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# Positive and Negative Aspects of Mandatory Mediation

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## ABSTRACT

*This article will discuss the legal aspects of mandatory mediation in India and why it has become a necessity in the current society. It will also discuss some of the major benefits and drawbacks of mandatory mediation.*

*Mandatory mediation is defined as a process where an independent mediator, who is not connected to any party of the dispute, is appointed by a court and makes formal requests to the parties to try and settle their dispute. The mandate order which usually includes conditions in case the disputes remain unresolved can be enforced by contempt proceedings against parties who do not comply with it.*

*With the passage of time disputes started to arise in court cases, which were not only delaying the disposal of cases but also ultimately causing injustice to parties because of this delay. As a solution for this problem, the concept of mandatory mediation was included in the Code of Civil Procedure (CPC) Rules. One important point that must be noticed here is that, by giving them the power to prescribe rules under section 77(8), C.P.C. encourages the courts to adopt a process of "judicialization" of legal relations, which has been criticized heavily by advocates.*

*The main reason behind introducing mandatory mediation is to reduce the number of litigations that take place in the court. Litigations are meant to find a solution but in many cases, they turn out to be more detrimental than helpful. Mandatory mediation helps in bringing disputes into a courtroom where parties can be openly heard, which is not possible when they are proceeding in private before the court.*

**Keywords:** Mediation, Conciliation, India, Indian Legal System, Civil Litigation, CrPc

## I. WHAT IS MANDATORY MEDIATION?

As frequently misconstrued, mandatory mediation doesn't mean commanding gatherings to resolve their disputes through mediation. It essentially implies ordering gatherings to endeavour mediation. It has been portrayed as 'intimidation into and not inside' the course of mediation<sup>2</sup>.

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<sup>2</sup> (Quek 2010, 485).

Everything necessary from the gatherings is to try mediation out. This should be possible in various ways. For example, a legal counsellor can make mediation mandatory for specific sorts of disputes preceding the foundation of procedures in courts or even after cases have been brought under the steady gaze of courts. In the event that it is before the foundation of procedures, it is in the idea of 'mandatory pre-litigation mediation'. There are occasions of the two types of mandatory mediation - before and after the foundation of procedures - present in different wards. While taking into account whether to execute mandatory mediation in a ward, homegrown elements like the time it takes for cases to arrive at preliminary, the expense of litigation, the predominant legitimate culture and political environment, and the mentalities of the lawful calling, legal executive, and overall population are critical<sup>3</sup>.

In India, in spite of the long postponements in courts, the disappointment of deliberate mediation to develop as a well-known dispute resolution system requires a reexamine on how mediation has been drawn nearer in the nation up until this point. An alternate methodology, which removes the underlying tact in selecting mediation, may offer the tricky arrangement. Mandatory mediation has been accommodated in various locales through at least one of the accompanying three modes<sup>4</sup>.

To start with, some mandatory mediation conspires completely accommodate a programmed and obligatory reference of specific matters to mediation. Such plans are by and large administrative and regularly expect gatherings to attempt mediation as an essential to beginning procedures in official courtrooms. The second kind of mandatory mediation frequently alluded to as court-alluded mediation, enables judges to allude gatherings to mediation with or without the gatherings' assent dependent upon the situation. Third, some mandatory mediation plans can be depicted as semi necessary in light of the fact that despite the fact that they don't command mediation, it is viably constrained as potential unfriendly costs orders in case mediation isn't attempted preceding initiating procedures. Before we continue to distinguish the appropriateness of one or a mix of these above modes in the Indian setting, it is fundamental to inspect the advantages and concerns related to the actual approach of mandatory mediation.

## **II. IS MANDATORY MEDIATION NECESSARY?**

A party usually gets caught in a years-in-length suit process, which for the most part dissolves the actual reason for our equitable justice framework. In emerging nations like India, where the vast majority choose a suit to determine questions, there is extreme over-troubling of courts

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<sup>3</sup> (Hanks 2012, 929)

<sup>4</sup> (Hanks 2012, 930)

and an enormous number of forthcoming cases on the agenda, which has, at last, prompted disappointment among individuals in regards to the legal framework and its capacity to give equity, regularly making genuine the prevalent view, "justice delayed is justice denied".

