ARYAVART SHODH VIKAS PATRIKA
RNI TITLED NO. UPBBIL04292
RNI REG. NO. UPBBIL/2014/66218 PP. NO.- 311-317
ISSN NO.-2347-2944
Vol.-10, No.-I, Issues-11 YEAR- June -2019

Mediation : Need, Scope And Way Forward

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***Abstract:* "An ounce of mediation is worth a pound of arbitration and a ton of litigation!" — Joseph Grynbaum**

Arbitration may be a new concept for western countries including new era legal philosophers but in India its origin was well rooted with the concept of 'Gram Panchayat'. The decision of panchas while sitting collectively as Panchayat commanded great respect as VOICE OF GOD like unquestionable for all .In course of time this mode of divine dispensation of justice through Panch Parmeshwar converted into various modes of adjudication like Arbitration, Negotiation ,Conciliation and Mediation. This paper seeks to identify and examine the present status of Mediation in light of shortcomings and strengths .

Key Words: Arbitration , Conciliation, Afcon Case , Italian opt-out model, Litigation, Settlement , Justice.

INTRODUCTION- Arbitration1 in India during the 20th Century was governed by the Indian Arbitration Act, 1859 with limited application and by the Second Schedule to the Code of Civil Procedure (hereinafter called as CPC). Later on it was replaced by the Arbitration Act 19402. One more time The Arbitration Act , 1940 was replaced by the new Act known as The Arbitration and Conciliation Act ,1996 which ,by virtue of its Section 85, repealed the earlier Act ,1940. Prior to this Act in 1899, the British government enacted Arbitration Act 1899.This was the first attempt when British government codified Alternative Dispute Resolution(hereinafter called as ADR) in India. After Independence several gradual additions have been made to the legal framework supporting ADR mechanism .The Arbitration and Conciliation Act, 1996 was intended to comprehensively cover international and commercial Arbitration and Conciliation as also domestic Arbitration and Conciliation specially when globalisation of economy was in its pre-stage and at the same time different kind of disputes were arising and were not safe for the flow of trade and commerce. At the very initial stage , the law relating to arbitration in India was influenced by the English Arbitration Law .In 1899, the British government enacted Arbitration Act ,1899 ,as one of the first attempts at codifying ADR in India which was modelled on the English Arbitration Law 1889.Prior to this enactment, The Bengal Regulation of 1772 was dealing with the same issues. The operational part of the arbitration law was made more effective by the Bengal-Regulation , 1793. As per this regulation matters and suits relating to accounts, partnerships, debts ,non –performance of contracts etc. could refer to arbitration .Nowadays There are four main types of settlement of disputes out of courts under section 89 of CPC 3.This section was inserted in the code by section 7 of the CPC Amendment Act ,1999 to resolve disputes without involving to trial and pursuant to the recommendations of Law Commission of India and Malimath Committee report. This section talks about four different modes of settlement and they are :

1-Arbitration
2-Conciliation
3-Judicial Settlement including settlement through Lok Adalat,or
4- Mediation

Though these four modes have the same origin and concept to resolve the disputes out of courts but all have different nature and pattern to sort out the problems .Major differences are as follows-

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(a) Difference Between Arbitration and Mediation The main differences between arbitration and mediation are as follows-

1-Mediation is a voluntary process whereas Arbitration is a non- voluntary Alternative Dispute Resolution (ADR) process;

2-In case of Mediation , all parties must consent to participate in good faith and work towards a mutually agreeable resolution while in case of Arbitration a knowledgeable , independent and impartial third party is empowered to make a decision;

3- Mediating parties are not bound to resolve their disputes on any pre –agreement terms but in case of arbitration ,decision of arbitrator may either be binding or non-binding ,depending on the terms of arbitration agreement;

4-Mediation does not involve decision in favour of one party or another, rather the mediator simply facilitates the negotiation process and the parties decide their own outcome while in arbitration decisions may be confirmed by a court and carry the same significance as that of a court-judgement.

(b)Difference between Mediation and Negotiation

1-Mediation involves the role of a neutral intermediary who is called mediator, to bring out a compromise or settlement between the two disagreeing parties .On the other hand Negotiation is defined as an endeavour that focuses on gaining the favour of people from whom they want something for their benefits.

2-Mediation needs a mediator while in case of Negotiation, settlement of disputes may be possible between the dissenting parties by resorting to mutual negotiations without the intervention of any third person or mediator.

