



## MEDIATION AN EFFECTIVE MODE IN SETTLING THE ISSUES: AN OVERVIEW

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### ABSTRACT

The courts in India are overburdened, there is scarcity of Judges. Time to time new amendments have been done in the laws to make provisions for early disposal of the cases. In this regard for settling the civil disputes between the parties, important amendments in the year 1999 and 2002 (which came into force from July 1, 2002) were done in the Civil Procedure Code of 1908. After these amendments Alternate Disputes Resolution gained momentum. Special act on ADR was passed, the courts started making efforts in settling the disputes outside the court by applying the ADR methods and through Lok Adalat's. In ADR the mediation method is one of the important technique, in which mediator plays an important role in mediating between parties and then settling the issues between them. Mediation has proved to be the effective mode in settling disputes, but still there are courts in India, where emphasis is not on settling the disputes through these techniques, which is matter of concern. All these issues are discussed here in this paper, so that there should be optimum use of these techniques.

Key Words: Mediation, Constitution, Civil Procedure Code, Civil Disputes, Parties, Resolution.

### I. INTRODUCTION

An Alternative dispute resolving system refers to ways of resolving disputes outside the court, where ADR procedures are usually done with the help of a neutral and independent person. ADR procedures in modern times have emerged as alternative to the courts. The ADR methods are more natural in nature and can be applied to all the disputes that are of civil nature and the disputing parties can easily resolve them by mutual understanding. ADR techniques are without formalities, they are more adaptable and help in the completion of process. The importance of ADR is reflected from the words of Mahatma Gandhi<sup>1</sup>, "I approached Tyeb Sheth and requested and advised him to go to arbitration. .... I suggested him that if arbitrator commending the confidence of both parties could be appointed, the case would be quickly finished.....I felt that my duty was to befriend both the parties and bring them together. I strained every nerve to bring about a compromise. ....I had learnt the true

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<sup>1</sup>M.K. Gandhi, *An Autobiography or The Story of My Experiments with Truth* 118-119 (GBD Books, New Delhi, 2015).

practice of Law. ....I realized that a true function of a lawyer was to unite parties riven as under. .... The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul.”

Different modes of ADR are Mediation, Conciliation, LokAdalats and Arbitration. In mediation and conciliation there is involvement and the assistance of a neutral third party, which empowers parties to resolve their own disputes. In mediation, the mediator (an impartial third party) assists the parties to a dispute in reaching a mutually satisfactory and agreeable settlement of the dispute, it is important to note that mediator is no authority to make the decision binding on the parties, it is confined to resolving the dispute through negotiation and not by adjudication. Then the end point of mediation will that be of conciliation which involves formation of opinion and delivery of verdict.

The mediation is very important mode in settling the civil disputes. It involves the techniques, skills and psychological approaches, where the mediator identifies the actual dispute of the parties, the expectation of the parties in dispute, probable solutions including aid and advice of the mediator. It is important to note here that the disputes between the parties in the court are resolved as per the law, but in mediation it is not necessary to go by the bindings of law. It is necessary to mention here that in other ADR methods, the arbitrator follows the law and rule of the procedure, but it is not in case of mediation. In mediation, the mediator goes in depth of the parties and in mediation both of the parties may be the winners. In comparison to other ADR methods the Mediation is having a cost effective and pocket friendly method. It is not wrong to say that mediator is neither an arbitrator, negotiator nor a judge; he acts as an unbiased friend and facilitate the parties. In the legal jurisprudence mediation is very much effective in the matters relating to industrial, commercial, trade, business, diplomatic, employment and family matters.

## **II. MEANING OF MEDIATION**

Mediation is a technique of ADR which is frequently used where mediator has no power to adjudicate or impose an award. Mediation is done by a neutral third person to reach negotiated settlement between the parties. Mediation has always been part of legal jurisprudence and the meaning of mediation is very important as it determines its nature and scope. The definition of the mediation in legal context are:

*As per The Black's Law Dictionary*<sup>2</sup> “mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution.”

*As per the Oxford Dictionary*<sup>3</sup> the word ‘mediating’ means, ‘act as go-between or peacemaker’, reflecting an attempt to end a problem between two or more people or groups who disagree by talking to them and trying to find things that everyone can agree on. It is process of influencing something and/or make it possible for it to happen.

*As per the Merriam Webster dictionary*<sup>4</sup>, mediation is the act or process of mediating, such as

- a) Intervention between conflicting parties to promote reconciliation, settlement, or compromise. Specifically, a means of resolving disputes outside of judicial system by voluntary participation in negotiations structured by agreement of the parties and usually conducted under the guidance and supervision of a trained intermediary;
- b) Indirect conveyance or communication through an intermediary;
- c) Transmission by an intermediate mechanism or agency.