Referring to *Hussainara Khatoon v. Home Secretary, State of Bihar*<sup>5</sup>, SC<sup>6</sup> held that the "right to an expeditious hearing is a fundamental right verifiable in the assurance of life and individual freedom cherished in Article 21 of Indian Constitution". This manner makes mediation an essential interaction due to its capacity for equitable justice.

### III. POSITIVE ASPECTS

#### 1. Time-efficient –

As the measure of time needed for the mediation is essentially shorter than required for litigation cases or ADR, mediation can happen generally right off the bat in the dispute, additionally assisting the mediator with focusing simply on significant issues and disregarding the others.

#### 2. Cheaper –

Since mediation for the most part expects little to less planning, is less formal and complex than litigation or ADR, can happen at the beginning phase of the dispute, it is in every case more affordable contrasted with prosecuting cases in the court.

#### 3. Secures relations –

Order 32A of the CPC suggests mediation for family/individual relations the explanation being conventional legal strategy isn't undeniably fit for the touchy space of individual relations. Consequently, for the assurance of connections, mandatory mediation under the watchful eye of court proceedings can truly help as courts generally pronounce one individual a victor and another a failure, which prompts feelings of spite that stay for long.

SC has stated in *Salem Advocate Bar Association, Tamil Nadu v. Association of India*<sup>7</sup> where it was held that reference to mediation, pacification and intervention is required for court matters. This will truly help in the acknowledgement of compulsory mediation as an answer for existing issues in our general set of laws.

### IV. NEGATIVE ASPECTS

1. It is said that alluding cases without assent might encroach upon the opportunity of

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<sup>5</sup> 1979 AIR 1369, 1979 SCR (3) 532

<sup>6</sup> Supreme Court

<sup>7</sup> Writ Petition (C) No. 496 of 2002

gatherings to pick the technique for settlement of disputes and would be against party independence.

2. Nonetheless, it is contended that mandatory mediation is intimidation into the course of mediation yet not pressure inside mediation. Mediation is only an interaction that gatherings are acquainted with, for their own advantage further compulsion can utilize the cycle yet there is no pressure to settle, gatherings can proceed to record a suit if this choice doesn't work out.
3. There is a lot of analysis against mandatory mediation from legal advisors, they think mandatory mediation is conflicting with the consensual idea of the cycle, nonetheless, attorneys' conflict may be because of the worry of decrease of inflow of cases to them, yet here the gatherings are not constrained for a settlement which is against their assent. When they are into the cycle they will comprehend the viability of the interaction and take part in mediation.

Mediation is a decent method since it is a simpler strategy for dispute resolutions and can limit time contributed, cost, and assets. Indeed, in case it is ineffective, the gatherings can generally go to the courts and get their dispute settled. So, mandatory mediation is a significant weapon against deferral, cost, and unfairness and goes about as an aid for society.

Unlike Arbitration and Conciliation Act, 1996, there is no statute to govern mediation in India. However, CPC was amended in 1999 to reestablish power with courts to allude forthcoming disputes to ADR instruments to support speedier dispute resolutions.

*Afcons Infrastructure v. Cherian Varkey Construction Co. Ltd.*<sup>8</sup> is the milestone judgment wherein the SC set down standards overseeing reference of forthcoming disputes to ADR. It held that gatherings' assent is mandatory just for alluding their dispute to assertion or appeasement and not really for different modes, including, mediation. Further, it saw that in situations where the gatherings don't agree to intervention/placation, the concerned court might allude the gatherings to different methods of ADR and they likewise have the ability to force expenses to guarantee the investment of gatherings in the mediation cycle. Along these lines, the investment of gatherings in mediation was guaranteed.

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<sup>8</sup> ((2010) 8 SCC 24)