©Difference between Conciliation and Mediation 1- Mediation is the process of resolving issues between parties where third person(mediator) assist them in resolving dispute, while in conciliation method an expert, called as conciliator, is appointed to settle dispute between the parties. 2-A conciliator plays a more pro –active role in the settlement proceedings as he has broader powers of intervention and is empowered to draft the terms of settlement. However, a mediator is a facilitator, who helps parties to resolve their problems on their own and he can give suggestions and persuade the parties to arrive at a solution. 3-The Apex court in the Afcons case4 has observed that the legal framework applicable to mediation is different from conciliation; while the former is subject to procedures laid down by the court and is deemed a Lok Adalat to make settlements enforceable as decrees5. (Provides that any institution or person conducting the mediation shall be deemed Lok Adalat and provisions of Legal Services Authority Act ,1987 shall apply to the proceedings .Further u/s 21 of Legal Services Authority Act 1987 provides that every award of the Lok Adalat shall be deemed to be a decree of a civil court.

MEDIATION IN INDIA- Litigation is not a voluntary act between the parties .One of them is invariably dragged compulsorily6. Court has the power to solve the dispute or the problem but the solution is satisfactory for either party or both the parties is not persuaded .In such case parties can move to mediation7 because mediation is a well-known and voluntary process where parties arrive at a mutually agreeable settlement for their dispute in the presence of a neutral third party . The concept of justice in mediation is advanced in the oeuvres of Professors Stulberg ,Love ,Hyman ,and Menkel –Meadow (Self –Determination Theories).8This process is different from arbitration because the nature of this process is confidential, non-binding and does not involve a strict formal procedure into question of law or ,right or wrong i.e. mediation is preferred for disputes which do not involve complex questions of law or evidence and hold potential for amicable resolution outside the formal and rigid procedures while it does not happen in arbitration .Mediation encourages the parties to participate directly in the presence of mediator9 .One more special feature of mediation is one kind of win –win remedy that is more durable because of the parties consent in the outcome .The main reason for delay

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in disposal of the cases is the multiple increases in number of disputes. Thought the increase in the institution of cases shows a positive sign of a vibrant democracy where more people are having awareness of their legal rights and approaching courts for justice but at the same time system is struggling with limited resources in terms of number of judges and courts. On the other hand, there is no specific legislation to govern the Mediation. Only The Arbitration and Conciliation Act, 1996 governs the procedure, appointment and enforcement issues for arbitration and conciliation nowadays in India. This Act covers the contractual disputes with an existing arbitration or conciliation clause with those matters which are referred for arbitration and conciliation by the court under section 89 of CPC along with other legislations, which are going to be discussed in coming paragraph of this paper. In 2005, hon'ble Supreme Court set up the Mediation and Conciliation Project Committee (MCPC) to encourage court referred mediation. MCPC has since been initiating regarding imparting training and generating awareness regarding the benefits of mediation .Even the Supreme Court has also established a panel to draft a law governing mediation In Indian Context , there is an absence of an Umbrella Mediation legislation10 but the parliament has introduced clear-cut provisions for mediation in different legislations and these legislations are governing different categories of disputes .In a large population of India where judiciary is already over- burdened due to pendency of cases , potential mediation is resolving several disputes without burdening an already over-burdened court system of country. Such different legislations are:

1- PRE –INSTITUTION MEDIATION AND SETTLEMENT UNDER SECTION 12A OF THE COMMERCIAL COURTS ACT ,201511- This section clearly talks that any suit, which does not ruminate any urgent interim-relief , can not be instituted unless the plaintiff exhausts the remedy of pre- institution mediation .To conduct such mediation few entities has been constituted by the central government under the Legal Service Authorities Act ,1987.There is a fixed duration of three months is required for the procedure , which can be further extended by two months with the consent of both the parties.

The Commercial Court (Pre-institution Mediation and settlement) Rules, 2018 have detailed procedure for such mediation and fees.

2-MEDIATION AND CONCILIATION PANEL UNDER SECTION 442 OF THE COMPANIES ACT ,2013- Section 442 of The Companies Act12 provides an option to parties to proceed before the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) to opt for mediation rather to direct move to Central government.

