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A CRITICAL STUDY OF EVOLUTION & CURRENT SCENARIO OF MEDIATION IN INDIA

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ABSTRACT

As a technique of settling disputes, mediation has been around since the Vedic period and is still in use now. It is affordable, and it ensures that disputes, particularly those involving family members, remain secret between three parties, two parties, and the mediator. Furthermore, the solution was not forced on either party; rather, it was agreed upon by both parties involved. The result is that it delivers a calm and effective response. In India, Alternative Dispute Resolution (ADR) is a relatively new phenomenon. It is beneficial to both parties since it relieves the courts of certain cases while also allowing the parties to settle their issue more swiftly and easily. A favourable atmosphere for mediation in Indian law has been formed as a result of this development. It is important to understand the difference between litigating an issue and resolving it through mediation. "In litigation, there is a blame game and the faults must be demonstrated in hopes that a Court will provide the solution; however, in Indian mediation, the issue is resolved through negotiation, where the solution is sought with the consent of the parties following consideration of their respective demands." Various types of alternative dispute resolution are practised in India, including arbitration, conciliation, negotiation, and mediation. Of the three modalities available in India, mediation is by far the most popular. This article will examine the current framework of mediation in India.

Keywords: ADR, Mediation, Dispute Resolution, Litigation.

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MEDIATION IN INDIA

It is a kind of alternative dispute resolution in which the parties to a dispute meet with a neutral third party (referred to as a mediator) who acts only as a facilitator to assist them in reaching an agreement on their differences. Mediation is a process in which an impartial third party listens to and helps both parties to an agreement by assisting them in understanding each other's points of view and finally comes to a settlement that is advantageous to both parties and will end the problem. "*The mediation process involves 4 steps or phases; the Opening phase, exploration phase, bargaining phase, and settlement phase".*[1]

DIFFERENT STEPS IN MEDIATION

Party-centric and neutral processes are used in India to resolve legal disputes in the great majority of cases, with parties choosing to mediate to obtain a mutually acceptable settlement of their legal conflict. It is customary for the parties to use the services of a third party, such as a mediator, to lead them through the process of obtaining a mutually acceptable settlement of their disputes. Structured discourse and negotiation are employed in mediation to assist parties in bringing their issues and possible solutions to the attention of one another, all with the assistance of a neutral mediator. Alternatively, the person may be anybody the parties agree upon or an ADR lawyer who has been agreed upon by the parties and is appointed by them.

Based on the terms they have agreed upon, the mediator supports them in achieving a mutually acceptable settlement. Any party may withdraw from the mediation process at any moment and without giving a reason since it is a voluntary procedure in which the parties retain entire control over their rights and powers. Parties may engage actively and directly in the dispute resolution process by using mediation. They can describe the facts of their disagreement, propose alternatives or ways of resolving the problem, and make a final decision by settling. Mediation in India is handled in a formalised way, and it complies with all of the fundamental standards of evidence admission, questioning, and cross-examination of witnesses that apply worldwide. To have a complete grasp of your legal rights in the situation, you need contact with an attorney that specialises in alternative dispute resolution to learn how to draught your demands and negotiate them with the other party. " There are several advantages to using mediation in India, one of the most notable being that it is a fully confidential method of dispute resolution. Because only the disputing parties and the mediator are involved, the issues made by the parties are personal and private matters between them. An impartial and unbiased third party, the mediator supports the

[1] Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd., (San Francisco: Jossey-Bass Publishers, 2004).

parties in arriving at their solution to their conflict via discussion and negotiation. Everything spoken during a mediation process in India is considered secret and cannot be divulged in a civil case or any other context without the prior written consent of all parties involved.

Mediation in India is a collaborative technique in which the mediator works with the parties to support the settlement of the problem via the mediation process. The mediator does not pass judgement on a dispute by imposing a decision on the disputing participants. A mediator's role is both facilitative and evaluative, depending on the situation. During a mediation session, a mediator works to encourage and facilitate communication between the parties, as well as to regulate their interruptions and outbursts. He also works to motivate them to negotiate to achieve a mutually accepted solution. The method for mediation in India is completely confidential, since any information supplied by any party, as well as any report created or submitted, is banned and must be kept confidential under the provisions of Indian law. Apart from that, any confessions made during mediation cannot be used against the other party in a subsequent court dispute, and any information provided to the mediator cannot be shared with the other party unless the other party specifically authorises the mediator to do so. This means that the mediator will not be called to testify in any court hearings and will not be authorised to divulge any information related to the ongoing procedures.

