

MEDIATION IN INDIA: CONCEPTUAL STUDY

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ABSTRACT

The legal system in India has evolved from a very raw and arbitrary form to a more tuned and refined system. It is not just the many new laws and acts that have been coming up in the recent trends, but there are many bodies that have been developing to solve disputes outside the court. One such alternative is Mediation. It is one of the most convenient forms of Alternative Dispute Resolution which could be used to dodge delay and extra unfair costs. Though Mediation is distinctively advantageous, it is under-used and not given enough importance. India is seeing recent trends in the rise in use of ADR, especially mediation for solving disputes. With our country's rising population and increasing cases in courts, it is best to resort to such alternatives at this hour because they are more time and cost effective and they definitely help in reducing the burden of timed-out cases in our courts and ultimately help in reducing judicial delay. This article essentially focuses on what is mediation, how it works, the laws governing mediation in India, and finally concludes by critically analysing the scope of mediation in India and how it can be used for speedy judgments and helping our legal system evolve towards a better, effective and a prospective direction.

Keywords: Alternative Dispute Resolution, Mediation, Judicial delay, Indian legal system, Justice.

INTRODUCTION

With around 2 million pending cases across the country, delay is the greatest and most obvious issue in the legal arrangement of our Nation. With increasing population and numerous flexible and rigid institutions in our society, the number of cases and burden on the existing courts will only rise with time. Merely increasing the number of judges and courts can definitely not be the solution as our judicial system accepts the process of adjournment. This will only lead to piling up of more cases in courts and ultimately leads to delayed judgments to the public at large. The very famous English jurist, William Goldstone, once said, "Justice delayed is justice denied." As

true as it is, it is unfortunate that Indian judiciary is still held by the clutches of delayed judgments. To shift the burden on judiciary, many other forms of dispute resolution are springing up. They are called 'Alternative Dispute Resolution' also known as 'ADR'.

There are numerous forms of ADR which include arbitration, mediation, negotiation, etc. Focusing on mediation, it is a very helpful and easy form of dispute resolution there is. It brings together parties in conflict and, gets them to agree on mutually acceptable terms and settle the dispute. In the process of mediation, there is a 'mediator' who is impartial by his thoughts and advising towards the parties. Mediation is comparatively an informal means of solving a dispute as it does not impose any decision on the parties.

Legal developments leading to Mediation in India

Mediation in its standard form as we know it today in India got legally recognized for the first time in the **Industrial Disputes Act, 1947**. However, the idea of mediation took shape and came into practice long before it was legally recognized. The parliament in 1996 enacted the Arbitration and Conciliation Act which made provisions for conciliation of disputes arising out of legal relationships. In 1999, however, the **CPC Amendment Act** was passed by the Parliament, inserting **Section 89** in the Code of Civil Procedure 1908, which specifically recognized mediation as a form of ADR. This Amendment came into force from 2002¹.

Salem Advocate Bar Association, T.N. V Union of India, (2003) 1 Supreme Court Cases 49. (Relevant Para: 9, 10 & 11) was the first case to uphold the constitutional validity of the relevantly new Section 89 of CPC. Another Supreme Court case which clarified the provisions in Section 89 and specifically outlined and clarified the definitions of "Mediation" and "Judicial Settlement" as given in Section 89 is the case of **Afcons Infrastructure Limited And Another V Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SC.**

The Supreme Court is also taking other steps for the adoption of mediation, like constituting a Mediation and Conciliation Project Committee (MCPC) which stated a pilot project on Judicial Mediation in Delhi. Training on "Techniques of Mediation" was given to 30 Judicial Officers for 40 hours. This program is helping establish mediation at national level.

Mediation Procedure

¹ Mediation and Conciliation Project Committee Supreme Court of India, *Mediation Training Manual for Referral Judges*, available at: <https://www.sci.gov.in/pdf/mediation/Mediation%20Training%20Manual%20for%20Referral%20Judges.pdf> , last seen on 09-10-2018

Mediation is known to be one of the most informal means of dispute resolution. It is flexible, non-binding and more efficient; nevertheless it has some very distinct steps to be followed in its process.

Step 1: Opening statement of the mediator

In the presence of the parties, the mediator introduces them to the ground rules of mediation. The parties are told about things they should and should not do and provision or privileges they are entitled to. The parties are also advocated and encouraged to work in co-operation to derive an effective conclusion. The opening statement of a mediator is given to develop a rapport with the parties. He/she states his qualification and takes an opportunity to establish his neutrality through this statement.

Step 2: Opening statement of the Parties

In the opening statements of the disputants, they are allowed to talk about what their problem is and how they think the issue can be solved. This opportunity is given to all the parties without discrimination. The mediator and the other parties are to listen to the disputant when they are delivering their opening statement. This step is to ensure that the parties are heard in the presence of one another and the mediator.

Step 3: Joint meeting

A joint meeting is called for which includes the parties in dispute with the mediator. In a joint meeting, parties expressly put forth their problems and discusses intensely on what the dispute is about, its facts and circumstances, damages if a party has faced any, etc., in detail. The mediator takes notes from this session and analyses them critically.

Step 4: Private caucuses

This is an opportunity for each of the parties to meet and discuss with the mediator in private. Private caucus, being a distinct feature of mediation, is the most important and vital part in the process of mediation. These meetings enable the mediator to know different perspectives of the case and understand facts and circumstances in more depth and detail.