3-DUTY OF FAMILY COURT TO MAKE EFFORTS FOR SETTLEMENT UNDER SECTION 9 OF THE FAMILY COURTS ACT ,1984- Section 9 of The Family Courts Act ,198413 impose a duty on courts to make efforts to resolve the dispute by settlement .In fact, the statement of objects and reasons clearly states that the establishment of the Family Courts was "with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs" In the case of K.Srinivas Rao Vs. D.A.Deepa14 the Supreme Court has held that mediation is an avenue that must be exhausted in matrimonial disputes. In such cases most of the time the procedure for proceedings is as per the rules by Hon'ble High Courts but that does not restrict any Family Court from laying down their own procedures.15

The process of mediation can not proceed without mediator16 .Mediation is a nonbinding negotiation process and the role of the mediator is to assist the parties in the referred case to resolve dispute but knowledge of current laws would be helpful in evaluating the issues arising between the parties and in suggesting an equitable settlement on them. Most of the conflicts find some genesis in emotions and feelings, it is but necessary that a mediator should not only have compassion but he

must also be a good listener. Compassion, positive approach , capacity to acknowledge other party's feeling and emotions are the basic skills to even manage outburst of a party with poise .A mediator should never try to show his power and position as it is bound to have a negative effect on the confidence building process between the mediator and the disputants.

SHORTCOMINGS OF MEDIATION-

Mediation in India is not popular and trustworthy mechanism of settlement despite the provisions have been discussed in different laws and the existence of mediation infrastructure created under the Legal Services Authorities act, 1987.Though, this is really disheartened that, to encourage people, we don't have any specific data that to what extent mediation has prevented disputes from landing up in courts yet consultation with mediation practitioners are good sources to examine the weak aspects of mediation like First reason is that mediation settlements are not covered under section 74 of The Arbitration and Conciliation Act that is there is no certainty regarding enforceability. The tern access to justice has been most commonly used to reform the lacunae and loopholes in state legal system to " ensure that every person is able to invoke the legal processes for legal redress irrespective for social economic capacity" and "that every person should receive a just and fair treatment within the legal system".17 In Afcons case, the Supreme Court has held that a mediation process initiated through court reference will be deemed to be Lok Adalat and will be enforceable but what about the private mediation? Secondly there is no central authority to promote and regulate mediation and this is the major reason that people are not much aware about the mechanism .Next is lack of trained and professional mediators and conciliators is like a barrier in progress because the mediator is like the driver who uses the fuel of provisions to get destination of settlement for the disputed parties who are like passengers in the journey of mediation. In most of the cases lawyers including Chartered Accountants and Company Secretaries may make for good mediators in case of commercial disputes but again there is a must need of training for experts including the judges In India at the part of parties there is no proper guideline for compulsory participation in mediation process while in Italy participation of parties in the mediation process has been made mandatory under its "ITALIAN OPT-OUT MODEL.

In the Italian opt-out model of mediation , plaintiff in certain types of disputes like real estate, medical malpractice ,banking contracts and others, before judicial proceeding can be issued must convene defendant(s) in front of a mediation organization registered with, and accredited by the minister of justice. If plaintiff fails to convene the defendant for mediation, it will cause the court action to stop but if defendant denies to attend the first mediation session then it may result in the form of penalties and the other negative consequences. The unique peculiarity of the Italian mediation model is to avoid the foregoing consequences .Litigants are made to particular in a first meeting with the mediation .This meeting is not a mere mediation information session ,but rather part of the mediation itself to maintain and preserve the voluntary nature of mediation .

If India wants to follow the Italian Opt-Out Model then there are some specific areas of commercial and civil disputes like joint ownership of real estate, family disputes relates to marriage ,divorce, inheritance etc., business and commercial leases, medical malpractice liabilities, insurance sector real estate, division of assets, bailment and so on ,that required an initial mediation session, before filing a case in courts and at the same time such model can be tested in the Indian judicial system.

CONCLUSION AND SUGGESTIONS-

Apart from India and Italy, every country is focusing on searching new dimensions to implement mediation in more progressive and effective way .In the same series the more recent and significant developments in mediation is the 'Singapore Convention on Mediation' which was adopted on 20th December

2018 .The major purpose of the convention was to create a uniform and efficient framework for settlement agreements through mediation specially disputes related to commercial issues .This convention has set the proper guidelines for India to address similar challenges in terms of enforcement and certainly in its domestic mediation framework .As one step ahead a broad foundation can be designed to involve other bodies like NGOs, Social Activists ,Specialist Professionals in respective fields and retired judges too .These all can be trained as mediators including new lawyers ,Charter accountants and other related professionals .Mediation as a part of legal curriculum in law colleges can be a solution for long term .For this a uniform training module and syllabus can be designed by National Judicial Academy, State Judicial Academies with the help of prominent academicians of respective field.

