

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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ISSN

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EXPLORING THE EFFICACY OF MEDIATION IN THE INSOLVENCY PROCESS: INDIAN SCENARIO

AUTHORED BY - ISHITA YADAV

Introduction:

India is infamous for being over-litigious, having a backlog of pending cases, and inability to provide timely justice. This is due to over-reliance on litigation as a dispute resolution method even though it is an expensive and tedious mechanism in terms of time and cost-effectiveness. *“Approximately 2.3 million cases have been pending in Indian subordinate courts for ten years and in some states, one in every four cases is pending for five years.”*¹ The pandemic outbreak has also seen a surge in the number of disputes all over the world which the jurists have interpreted as *“the interpretation of force majeure clauses, material adverse effect clauses, and termination clauses.”*² This pendency is negating the many successes of the Indian judicial system. In this regard, Alternative Dispute Resolution (‘ADR’) is gaining prominence in the Indian context due to its opposite nature of rendering *“a satisfactory method of dispute settlement by being an economic, expeditious and informal remedy.”*³ One such ADR method is mediation *“wherein a third person facilitates communication between two or more parties in dispute, by promoting voluntary decision-making and assisting them to come to mutually acceptable solutions.”*⁴ Even though empirical data has proven mediation to be *“cheaper, faster and more satisfactory”*⁵ as compared to traditionally dominant litigation or ‘adjudicative arbitration’, it is still seen as an ‘alternative’ despite its growing prominence and wide acceptance.

¹Daksh, “Access to Justice Survey 2015-16: Key Findings” <https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>. Last Accessed 29 March, 2021

² Ankoosh Mehta, Durga Agarwal and Maitrayi Jain, “Mediation: The Future of Dispute Resolution”, Covid-19 CAM SCC Expert Corner (25 June 2020) <https://www.scconline.com/blog/post/2020/06/25/mediation-the-future-of-dispute-resolution/>

³ Silpi Jain, Aryan Mohindroo and Harshil Manchanda, “Mediating the Irish Way: Taking an Alternative Approach to Alternative Dispute Resolution in India” Arbitration: The International Journal of Arbitration, Mediation and Dispute Management Volume 87 Issue 1, pp 68 (18 February 2021)

⁴ Black's Law Dictionary, Eighth Edition, South Asian Edition (First), 2015. Also see, James A. Wall, Jr., John B. Stark & Rhetta L. Standifer, “Mediation: A Current Review and Theory Development”, 45(3) J. Conflict Resol .pp. 370–391 (2001).

⁵ Mary Radford, “Advantages and Disadvantages of Mediation in Probate, Trust and Guardianship Matters”, 1 Pepp. Dispute Resolution L. J. 241, 249 (2000) . Also see supra note 2 at pp. 68

Mediation has been gaining prominence in India; be it the “successful application of mediation in the *Amarchand Mangaldas* split, “touted as the largest law firm split in India”⁶ or the court-monitored mediation by the constitutional bench of the Supreme Court of India in the recent Ayodhya dispute⁷.

Locating Mediation in Indian Statutes:

In India, explicit reference to mediation is found in numerous statutory enactments. It first received legal recognition in the Industrial Disputes Act, 1947⁸ (‘ID Act’). This statutory recognition also led to the advent of mediation’s identity crisis as the ID Act provides for the appointment of ‘conciliators’ for mediating industrial disputes to provide cost-effective and quick settlement of industrial disputes. It will be profitable to differentiate between the much-synonymous Conciliators and Mediators for further clarity on the legislative intent between the two under S.89 CPC⁹ which includes conciliation and mediation as different redressal mechanisms. A conciliator has broader ‘evaluative powers’ of intervention and can draft the settlement terms while a mediator is a ‘facilitator who can give suggestions to parties to resolve the dispute on their terms.

In matrimonial disputes under the Hindu Marriage Act, 1955¹⁰ and Special Marriages Act, 1954¹¹ court initially mandate mediation to the parties. Even the Companies Act, 2013¹² provides for mediation of disputes by the National Company Law Tribunal. Apart from these, the Consumer Protection Act, 2019¹³ also has introduced provisions of mediation of consumer disputes at the initial stage itself.

The major development of mediation in the Indian regime is accredited to the 129th Law

⁶ Rohan Dhariwal and Shrey Pattnaik “Shifts or Illusions? The Reality of India’s Growing Mediation Scenario” Kluwer Mediation Blog (28 May 2015) <http://mediationblog.kluwerarbitration.com/2015/05/28/shifts-or-illusions-the-reality-of-indias-growing-mediation-scenario>

⁷ Mridul Godha, “A Renewed Interest in Mediation in India”, Kluwer Arbitration Blog Post (31 March 2019) <http://mediationblog.kluwerarbitration.com/2019/03/30/a-renewed-interest-in-mediation-in-india/>

⁸ Section 4 of the Industrial Disputes Act, 1947

⁹ Order X Rule 1A of the CPC.

