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Mediation: A Tool to Access to Justice

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ABSTRACT

Mediation is a tool to secure the justice through mutually agreement between the parties. It was supposed to be an instrument of tool to secure the ends of justice through the involvement of third party. But, instead of securing the justice it has rather resulted more into dilution of justice in India. This was also supposed to be a help for the Indian Judiciary to overcome the burden of matters on it but in this case also it has rather enhanced the burden on Judiciary as the parties were dissatisfied by the mechanism of Mediation or I would say an Alternate Dispute Resolution. The basis on which Alternate Dispute Resolution works in India is simply that it protects the privacy of the family matters. Due to Alternate Dispute Resolutions like, Arbitration or Mediation the family matters, or the Company's reputation matters are dealt privately without any interference of people other than known to the parties and given a majorly the Company an opportunity to opt for it as it protects their Company's name and fame. But, the question is do the Alternate Dispute Resolutions have in reality resulted in achieving the aim they were established for?

I. INTRODUCTION

According to the Dictionary of Black Law, "*Mediation is a non-binding dispute resolution method involving a neutral third-party who tries to help the disputing parties to reach a neutrally agreeable solution.*"

The Alternate Dispute Resolution Method of dispute resolution is relatively not a new trend in India. It is a traditional concept of dispute resolution between the parties which is being practiced since Vedic period in India. It is very cost effective method which keeps the matters (especially, family matters) secret among three parties viz, disputing parties and one mediator. It is valuable for both the sides - the courts are being somewhat less troubled with cases, and the parties are getting their issues settled rapidly with less problems and in a smoother way. In this manner, there has been made a significant situation for intervention in Indian Law. Thus, there is an important position for mediation under Indian Law. Mediation in India is a voluntary procedure where the disputing parties decide to find a solution to their

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legal problem mutually by entering into a written agreement and appointing a mediator. The decision making powers stay with the disputing parties, with the mediator going about as a support to carry them to a comprehension. The parties can also procure ADR Advocates to speak on behalf of them before the mediator and put the situation in an expert manner. The difference between mediation and arbitration are that mediation is comparatively informal process than arbitration. In arbitration an arbitrator needs to be formally appointed either beforehand or at the time of need. Whereas, a mediator can be anyone, of any designation, and can also be appointed either formally or casually depending on the wish of the parties. The law of mediation in India has been made user friendly and pretty flexible.

In India, mediation can be divided into two categories:

(A) COURT-REFERRED MEDIATION

The Indian Courts at any time of the case trial can refer the matter for the mediation under **Section 89 of Code of Civil Procedure, 1908**. It is particularly found in the matrimonial cases like, divorce.

(B) PRIVATE MEDIATION

In Private Mediation, qualified faculty fills in as mediators on a fixed-fee basis. Anybody from courts, to the overall population, to corporates and as the government sector, can select mediator to determine their dispute through mediation.

II. MEDIATION OVER THE YEARS

The Arbitration and Conciliation Act, 1996 was the first statute to introduce the mediation to Indian legal system. Introduction of **Sub-section (1) of Section 30 of the Arbitration and Conciliation Act, 1996**, encouraged the parties to be involved for the option of mediation despite arbitral proceedings having started and, also empowers the arbitral tribunal to use mediation as a means of dispute resolution. However, due to a lack of implementation (or even proper formation) of any specific rules of mediation, this provision has almost been rendered dead. But this, was resolved to a certain extent by the introduction of **Section 89 of the Code of Civil Procedure, 1908**, which dealt with exploration of the various alternate methods of dispute resolution. The idea of judicial mediation was also first introduced by this section. Depending on this, the Court, where satisfied that the situation are such that with the end goal the parties can attempt to settle their issues genially in manners whenever attempted, then the Court may urge the parties to seek out the methods for mediation, arbitration and other different types of alternate dispute resolution. In spite of this, not like all other

statutorily-recognized types of non-binding alternative dispute resolution, there is still no solid statute that tends to the worry of and guarantees "privacy" in mediations in India.

It was in 2011 that for the first time the Hon'ble Supreme Court of Indian in the case of *Moti Ram (D) Tr. LRs v. Ashok Kumar (2011)*² held that the proceedings under mediation are confidential in nature, and only an settlement agreement executed or an alternative statement that the mediation proceedings were unsuccessful, should be provided by the mediator to the court when needed.