*As per Business English*, it means, ‘the process by which someone tries to end a disagreement by helping the two sides to talk about and agree to a solution’.

Simple meaning of mediation reflects about a process done between conflicting parties by a neutral third party. The independent and impartial person who is mediator, after taking the parties in dispute into the confidence, tries to resolve the disputes, the mediator plays an active participation for bringing out the fair result. Mediation is different from the arbitration. In arbitration, arbitrator acts as a judge. Mediation is very common in resolving the civil disputes relating to family matters, contracts and damages cases. Mediation is done for a substantial fee by the professional mediators and this fee is borne by both the parties. It also helps the parties get early results.

### **Mediation in India**

In the mediation process the resolution of the dispute between parties is assisted by a third party who helps them to negotiate and reach at a just outcome. It takes place in three broad phases i.e. First- introduction (identifying the issues);

Second- a joint session; and

Third- reaching to agreement.

<sup>2</sup>Black's Law Dictionary, (10th. Edition).

<sup>3</sup>A S Hornby *Oxford Advanced Learner's Dictionary*528 (14<sup>th</sup> edition).

<sup>4</sup> <https://www.merriam-webster.com/dictionary/mediation>

The concept of mediation is traceable in India since thousands of years by historians, anthropologists and scholars. In ancient time it was known with different names and had sanction of the sovereign. Though in those times mode of mediation may differ or there may be absence of honest endeavour to resolve the dispute amicably, as it all depend on the system of the sovereign ruling the country or we can say, on the morality of the sovereign. In modern India the mediation is divided into two broad basis, one the traditional and the other is formally structured.

### **Traditional Mediation platforms**

Traditional mediation is deep rooted in our society or we can say it is part and parcel of the society, in which mediation is done by a family member, friends, civil bodies which may include elderly persons from the society, these are mainly:

#### *Family Mediation*

In our society family mediation is in existence since ages and centuries. It includes the family led by the male or female, the person whoever is holding the central power plays the important role of in mediation, whenever disputes arise between the family. Though in most of the parts of the country there is patriarchal social system but there are few areas and tribes where there is matriarchal society.

#### *Friendly interventions*

It is an important mediation where friends, near and dear to the families play a role in disputes resolving between the parties. It not only exists in India but in almost all parts of the world. Family friend sometimes include an advocate or any wise man.

#### *Civil bodies*

It is very important to note here that the existence of mediation done by the civil societies exist traditionally in our system. In village, village bodies (consisting of elderly villagers), in cities civil bodies again consisting of elderly persons are the persons who mediate between the parties, through deliberations and talks. Panchayats are the most commonly used platform under this category.

### **Structured Mediation under Indian system**

In the country there are rules and laws for the mediation which are reflected in statutes, as mediation is considered to be important mechanism for dispute resolving.

### Provisions in CPC

Civil Procedure Code is general law of procedure, certain provisions of it reflect about the mediation. For example, Section 89<sup>5</sup> gives the power to the courts, for the settlement of the disputes case be referred to arbitration, conciliation, judicial settlement including settlement through LokAdalat or for mediation. The mandate of section 89 CPC recognize mediation as right and distinguish it from conciliation and LokAdalat settlements.

Order 10 Rule 1A of CPC<sup>6</sup> is to be read with the Section 89 CPC. This rule makes it mandatory for the court to explore the resolution of the disputes through the alternative means as reflected under section 89 of CPC. Under Order 32 A<sup>7</sup> of the CPC all the rules reflect the duty of the court in family matters including matrimonial, maintenance, adoption, succession and legacy matters. This section is having greater intensity and intention in dispute resolving. The court has to explore the possibility of settlement between the parties.

### Provisions in other statutes

In the present times when statutes are made then emphasis is given by the state to insert some provisions relating to mediation in the statutes. In the companies Act, 2013 section 442 obligates the central government to maintain a panel of experts for mediation between the parties during the pendency of any proceedings before the central government or the tribunal or the appellate tribunal under this act. In this mediation the parties can request or the judicial bodies including the central government suo-moto, refer any matter pending before them to the experts from mediation and conciliation panel. It is pertinent to mention here that pursuant to section 442, the central government notified the companies (Mediation and Conciliation) Rules, 2016 to give effect to the provisions of mediation.

