediation centres attached to High Courts. The Committee's major recommendations and notes are as follows:

¹⁵ *Shri Mandir Sita Ramji v Lt. Governor of Delhi* (1975) 4 SCC 298

- The committee, with respect to pre-litigation mediation, has suggested that the compulsory part of mediation should be reconsidered and made optional along with the introduction of the phased manner of application of the bill. It has also suggested that the Commercial Courts Act, 2015 has to be studied before implementing pre-litigation mediation.
- Tackling the issue of four different registrations from four different bodies, the committee has suggested the issuance of a unique mediator number for each mediator given by the nodal authority made under the Bill.
- The Committee also has recommends that insertion can be made in the Bill to grant an interim relief wherein the ingredients such as prima facie case, irreparable loss, and balance of convenience, etc. would have to be made out by the parties, praying for such relief, in order to ensure that the term “exceptional circumstances” is not stretched for filing applications for interim relief before Court or Tribunal. Such an application for interim relief shall be made within a fixed time period and the Courts will have the discretion to judge the matter accordingly.
- As anticipated, the committee was against clause 26 which gives power to the Supreme Court or High Court to make laws of pre-litigation according to them.
- In order to ensure that capable members are appointed to the Mediation Council, the committee has suggested that the Central Government can appoint the Chairperson and Members of the Mediation Council of India through a selection committee.
- One other prominent recommendation made by the Committee is reducing the time limit from 180 days to 90 days with a further extension of 60 days rather than 180 days again.
- Keeping in mind the wide range of duties falling upon the Mediation Council of India, it has also recommended establishing State Mediation Councils with the same effect as that of Central just with smaller jurisdictions.
- The committee has also recommended reframing the new definition of mediation and not putting it separately under clause 4 as it already exists in clause 3.

CONCLUSION

One would expect the concerns to be addressed and solved either in the initial drafting period or at least by the Committee but most of the concerns remain unresolved or lacks substance. Although the Committee has ensured to address major drawbacks of the Bill, its recommendations are not binding and only advisable. Even after the assessment by the Standing Committee, due to its advisory nature, the impact of the Bill, if made into an Act, regardless will be adverse as it is conceptually flawed and plans to institutionalize a somewhat vague concept of ADR mechanism which would it one among the many ineffective laws of India.