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MANDATORY PRE- LITIGATION MEDIATION: REFORM OR PROCEDURAL BURDEN?

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INTRODUCTION

In a democratic country like India, judiciary is seen as a protector of justice. Hence common people knock the door of courts to seek relief for their problems. but when these complications continues for ages, they in turn become burden. There are 55 million of cases pending before the courts of India, most visible in the district judiciary, where nearly 85% pendency resides. The situation of the trial criminal cases is particularly alarming, the under trial prisoners have spent a significant portion of their life in prisons waiting for their trial. Another pressing concern is, the inadequate judge-to-case ratio in comparison to global standards. Mediation has emerged as an amicable dispute resolution method, to reduce the burden on courts, where the matter is resolved out of the court, leaving both the parties mutually satisfied. The entire process of mediation is confidential and less time consuming than traditional litigation. The courts have acknowledged the importance of promoting mediation as an alternative to litigation. The mediation act, 2023 introduces the concept of pre-litigation mediation which is a progressive shift towards reducing judicial backlogs. It simply means to approach mediation first before proceeding to the courts. In many acts currently in India, there are provision for mandatory pre-litigation mediation, which is an important step taken to minimize unnecessary litigation.

LEGAL FRAMEWORK

Mediation is distinct from traditional litigation. In mediation, parties are encouraged to express themselves freely and actively engage in discussion and negotiation. Its objective is to achieve a win-win outcome, unlike litigation where typically one party succeeds and the other does not. Hence, mediation serves as an effective alternative to litigation, allowing parties to participate directly and propose their own solutions, leading to mutual satisfaction.

A key feature of mediation is that the entire process is voluntary and confidential. Accordingly,

Section 5 of the Mediation Act, 2023¹ provides that, irrespective of the existence of a prior mediation agreement, parties may, by mutual consent, opt for mediation in any civil or commercial dispute

Section 12A of the Commercial Courts Act - mandates that, where the matter is not urgent, the plaintiff must first exhaust the remedy of pre-litigation mediation before approaching the court. The period prescribed for mediation is three months, extendable by a further two months with the consent of the parties. The time spent in mediation is excluded from computation under the Limitation Act, 1963.

Thus, the essential requirement is that parties must undertake pre-litigation mediation unless urgent interim relief is sought. The legal position has been clarified by the Hon'ble Supreme Court in Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.² and Yamini Manohar v. T.K.D. Keerthi³, and further elaborated in Dhanbad Fuels Pvt. Ltd. case⁴. The Court held that the requirement under Section 12A is mandatory, and courts must ensure that the plea of urgent interim relief is not used as a mere pretext to bypass mediation. However, if the test for grant of interim relief is genuinely satisfied, the suit may proceed without compliance with Section 12A, irrespective of the ultimate outcome on merits.

Section 89 of the Code of Civil Procedure, 1908 (CPC):

This provision empowers civil courts to refer disputes to alternative dispute resolution (ADR) mechanisms where there exist elements of a possible settlement acceptable to the parties. It reflects the legislative intent to encourage out-of-court settlements and reduce the burden on the judiciary.

Under Section 89(1), when the court is of the opinion that a settlement may be possible, it shall formulate the terms of a potential settlement and present them to the parties for their observations. After considering their responses, the court may reformulate the terms and refer the dispute to one of the following ADR methods:

- a) arbitration;
- b) conciliation;
- c) judicial settlement, including settlement through Lok Adalat; or

¹ Section 5 of the Mediation Act, 2023

² M/S Patil Automation Private Limited vs Rakheja Engineers Private Limited on 17 August, 2022.

³ Yamini Manohar vs T K D Keerthi on 13 October, 2023

⁴ M/S Dhanbad Fuels Private Limited vs Union Of India on 15 May, 2025

d) mediation.

Section 89(2) further clarifies the procedural framework applicable after such reference:

- In the case of arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 apply as if the matter were referred under that Act.
- Where the matter is referred to a Lok Adalat, the provisions of the Legal Services Authorities Act, 1987 govern the process.
- In case of judicial settlement, the dispute is referred to a suitable institution or person, which is deemed to be a Lok Adalat, and the provisions of the Legal Services Authorities Act, 1987 apply.
- For mediation, the court facilitates a compromise between the parties in accordance with the prescribed procedure. *Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. P. Ltd.* (2010) 8 SCC 24

Thus, Section 89 CPC serves as a crucial statutory mechanism for promoting ADR and enabling courts to actively facilitate amicable dispute resolution⁵. The Supreme court judgment in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*⁶ plays a crucial role in the legal interpretation of Section 89 of the Code of Civil Procedure, 1908. It redefined and clarified the procedure and framework to be followed by courts while referring matters to mediation and other ADR mechanisms. The Supreme Court held that a matter should be referred to mediation only when it contains elements of a possible settlement. Thus, the court must first assess the suitability of the dispute for ADR before making such a reference. The judgment also laid down guiding principles and criteria for determining which cases are appropriate for mediation, thereby streamlining the practical implementation of Section 89 CPC.