The provisions relating to mediation are also reflected in the Industrial dispute act, 1947, it embodies a formal and assertive structure of mediation and can be done bilaterally between the employer and their workmen with or without the assistance of in-house experts or formal conciliation proceedings with the assistance and concurrence of conciliation officer. The settlement reached by virtue of conciliation proceedings has the same force as the award of a labour court, industrial and national tribunal.

Then in Real Estate (Regulation and Development) Act, 2016, there is explicit provision regarding mediation for prompt consideration and resolution of the complaints and disputes.

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<sup>5</sup> Inserted by the CPC (Amendment Act, 1999, S.7 (w.e.f. July 1, 2002). *Code of Civil Procedure* 37 (Professional Book Publishers New Delhi, 2002). Page 37.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

Section 32(g) of the act empowers the regulatory authority to make recommendations to the state government to facilitate amicable conciliation of dispute between the promoters and the allottees.

In the provisions of Commercial Courts Act, 2015, section 12-A embodies pre-litigation mediation as exist in other progressive countries. As per the provision, the plaintiff cannot file urgent interim relief without exhausting the remedy of pre- institutional mediation and the mediation process shall have to be completed within three months from the date of application and this period can further be extended for two months with the consent of parties. The settlement has the same status and effect of arbitral award under sub section 4 of section 30, Arbitration and Conciliation Act, 1996. On Section 12-A, the Bombay High Court in case *Deepak Rahejav. Ganga Taro Vazirani*<sup>8</sup> expressed its opinion as, “These debates in the Parliament support the view that Section 12A is mandatory and enacted in the larger public interest. The debates also indicate that Section 12A is an innovative legislative tool enacted to expedite the commercial disputes resolution in the economic interest”.

In the consumer protection Act, 2019 provisions are made which empowers the district commission, if it appears to the commission at the first hearing of the complaint after its admission or at any later stage that chances of settlement are there which may be accepted to the parties, direct the parties to give in writing their consent to have their disputes settled by mediation.

### **Mediation Provisions and the Judiciary**

In our system the judicial organ always being the front-runner in introducing the innovative concepts for the benefits of the society, whether it be public interest litigation, Legal Aid Setup in the country or setting of the mediation centres. The High courts and Supreme court have their own set of rules and the mediation centres, in the case *M.R. Krishna Murthi v. New India Assurance Co. Ltd*<sup>9</sup> the supreme court of India reaffirmed the commitment of the Indian Judiciary and the legal fraternity in favour of having a substantive mediation law. In this case the Supreme Court, has given the direction to the government to consider the feasibility of enacting Indian mediation act to take care of various aspects of mediation in general. Now even district courts have mediation centres. It is pertinent to mention here that in state of Delhi, in the district courts, matter relating to family, matrimonial, labour, tenancy, complaints under section 138 Negotiable Instrument act can be referred for mediation.

<sup>8</sup>Commercial Appeal (L) No. 11950 OF 2021 (Jan 10, 2021) available at <https://indiankanoon.org/doc/8789372/>  
<sup>9</sup> 2019 SCC online SC p. 315

The significance of mediation has been consistently recognised by the judiciary in the country. During the covid-19 period the supreme court in case *Ficus Pax (P) Ltd. v. Union of India*<sup>10</sup> while deciding the bunch of writ petitions relating to disputes of workers with the government relating to payment of wages during lock down in covid-19 period held that efforts should be made to sort out the differences and disputes between the workers and employers regarding payment of wages through negotiations and settlement and directed the employees to initiate the process of negotiation with their organisation and enter a settlement with them and if they were unable to settle by themselves, submit a request to the concerned labour authorities.

The mediation has become such an important concept that even the Law Commission of India in its 129<sup>th</sup> report<sup>11</sup> proposes the courts to compulsorily refer disputes for mediation.

### **Kinds and procedure of mediation**

Different models based on different ideologies are found of mediation but the basis, procedure and skill are almost same in all jurisdictions and cultures. Now a days emphasis is on in resolving the disputes before initiating the case against the erring party and mediation has emerged as a frontrunner in alternate dispute resolution mechanism. In today's mediation, skilled and trained mediators help in resolving the disputes. The mediation in today's time include:

- i. *Facilitative Mediation*: Facilitative intervention is termed as conventional mediation, it has been witnessed since the ancient times and in 20<sup>th</sup> century this sole mediation as a facilitatory, which now termed as facilitative mediation. In this mediation instead of forcing suggestions proposals, solutions and recommendations, the mediator create confidence among both the parties and work out towards the solution. So, this kind of mediation is also termed as form of facilitated negotiation which is done by an impartial third party.
- ii. *Court Referred Mediation*: Mediation is the voluntary participation of the parties in the resolution of their dispute, but sometimes parties don't approach the court for mediation. The court seeing the chances of the settlement and in the interest of the party's court direct the parties to go for mediation. It is most effective and less