To achieve the goal of successful mediation model in India, there is a need to chalk out carefully the plans and ideas to spread legal awareness among people about the benefits of mediation. These are :

1 -In every contract a dispute resolution clause should be made mandatory. It should provide that in case of any dispute between the parties irrespective of the value of dispute it would be mandatory for the parties to attend first of all a mediation session for resolution of their disputes and if it fails then take resort to other methods.

2- More and more cases need to be referred by the courts for settlement through mediation under section 89 of the CPC.

3- Pre – Institution mediation and settlement as given under section 12 A of the Commercial Courts Act 2015 must be included in other statutes too.

4- The plaintiff must be free to choose his mediation provider .

5- Legislation should provide some standardisation for mediation and clarity about the process and outcomes.

6- There is need to provide a friendly and non-threatening environment for the parties who are already suffering .

7- To reduce the burden of limited judicial resources , mediation should be conducted by public and private institutions outside the court. The efficiency and fairness of the system should be ensured through strong monitoring mechanisms.

8- The foremost prerequisite for making opt-out mediation successful in India is to provide adequate capacity of trained professionals and technical infrastructure .

9- It's a need of hour to enact a separate act of mediation like The Arbitration and Conciliation Act 1996.

Once in his classic and world famous work "The Nature of the judicial Process", Justice Benjamin N. Cardozo said that "The final cause of law is the welfare of the society. The rule that misses its aim cannot permanently justify its existence. When judges called to say how far the existing rules are to be extended and restricted , they must let the welfare of society fix the part, its direction and its distance."18 In case where the promise of 'justice with satisfaction' is ground of quality service , this is the call of time to take adequate initiatives.

REFERENCES

1-Section 2(1) (a) of The Arbitration and Conciliation Act, 1996 states "arbitration" means any arbitration whether or not administered by permanent arbitral institution. 2-Dr. Paranjape, N.V, Law relating to Arbitration Conciliation in India, Central Law Agency .7th ED 2016 pg 1. 3-Section 89 of the Civil Procedure Code: Settlement of disputes outside the court.

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for :—

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through

Lok Adalat: or

(d) mediation.

(2) Were a dispute has been referred—

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.]

4-Afcons infrastructure and Ors. Vs.Cherian Verkay Construction and Ors.2010 (8) SCC 24

5-Ibid

6-Justice Sinha , Navin ,Litigation-Mediation – Solution, NYAYA DEEP, National Legal Services Authority ,Volume XV ,Issues 3&4 ,July 2014 &October 2014,pg 14

7-SEE Black's Dictionary Eighth Edition , First South Asian Edition,2015

" Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

8-Justice Sikri, A.K, & Arora, Shreya, Mediation:New Dimension of Access to Justice, NYAYA DEEP ,National Legal Service Authority ,Volume XII ,Issue 3, July 2011,pg 10

9- SEE Online OXFORD Dictionary: Mediator is an expert in the process of dispute resolution , controls the proceedings.

10-SEE Online Oxford Dictionary : Umbrella legislation is a common legislative framework that regulates numerous professions under one statues. The primary objective of umbrella legislation is to ensure consistency in the regulation of numerous professions by creating one overarching statute that provides for uniform standards and practices that apply to all professions governed by the legislation. For example The EPA (Environment Protection Act)

11-Section 12 A of The Commercial Courts Acts 2015 :Pre –Institution Mediation and Settlement

(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorized by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963(36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral

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award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

12- Section 442 of The Companies Act 2013: Mediation and Conciliation Panel.—

(1) The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed 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.

(2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo- moto, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(5) The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be

. (6) Any party aggreived by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

13-Section 9 of The Family Courts Act ,1984:Duty of Family Court to make efforts for settlement-

1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit."

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility

of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.

14-K. Srinivas Rao Vs.D. A. Deepa (2013) 5SSC 226

15-Section 9 and Section 10(3) of The Family Courts Act ,1984

16- SEE Online OXFORD Dictionary: Mediator is an expert in the process of dispute resolution , controls the proceedings.

17-Arora,supra note at pg 9

18-Gautam, Satinder Kumar, Mediation & Conciliation ,NYAYA DEEP ,National Legal Services Authority, Volume XI .Issue 1 ,January 2010 pg 92

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