MEDIATION: THROUGH THE YEARS

"The 1996 Arbitration and Conciliation Act was the first legislation to incorporate mediation into the Indian judicial system. By introducing Subsection (1) of Section 30 of the Arbitration and Conciliation Act, 1996, encourages parties to consider the possibility of mediation and conciliation despite the commencement of arbitral proceedings and thus empowers the arbitral tribunal to use mediation as a means of resolving disputes."[2] Nonetheless, owing to a lack of effective implementation (or even creation) of any particular mediation norms, this clause encouraging mediation is on the verge of becoming obsolete. "This was somewhat remedied by the adoption of Section 89 of the Code of Civil Procedure, 1908 (which was originally introduced in Section 30 of the Arbitration and Conciliation Act, 1996), which dealt with the investigation of alternative conflict settlement techniques." Additionally, this part pioneered the concept of "court mediation."[3].

[2] Section 30(1) , Arbitration and Conciliation Act, 1996
[3] Ibid.

"On this basis, the Court is convinced that the parties may attempt to resolve their differences peacefully in ways that, if attempted, the Court may urge the parties to seek out mediation, arbitration, and other forms of alternative dispute resolution. Despite this, and in contrast to other statutorily recognised forms of non-binding alternative conflict resolution, there is currently no specific law in India that addresses and guarantees "confidentiality" in mediations." Only recently, in 2011, the Supreme Court of India ruled that mediation processes are private and that the mediator should give the court only a signed settlement agreement or, in the alternative, a declaration that the mediation proceedings were failed.[4] It is anticipated that this decision would enhance the popularity of mediation as a means of settling conflicts in India. "Indeed, it has been observed that throughout the processes of significant cases, such as the one involving the Babri Masjid's destruction, the Chief Justice of India intervened to enable mediation between the warring parties. In a similar vein, the Law Commission of India proposed in its 129th Report that the Court be required to submit conflicts to mediation for resolution.[5] This point was made in the seminal case of Afcons Infra Ltd v. M/S Cherian Varkey Constructions.[6] Additionally, the Supreme Court of India ruled in this decision that all matters involving trade, commerce, and contracts, as well as consumer disputes and even tortious responsibility, are often mediated."

"Another seminal decision by the Supreme Court came on 22nd February 2013 in the case of B.S. Krishnamurthy v. B.S. Nagaraj[7], in which it directed Family Courts to make every effort to resolve matrimonial disputes through mediation and to also refer parties to mediation centres with their consent, particularly in matters involving maintenance, child custody, and the like. Since the establishment of mediation centres in the cities of Delhi (in 2005) and Bangalore (in 2007), about 30,969 cases have gone through the mediation process, with approximately 60% of these cases resolved. One of the most well-known recent instances of mediation was the one (although conciliation was rejected notwithstanding mediation) between Mukesh and Anil Dhirubhai Ambani of Reliance over the acquisition of South African telecom giant MTN." As a result, many recent Supreme Court judgments seem to indicate that the Courts are progressively adopting a more favourable attitude toward mediation. Additionally, "mediation seems to have become the most sought-after method of resolving patent disputes. Additionally, it has been observed that many Indian generic drug manufacturers are increasingly turning to mediation to resolve patent disputes, as evidenced by the recent famous cases of patent disputes between Hoffman La Roche

[4] Dayawati vs Yogesh Kumar Gosain 2017 SCC OnLine Del 11032
[5] 129th Report, Law Commission of India, http://lawcommissionofindia.nic.in/101-169/Report129.pdf accessed 10 September 2021.
[6] Afcons Infra Ltd v. M/S Cherian Varkey Constructions 2010 (8) SCC 24
[7] B.S. Krishnamurthy v. B.S. Nagaraj S.L.P. Civil) No(s).2896 OF 2010

and Cipla[8] (although mediation between the two parties failed to resolve the dispute) and Merck and Glenmark. Generally, it is anticipated that generic medicine firms would act with public health concerns at the forefront of their minds." However, although mediated agreements may benefit all parties involved and save them the agony of long legal processes, they may wind up increasing the cost of medicines produced in nations such as India. This would undoubtedly be detrimental to consumers in emerging markets such as India. Thus, during mediation, "the mediator may want to address not just the interests of the disputing parties, but also the concerns of others who may be impacted by the result of the mediation, to prevent lengthy appeals/petitions in court."

Despite its success in other nations, mediation has made little progress in India, owing mostly to a lack of knowledge about mediation and its advantages. It does seem as if there has been a dearth of effort on the side of the government, as well as the legal profession, to raise knowledge of mediation across the nation. Even while courts in India have been quick to recognise the growing use of mediation as a valuable tool for decreasing case backlogs and delays, attorneys in India have been unable to react quickly enough to mediation. Additionally, the existing court-assisted mediation facilities pay little attention to this element of outreach. However, the renowned Malimath Committee Report highlighted some issues that must be considered while attempting to create a diverse array of alternative justice delivery mechanisms that will have a long-term impact on settling and reducing conflicts affecting the ordinary man. Additionally, the Law Commission's 129th Report highlighted many innovative techniques that may aid in the expeditious disposition of cases in metropolitan areas.