<sup>10</sup> (2020) 4 SCC p 810

<sup>11</sup>Law Commission of India, "129<sup>th</sup> Report" (1988) available at <https://lawcommissionofindia.nic.in/101-169/Report129.pdf>



- expensive way. The courts act under the statutory provisions and some of these mediations are supervised by the courts themselves.
- iii. *Evaluative Mediation:* Obvious divergence to facilitative mediation is evaluative mediation. In this type of mediation mediators are expected to make proposals, suggestions, recommendations and articulate ideas, thoughts and belief, the mediators encourage and impress upon the parties to evaluate merit of their contentions and claims and come out with an equitable and fair resolution. Evaluative mediation generally applied in court mandated mediation, here mediators are skilled and possess legal expertise on the subject matter of the dispute. In this mediation mediator plays an important role.
  - iv. *Transformative Mediation:* Like facilitative mediation it is more party driven. It is constructive, reasonable and efficient category of mediation. Transformative mediation is founded on the principles of empowerment of each of the parties as much as possible and recognition of each other position and belief. Empowerment in respect of decision making signifies that the party utilizes the good decision-making skills to make decisions about settlement. In this mediation the party's structure both the process and the outcome of mediation and the mediator follow the lead. This mediation is better and improved version of the facilitative mediation, it is mainly used in public policy conflict, industrial commercial disputes, civic conflict and family etc.
  - v. *Mediation-Arbitration:* In short termed as *Med- Arb*, not very popular except the parts of Europe, it is an alternative mode of conflict resolution which entails engaging in arbitration in the event of mediation failure. This practice is new age discovery and provocation to the jurist. As in mediation and arbitration matters are pursued between the disputing parties, a solution to the dispute either found amicably at the mediation or in a binding manner by arbitration, here same person or different persons may act as mediator and arbitrator.
  - vi. *Arbitration-Mediation and Arbitration-Mediation- Arbitration:* In short *Arb-Med* and *Arb- Med- Arb* are two separate but similar practices with slight divergence. Here dispute is first referred to arbitration then to media. Here skilled third party conducts arbitral meetings with the contesting parties, access the evidence of the parties and arguments in a formally conducted arbitration. It formulates an award but don't share it with the parties, then it attempts to mediate between the parties, to resolve the dispute amicably. If the parties resolve their disputes in mediation, then the outcome



of it comes as a consented award, failing which the arbitrator delivers a previously determined award. If the dispute settled up to mediation, it is termed as *Arb- Med* and if dispute is finally decided by the arbitration, then it is termed as *Arb- Med- Arb*. In the Indian context this mediation and the earlier one are not prevalent.

- vii. *E-mediation*: Electronic mediation is the mediation process in which disputes are resolved by taking the help of information communication tools. It is alternative dispute resolution that is performed online communication through texting, emailing, voice messaging and video conferencing, which now has become a way of normal business life. It is convenient and time saving, in the digital age electronic mediation has assumed an important place. In the last two years in the time of covid-19 lockdowns e-mediation become very much prevalent. On e- mediation platforms the parties communicate with the mediators through video conference, using different applications and software, such as Google meet, Zoom, Microsoft Teams etc. online private individual and joint sessions are conducted with mediators along with voice chats. Though there have been concerns regarding confidentiality and safety issues connected to using the online apps and software's.

### **Modes of Mediation**

In the mediation, cases are referred to the mediation centres with the consent of the parties, the mediator is impartial third party which assist the parties to resolve their disputes through reaching a mutually satisfactory and agreed settlement of their disputes. The mediation has been institutionalised within and outside the courts. Outside the courts it has been institutionalised by trade, business and commerce-based association such as Federation of hotel and restaurant association of India or Chamber of commerce and industry most of these trade bodies have a formal mediation mechanism.

In the courts it is organised, whether it be High Courts, Supreme Court or the district courts. It is important to note here that in the mediation no court rules or legal precedents are involved, mediation centres in the courts worked under their own internal rules and bar association also plays an important role in it. It is not right to say mediation centres are alternate to filing of a case in the courts, but is an important mode in resolving the disputes between parties. As a general rule, mediation is non-binding procedure, where mediator through his effort and deliberation with the parties makes them understand and help both the parties agree on the settlement. Cases to the mediation centres are sent on the request of the parties or the courts taking *suo-moto* action in referring the case to the meditation centre. In

present times pre-suit mediation is becoming more widely accepted way of resolving disputes. The mediation has becoming more important dispute resolving mechanism as the proceedings of mediation are confidential, non-binding, quick and inexpensive.