Step 5: Joint negotiation

After parties are done with a single or multiple private meetings with the mediator, there is a joint negotiation where the parties are brought together again and are allowed to negotiate as an

attempt to attain their end of the bargain. This could be followed by many more private caucuses or joint negotiations.

Step 6: Closure

This is the end of the process of mediation. By this stage, the parties have arrived at a mutually agreed resolution and sign the written summary of the agreement. The mediator might also advise the parties to get the agreement reviewed by a lawyer. The parties may also choose to sign a legally binding agreement. If no consensus was reached by the parties, the mediator will review the progress made through that mediation and advise the parties of his/her perspective and conclusions. Since it is not binding, the parties may later on go for arbitration or the court.

Role of Mediator

A mediator is a third party who opens doors for the conflicting parties to negotiate and arrive at a mutually agreed solution for their own conflict. The functions of a mediator sure include the initiation of the parties to the process of mediation. This includes bringing the parties together in a comfortable and confidential environment and set up their first meeting. It involves making room for each party to let out the facts and circumstances of the case to the mediator in an environment where the parties are not afraid of their information being leaked. The element of confidentiality is an important function of a mediator and one of the basic factors of the whole process of mediation itself.

Another important function of the mediator is impartiality. A mediator should ideally be impartial in the matter or case at hand. He/she is not supposed to show any kind of favoritism. No party in mediation can be at loss due to partiality of the mediator. This trait of the mediator acting as a catalyst forms the very basis of what make a mediator and mediation successful. Apart from impartiality and confidentiality, there are other things a mediator has to keep in mind to carry on in mediation. He/she is bound to bring the parties together and make sure there are no barriers of communication between the parties. Mediation being what we know today is distinct and more preferable than litigation because of some obvious reason like it being time and money effective and its scope of communication of one party with another is easier and peaceful than in litigation. Or sometimes, the parties might come from different backgrounds and find difficulty in conveying their side of interests. It therefore becomes the responsibility of the mediator to facilitate this peaceful communication and negotiation between the parties.

Need For Mediation

The next question would be why we need to move towards a system more acceptable of mediation or how mediation will soon be expanded. In most other developed countries, mediation is already a huge thing which has been reducing burden on the formal judicial system. For a country like ours, where the population is exploding and the scope of judicial functioning is still limited, mediation would be of utmost help because of the aspects like speedy dispute resolution tactics and time and cost effectiveness it upholds.

ADVANTAGES OF MEDIATION

- First, mediation holds the privacy of the parties as a priority. Before the process of mediating begins, the parties and the mediator sign an agreement of non-disclosure. It is unlike a court where the public and media have access to the proceedings. “The Delhi High Court, December 11, 2017, held that a mediation report should only contain one sentence and nothing more, in order to maintain the confidentiality of proceedings.”²
- Second, it is time and cost effective. In our traditional courts, months and years pass by before a case is heard. Plus, there will be high expenses tagged along. In the case of mediation, there will be very less chances of delay depending on the parties.
- Third, it is informal. Parties in mediation are more comfortable as it is set in an informal setup unlike a formal court where and the parties’ privacy regarding the case will be protected. It makes the parties comfortable and more at ease in general.
- Fourth, parties are not bound by the decision of the mediator which allows them to negotiate until their end of the bargain is attained. They are free to divert away from mediation and resort to other means at any time they wish.
- Fifth, it saves the relationship of the parties. Justice Bobde, SC Judge once said, “The court cases, which are often fight to the finish by both the parties, lead to ill- health and tension within family of the litigants. If a study is done on impact of litigation, it would reveal that it has a disastrous effect.”³ When two parties in conflict are to fight against

² Apoorva Mandhani, *Mediation Report Should Preferably Contain Only One Sentence, Nothing More, to maintain confidentiality: Delhi HC [Read Order]*, available at: <https://www.livelaw.in/mediation-report-preferably-contain-one-sentence-nothing-maintain-confidentiality-delhi-hc-read-order/>, last seen on: 11-10-18

³ Sanjay Sahay, *Mediation Not Only Reduces Pendency Of Cases, But Also Leads To Peace And Harmony In Society: Justice Bobde*, available at: <https://www.livelaw.in/mediation-not-reduces-pendency-cases-also-leads-peace-harmony-society-justice-bobde/>, last seen on 11-10-18

each other in a court, it adversely affects their personal relationship. Especially family matters and the like can use mediation to solve their conflicts and save their relationship from taking an ugly turn in their personal lives.

Mediation might also have some downsides like its inability to keep the parties bound by its decision, letting a party's private information leak or not having the element of expertise attached to it. Mr. Gregg F. Reylea, International Mediator, Arbitrator Trainer & Author highlighted the challenges in mediation, saying, "Challenges in mediation include professional acceptance, Mediation has to be made accessible to more people, professionalism of training needs to be maintained on priority."⁴ But in mediation, the advantages always rule out or overpower its disadvantages. Justice Sikri described mediation in India and said, "Mediation helps in removing the dust from the heart, bringing the parties land on a resolution or decision."⁵ Parties do not just have the opportunity to save their relationships with the other party but also gives them full authority and liberty to go to court of law if they feel that their end of justice is not fulfilled. "A Bench comprising Justice S. Ravindra Bhat and Justice Yogesh Khanna noted that failed mediation results in an adjudicatory process, where the parties have full liberty to fall back on all contentions available to them in law."⁶ Hence, it can be said that mediation is easily one of the best ways of alternate dispute resolution and has a massive scope for development in India which if done right might change the course of our judicial system for better.

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⁵ Ibid

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