ADR processes such as mediation have been successfully used in marital disputes and business issues to find a quick solution that is not only efficient and financially effective but also maintains the confidentiality of the whole conflict resolution process. The mediation process in India is flexible because it serves a dual purpose of assisting disputing parties in reaching a mutually acceptable resolution of their dispute while also alleviating the load of outstanding cases on the courts.

- **Arguments in favour of Mandatory Mediation**

The amount of time necessary for mediation is considerably shorter than the amount of time required for trial or arbitration, mediation may take place very early in the dispute, which allows the mediator to focus only on the problems that are important and disregard the others. The fact

[8] F.Hoffman-La Roche V. Cipla Ltd (2009) 40 PTC 125 (Del)

that it usually needs little to no preparation is less formal and complicated than a trial or arbitration, and may take place at an early stage of the dispute means that it is always less costly than a trial.

Mediation for familial/personal relationships is recommended under Order 32A of the Code of Civil Process, for the reason that regular court procedure is not well adapted to the delicate field of personal relationships. As a result, mandated mediation before a court trial may be very beneficial for the preservation of relationships, as court proceedings often proclaim one person a winner and another a loser, resulting in long-lasting grudges between the two parties. "Hon'ble Supreme Court of India has pronounced a landmark decision *Salem Advocate Bar Association, Tamil Nadu v. Union of India*[9] where it was held that reference to mediation, conciliation and arbitration is mandatory for court matters. This will help in the acceptance of mandatory mediation as a solution to existing problems in our legal system."

The Supreme Court of India ruled in the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*[10], that the "right to a speedy trial is a basic right inherent in the protection of life and personal liberty entrenched in Article 21 of the Indian Constitution. As a result, due to its capacity to disseminate swift justice, mediation has become an essential procedure. An ordinary person may get entangled in a years-long legal procedure, which often undermines the entire objective of our judicial system in the process. "Discourage litigation," Abraham Lincoln said, "referring to the prolonged nature of judicial procedures. As a last resort, you may persuade your neighbours to compromise whenever you can by pointing out to them how the nominal winner is often a real loser in terms of fees, costs, and time wasted. There is an excessive overburdening of courts in developing countries like India, where the majority of people choose litigation to resolve disputes, as well as a large number of cases on the docket. This has resulted in widespread dissatisfaction with the judicial system and its ability to provide justice, which frequently confirms the popular belief that justice delayed is justice denied."

- **Arguments Against Mandatory Mediation**

It is said that sending cases without permission may infringe on the rights of parties to select the manner of conflict resolution and would be in violation of the principle of autonomy of parties. Mandatory mediation, on the other hand, is considered to be a compulsion to the process of mediation rather than coercion within the process of mediation. There is no compulsion to utilise mediation; instead, parties may be coerced to use the process for their advantage. There is no force

[9] Salem Advocate Bar Association, Tamil Nadu v. Union of India (2005) 6 SCC 344.
[10] Hussainara Khatoon v. Home Secretary, State of Bihar (1979) AIR 1819

to settle, and parties can very easily launch a lawsuit if the mediation process does not work out for them.

Lawyers have expressed strong opposition to mandatory mediation, believing that it is incompatible with the consensual nature of the process. Lawyers' opposition may be motivated by a fear of a reduction in the number of cases coming into their offices; however, in this case, the parties are not compelled to agree to a settlement that is not in their best interests. Once they are involved in the process, they will have an understanding of its efficacy and will be able to engage in mediation. Mediation is an effective conflict resolution technique because it is a less time-consuming and less expensive way of resolving disputes. It also has the advantage of requiring less time, money, and resources. Even if the mediation is unsuccessful, the parties may always take their issue to court and have it settled there. Briefly said, forced mediation is a useful tool in the fight against delay, expense, and unfairness. It also serves as a benefit to the general public at large.

CONCLUSION

Individuals are predisposed to the adversarial process by default as a result of a general lack of awareness about non-adversarial methods of dispute resolution in society. When the Arbitration and Conciliation Act of 1996 was enacted, this changed the situation in the case of an arbitration dispute. Because of a specific piece of legislation on the issue, India today has a far stronger arbitration culture than it had in 1996. Mediation-specific legislation may also encourage India to be more open to the idea of settling disputes via mediation. Even though various laws have granted parties the liberty to resolve their disputes via mediation and that there are possibilities for both court-referred and private mediation, there is a dearth of clear procedural guidance on this subject.

According to contemporary law, mediation is considered to be one of the Alternative Dispute Resolution (ADR) methods available. The employment of mediation as a Primary or First Dispute Resolution approach, rather than as an Alternate Dispute Resolution method, is urgently required. Encouragement of mediation may be the most effective strategy for ensuring that justice is given as swiftly as possible. We may conclude that the present period is prosperous, and mediation must be promoted as the primary form of dispute resolution before turning to any other kind of adjudication in the future. Apart from being a very successful strategy for conflict resolution, it also helps to the building of a peaceful and collaborative community environment.