### **Importance of mediation in present times**

The mediation proceedings are widely accepted and sensible way of resolving disputes. Mediation enjoys a great success rate as the parties brought together to a neutral environment, where they can freely present their position before a neutral third party, who then limit the issues and put them in perspective the importance of mediation in present times is reflected as under

- i. *Informal Proceedings*: The mediator does not impose decision upon the parties, in mediation settlement is arrived with the consent of the parties. The mediator helps the parties to reach the amicable settlement in resolving a dispute. There are no fixed solution in mediation. Parties can look to developing creative solutions to resolve matters and the solutions rest with the parties themselves.
- ii. *Privacy and Confidentiality*: The mediation between the parties took place in separate rooms and are not of public nature. The confidentiality is maintained and the proceedings before mediation are not a matter of public record. No party can take any advantage or benefit of the statement given in mediation of the other party in any court of law, moreover the parties cannot take the benefit of the observation of the mediator during mediation in any court of law. There are no of judgements, where high court and the supreme court of India has retreated time and again that full privacy and confidentiality should be maintained of the proceedings took place before the mediation. In case *Perry Kansagrav.Smriti Madan Kansagra*,<sup>12</sup> Supreme Court in para 30 laid down, "The mandate of Section 89 of the Civil Procedure Code, 1908, read with Rule 20 and Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 provides for confidentiality and non-disclosure of information shared with the mediator and during the proceedings of mediation". In another case of *Moti Ram(D) Tr. Lrs. & Anr v. Ashok Kumar & Anr*,<sup>13</sup> the supreme court held, 'If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the 'Mediation has been unsuccessful'.

<sup>12</sup> 2019 SCC OnLine SC 211, decided on Feb 15, 2019

<sup>13</sup> (2011) 1 SCC 466

Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings’.

- iii. *Time and cost saving*: In comparison to the normal proceedings in the civil courts, in mediation centres less time consumed. It is very quick process, only in complicated issues and mediation between multiple parties more time is required. The proceedings before mediation are without formalities and no cost or very less cost is spent in the mediation proceedings.
- iv. *Parties Right*: It is parties right and have control over opting for mediation, it is also there that during the mediation proceedings either of the party can terminate its participation. The mediator helps parties to have control over negotiation during the mediation proceedings. In case *Ganga Taro Vazirani v. Deepak Raheja*,<sup>14</sup> Supreme Court in para 26 laid down, “A defendant who genuinely desires to resolve the disputes through mediation, can always request the Court to invoke the provisions of section 89 of the CPC to send the parties to mediation.”

So, in the mediation it is parties which prescribe the rules and terms, subject to which their disputes are to be mediated. Mediation is hybrid process where informal procedure is adopted and a neutral person helps and assist the parties in dispute to reach on settlement. This neutral person collects information from both the sides and maintain confidentiality in the matter. The mediator narrows down the issue, make the parties understand, facilitate dialogue and resolve the dispute after the negotiation between the parties.

### III. CONCLUSION

Mediation has become such an important platform that now a days the organs of the state i.e executive, legislature and judiciary overwhelmingly propagate the mediation gateway for the dispute resolution, though mediation is a voluntary process, it is not necessary for the parties in dispute to agree on some solution, what is required a honest endeavour to resolve the dispute amicably. Mediation is an effective means of alternate dispute resolution, it don’t cause any prejudice and bias towards the parties, even if the mediation fails to arrive at an amicable settlement, it don’t affect the rights of the parties and if mediation meet with a positive outcome then it became a binding and enforceable effect. Mediation is an attempt to revival of the process in resolving the disputes in a traditional way. Mediation success rate is very high in dispute resolving as comparison to the other modes. So, to popularise the concept of mediation certain steps are required to be taken. These include:

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<sup>14</sup> 2021 SCC Online Bom 195, decided on Feb 16,2021

- i. The government must ensure setup of mediation centres in all the courts of the country.
- ii. Mediation should be made obligatory alternative before litigation starts in court.
- iii. In case the mediation fails between the parties the guidelines laid down by the Indian judiciary relating to privileges to the statement of parties and the report of mediator should be taken care by the adjudicating bodies.
- iv. Awareness programmes should be initiated by the government, to aware the masses to opt for mediation in the mediation centres for settling their disputes.

By following the above suggestions there can be optimum use of the technique of mediation, which will benefit the society and the country at large.

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