OBJECTIVES OF PRE-LITIGATION MEDIATION

The objective of mediation is to resolve disputes in an amicable manner, where the outcome is determined by the parties themselves. In India, two primary legal provisions govern mediation. First, Section 89 of the Code of Civil Procedure (CPC) empowers civil courts to refer a dispute to mediation with the consent of both parties. If the parties refuse to opt for mediation, the suit continues before the court. Second, Section 12A of the Commercial Courts Act mandates that,

⁵ [https://www.drishtijudiciary.com/alternative-dispute-resolution/Afcons%20Infrastructure%20Ltd.%20v.%20Cherian%20Varkey%20Construction%20Co.%20P.%20Ltd.%20\(2010\)%208%20SCC%2024](https://www.drishtijudiciary.com/alternative-dispute-resolution/Afcons%20Infrastructure%20Ltd.%20v.%20Cherian%20Varkey%20Construction%20Co.%20P.%20Ltd.%20(2010)%208%20SCC%2024)

⁶ *Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. P. Ltd.* (2010) 8 SCC 24

in matters of a civil or commercial nature (where no urgent relief is sought), parties must first exhaust the remedy of pre-institution mediation before approaching the court. However, the practical situation is not as ideal as it appears on paper. If mediation fails under Section 89 CPC, the matter is referred back to the court, which can further prolong the litigation process.

Pre-litigation mediation was introduced to address the shortcomings in the existing mediation framework in India, where mediation was often perceived as a procedural burden and litigation was generally preferred. To strengthen the use of mediation, Section 12A of the Commercial Courts Act made pre-institution mediation mandatory in civil and commercial nature cases. The objective behind this provision is to ensure that parties at least attempt mediation before approaching the court. If the dispute is resolved at this stage, it eliminates the need for litigation, thereby saving time and reducing the burden on both the courts and the parties. However, while participation in mediation is mandatory under this provision (subject to exceptions such as urgent relief), the success of mediation is not. The outcome ultimately depends on the willingness of the parties, and there is no obligation that the mediation must result in a settlement.

FEATURES OF MEDIATION:

Confidentiality: The entire mediation process is confidential. Under the Mediation Act, 2023, the mediator is under a duty not to disclose any information arising out of the mediation proceedings to third parties, nor can such information be used as evidence in court. It is the mediator's responsibility to ensure that the confidentiality of the process is strictly maintained. The only exception to this rule arises where the information relates to the commission of a criminal offence; in such cases, the mediator may disclose the information in good faith.

Voluntary Process: Mediation is essentially a client-oriented and voluntary process, as it begins with the consent of both parties, except where it is mandated by law (such as under Section 12A of the Commercial Courts Act) or by prior agreement between the parties. In mediation, the parties themselves are the primary participants and decision-makers. They may appear either individually or with the assistance of their counsel and directly communicate their concerns before the mediator.

The mediator facilitates dialogue but does not impose a decision. For instance, in matrimonial disputes, if the husband and wife believe that their relationship can still be preserved, they may opt for mediation. Through structured mediation sessions, they are able to communicate

openly, explore solutions, and arrive at mutually acceptable terms. The points agreed upon by the parties are then recorded in a mediation settlement agreement, which is final and legally binding.

Time-Bound Nature of Mediation: Mediation is a strictly time-bound process, which makes it more efficient and practical compared to traditional litigation. In the case of pre-litigation mediation under Section 12A of the Commercial Courts Act, the process is required to be completed within a period of three months, which may be extended by a further two months with the consent of the parties. This time-bound framework makes mediation more accommodating and less time-consuming, as disputes can often be resolved within a relatively short period. As a result, it helps save both time and costs for the parties while also reducing the burden on the judicial system.

Reducing judicial burden: One of the key features of mediation is that it helps reduce the burden on the judiciary. When a court identifies elements of a possible settlement, it may refer the dispute to mediation. If the mediation process is successful, the dispute is resolved without the need for prolonged judicial intervention, thereby easing the caseload of courts. Even in cases of pre-litigation mediation, disputes may be settled at an early stage without involving the judiciary, which further contributes to reducing judicial backlog.

INTERNATIONAL PERSPECTIVE ON MANDATORY MEDIATION **(ITALY MODEL)**

In March 2010, Italy enacted Legislative Decree No. 28, introducing mandatory pre-litigation mediation for the resolution of civil disputes. To understand the mandatory nature of mediation, it is useful to examine the Italian model. Under this framework, parties to a civil dispute are required to first attempt mediation before filing a suit in court. If mediation fails, they are then free to initiate court proceedings. This model of mandatory mediation was designed to reduce the burden on the judiciary and address the problem of judicial backlog. However, the system was later refined. Following the 2013 amendments, the Italian model introduced a more balanced approach that does not unduly restrict access to courts.

Under the current framework, civil disputes are referred to a mandatory initial information session. In this session, the mediator understands the dispute and explains the process of

mediation, along with its advantages and disadvantages, to the parties. After this initial meeting, the parties (or even the mediator) may choose not to proceed with mediation and instead continue with court proceedings, or they may voluntarily agree to attempt mediation. Thus, parties retain the right to pursue litigation from the point at which the first mediation session proves unsuccessful.