Following in similar strides, the Law Commission of India in its 129th Report prescribed that it ought to be made obligatory for the Court to allude disputes to mediation for settlement. In the landmark case of *Afcons Infra Ltd. v. M/S Cherian Varkey Constructions (2010)*³, the Hon'ble Supreme Court of India held that all matters pertaining to trade, commerce, contracts and consumer disputes can also be normally mediated.

In 2013, the Hon'ble Supreme Court in the case of *B. S. Krishnamurthy v. B. S. Nagaraj (2011)*⁴ directed the Family Courts to endeavor to settle matrimonial disputes by means of mediation and to likewise acquaint parties with mediation focuses with assent of the parties, particularly in issues concerning maintenance, child custody, and the lot.

It has been seen that up till presently mainly companies and institutions in the field of insurance, banking and trading have depended on mediation and Alternate Dispute Resolutions as methods for settling disputes. Consequently, consolation is particularly required for making arrangements obligatory for Alternate Dispute Resolutions particularly mediation to be utilized as the most usually sort after methods for dispute resolution is genuinely necessary. Awareness must be focused on the average citizens with countrywide exposure in different media. Consequently, there is an earnest need to distinguish people or community based initiatives for taking up the reason for spreading awareness about mediation over the nation. It currently appears that India need better approaches for taking a gander at compromise and the legal professionals and expectation that we find another way that will help in spanning bonds between the morals of training, the estimations of the law and the requests of open arrangement. The procedure has begun, yet gradually. Awareness in the general public of the mediation procedure and its advantages, and creating capacities with regards to a similar will help to facilitate the move from ill-disposed case to strategies for trade dispute resolution in a major manner. This will likewise help in diminishing the

²Moti Ram (D) Tr. LRs v. Ashok Kumar, (2011)1 SCC 466.

³*Afcons Infra Ltd. v.M/S Cherian Varkey Constructions*, (2010) 8 SCC 24.

⁴*B. S. Krishnamurthy v. B. S. Nagaraj*, (2011) 15 SCC 464.

accumulation of long pending cases in Indian courts and usher in another period.

III. PROCESS OF MEDIATION IN INDIA

In most of the matters, parties willingly choose mediation to mutually resolve their legal issue, making mediation in India a party driven and neutral procedure. The 3rd party like the mediator is delegated who acts impartially in guiding the parties to mutually resolve their issues. Mediation utilizes organized correspondence and arrangement where individuals put their issues and solutions for them before one another with the assistance of the mediator in between.

The mediator at that point encourages them to arrive at a resolution on the basis of their settled terms. As it is a voluntary procedure and the parties hold every one of the rights and powers, any party can pull back from the procedure of mediation at any stage without expressing an explanation.

The Mediation process in India is completely confidential as any information which is furnished by any of the party and a document prepared or submitted is sealed and inadmissible. An admission made during mediation proceedings cannot be used in any other court case or proceedings and any information provided to the mediator can also not be disclosed to the other party unless the party giving the information specifically permits the mediator to do so. Moreover, the mediator cannot even be called as a witness to testify in any case before the court as it can lead to disclosure of information, which he can't do.

Thus, there are five fundamental rules of Mediation which the Indian Country follows:

1. Neutral Mediator to conduct the proceedings
2. Self-Determination of the parties
3. Voluntary Process
4. Confidentiality
5. Fairness of Process.

IV. EFFECTIVENESS OF MEDIATION

In India, at times, the court can also refer the matters like of matrimonial, corporate affairs, trades, etc. to the mediator for mediation. The matters related to divorce are most commonly referred cases for mediation in India. Such matters be confidential and stay between the parties only and reach to the solutions through peace ignoring the public opinion.

V. A WAY FORWARD

The Mediation as an Alternative Dispute Resolution has gain much importance and significance in the recent years. But, it may also be noted that according to the Souvenir-National Conference on Mediation, 2012 by the Mediation and Conciliation Project Committee, Supreme Court of India, the success and acceptance of the Mediation differ from country to country. So as to take mediation ahead and use it in the most ideal way, it is basic to spread its awareness among the general population. All the more urgently, those occupied with mediation must gain mediation abilities in a logical and structured way. Law students must be presented to mediation aptitudes preparing at the University level itself. Attorneys or different experts who wish to intervene must experience proceeding with proficient improvement courses to sharpen their mediation aptitudes. It is just if those from a lawful foundation have a perfectly clear information about mediation that they can educate and manage their customer to profit of the advantages of mediation. Numerous connections can be spared through mediation and furthermore the weight of cases upon the Courts will diminish. Empowering, mediation as an Appropriate Dispute Resolution system likely could be the path forward for guaranteeing quick conveyance of equity.

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