Looking at the present situation of mediation in India, it has emerged as an effective dispute resolution mechanism, with many matters being successfully resolved through this process. However, mediation is not always successful in every case. A notable example is the Ayodhya Babri Masjid dispute, where the Supreme Court of India referred the matter to mediation with the aim of resolving the dispute between two religious groups in an amicable manner, without hurting their sentiments. A panel of three mediators was constituted for this purpose. Despite these efforts, the mediation process did not succeed, and the matter was ultimately referred back to the Supreme Court for final adjudication and resolution.

The enactment of the Mediation Act, 2023 has significantly strengthened and formalized the mediation framework in India. The Act provides a comprehensive legal structure governing various aspects of mediation, including the procedure to be followed, the qualifications and duties of mediators, and the institutional framework for mediation. It also establishes the Mediation Council of India, which is entrusted with regulatory and supervisory functions, including the recognition of mediation service providers and the laying down of standards for mediators. Additionally, the Act contains provisions relating to the appointment of mediators, thereby ensuring greater transparency and consistency in the mediation process.

KEY JUDICIAL DEVELOPMENT:

1) Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd (2010) 8 SCR 1053⁷-

Name Of the Case	Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd
Citations	(2010) 8 SCR 1053.

• Facts and legal Issues of the case: -

In Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., the dispute arose out

⁷ Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd (2010) 8 SCR 1053

of a construction contract between the parties. Owing to disagreements regarding contractual obligations and payments, a civil suit was instituted before the Trial Court. During the pendency of the suit, the court referred the matter to arbitration under Section 89 of the Code of Civil Procedure, 1908. Afcons Infrastructure challenged this order on the ground that arbitration could not be imposed without the consent of both parties. The matter eventually reached the Supreme Court, which examined the scope of Section 89 CPC and the role of various Alternative Dispute Resolution mechanisms, including mediation, conciliation, arbitration and Lok Adalat.

- **Ratio Decidendi**

The Supreme Court held that a court cannot refer parties to arbitration or conciliation under Section 89 of the Code of Civil Procedure, 1908 unless both parties agree to such a reference. At the same time, the Court emphasized that mediation, judicial settlement and Lok Adalat are effective methods of resolving disputes amicably and can be encouraged by courts. The judgment also explained the proper interpretation of Section 89 CPC and identified the types of disputes that are appropriate for resolution through ADR mechanisms, thereby promoting the use of mediation in India.

2) **Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd manu/sc/05896/2022⁸ -**

Name Of the Case	M/S Patil Automation Private Limited and Ors. V. Rakheja Engineers Private Ltd.
Citations	MANU/SC/05896/2022

- **Facts and legal Issues of the case: -**

The present matter arose out of a commercial dispute concerning the recovery of money. The respondent instituted a suit for recovery before the Commercial Court without first resorting to pre-institution mediation under Section 12A of the Commercial Courts Act, 2015. The defendant thereafter sought rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908, contending that the suit was barred by law due to non-compliance with the mandatory requirement of pre-institution mediation. The Commercial Court rejected the objection and allowed the suit to proceed. Aggrieved by the same, the matter eventually reached the Supreme Court, where the principal issue for consideration was whether pre-institution mediation under Section 12A is mandatory or merely directory in nature.

⁸ Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd manu/sc/05896/2022

• **Ratio Decidendi**

The Supreme Court held that pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 is mandatory in nature. The Court observed that the legislative intent behind introducing this provision was to reduce the burden on the judiciary and encourage the resolution of commercial disputes through settlement at an early stage. Accordingly, it held that a commercial suit instituted without complying with the mandate of Section 12A is barred by law and is liable to be rejected. The only exception to this requirement is where the plaintiff seeks urgent interim relief. The Court further clarified that the plaint may be rejected by the court even suo motu for non-compliance with Section 12A.

However, the Court was mindful of the fact that several commercial suits had already been instituted without resorting to pre-institution mediation. Therefore, it held that its declaration regarding the mandatory nature of Section 12A would operate prospectively. Consequently, the requirement of mandatory pre-institution mediation would apply only to suits instituted on or after 20 August 2022, and suits filed prior to that date would not automatically become invalid.

Conclusion-

In recent years, pre-litigation mediation has emerged as an effective tool to address the increasing burden on the judiciary by providing parties with an alternative avenue to resolve disputes amicably. Commercial disputes, in particular, can often be settled through smooth negotiations and mutually acceptable settlements, thereby saving time and costs associated with prolonged litigation. The judicial development in this area has been significantly shaped by landmark judgments such as *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*, which made pre-institution mediation mandatory in certain commercial disputes, and *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, which promoted mediation and other ADR mechanisms as effective means of dispute resolution.

However, despite these developments, the success of pre-litigation mediation largely depends on the awareness and willingness of the parties to participate in good faith. In practice, such willingness is often lacking, and many parties perceive pre-litigation mediation as a procedural formality or an additional burden rather than an opportunity to resolve disputes efficiently. Therefore, along with legislative and judicial support, there is a need to create greater awareness and foster confidence in mediation so that it can truly serve its intended purpose.