¹⁰ S. 23(2), Hindu Marriage Act, 1955.

¹¹ S. 34 (2), Special Marriages Act, 1954.

¹² S. 442 of the Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016

¹³ S. 37, Consumer Protection Act, 2019.

Commission Report which first recommended usage of ADR mechanisms in India.¹⁴ This recommendation led to the insertion of Section 89 Civil Procedure Code in 1999. As per S. 89, the court, as it deems fit, can refer any case(s) to arbitration, conciliation, *Lok adalats*, or mediation. This provision for mediation of civil cases in India is known as ‘court-referred mediation.’¹⁵ Court-referred mediation is more recognizable and opted-for over private mediation due to different sets of rules by different courts.

Additionally, the Indian Government recently amended Commercial Courts Act, 2015 (‘CCA’) to provide speedy settlement through mediation in commercial disputes. The insertion of section 12A mandatorily requires parties to go through pre-institution mediation given that the matter does not require urgent relief. With the amended statute, the settlement arrived through mediation shall have the “same status as that of an arbitral award as provided under section 30(4) of the Arbitration and Conciliation Act, 1996.”¹⁶

In January 2020, firstly, the Supreme Court in *MR Krishna Murthi v New India Assurance Co. Ltd.*¹⁷ stated the need for uniform legislation on mediation in India and secondly set up a panel under the aegis of Mr. Niranjana Bhat, to “draft legislation and recommend, codifying mediation practice in India.”¹⁸ “The key elements emphasized upon by the mediators included confidentiality, the enforceability of settlements arrived through mediation and voluntary nature of the process, among others.”¹⁹ The nod from the Apex Court for a codified mediation practice is a positive sign for boosting mediation practice in India, which was further affirmed by the Supreme Court inquiring about the progress from the Centre on a plea hearing dated 19th March 2021.²⁰

¹⁴ 129th Law Commission of India, “Urban Litigation: Mediation as Alternative to Adjudication”, (1988), <http://lawcommissionofindia.nic.in/101-169/Report129.pdf>

¹⁵ Supra Note 3, Ireland Alternative at pp. 5

¹⁶ Section 12A(5), Commercial Courts Act, 2015.

¹⁷ M.R. Krishna Murthi v. The New India Assurance Co. Ltd., AIR 2019 SC 5625.

¹⁸ Supra note 15, Ireland Alternative at pp. 81

¹⁹ Manisha T. Karia, “The Effective Implementation of Mediation in India: The Way Forward”, Bar and Bench Column (29 December 2019) <https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward>.

²⁰ Srishti Ojha, “Supreme Court Asks Centre To Respond If A Law Is Being Made For Mediation” <https://www.livelaw.in/top-stories/supreme-court-legislation-is-being-made-for-mediation-youth-bar-association-of-india-ybai-171442?infinitescroll=1> (19 March 2021).

Implementation of mediation in India:

Despite the above-mentioned legislative attempts of giving statutory recognition, mediation has failed to achieve the status of the mainstream ADR process. Despite the noteworthy attempts of rendering mediation as an effective dispute resolution mechanism, the main reason that can be attributed to its slow progression is the absence of a uniform mediation process in India. Along with a lack of mediation legislation, Vidhi Centre for Legal Policy in association with the Department of Justice, Ministry of Law & Justice, India has revealed other reasons to be, “lack of quality mediators, exclusive infrastructure to cater to complex cases for party dissatisfaction with the court programs.”²¹ It can thus be contended that mediation cannot reach its true potential with the loosely inserted and scattered mediation provisions. There is an absence of a uniform definition of mediation in the above-stated legislative enactments which further are also unclear on the process, qualification, and role of mediators.

However, some attempts at streamlining the mediation process have been undertaken by the enactment of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 (‘2003 Rules’) and Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018. These rules codify some of the basic core principles in terms of the process of how mediation shall be conducted, the confidential nature of the proceedings, specifying the qualification of mediators and their roles. Nevertheless, the rules have proved to be inadequate for mediation as a process as they are not uniformly applied and are tailored to cover specific cases under the same subject-matter jurisdiction. A closer reading of S. 12A of the CCA shows that authorities under Legal Services Authorities Act, 1987 (‘LS Act’) are empowered to conduct pre-institution mediation which essentially entails that mediation can be accessed only from government authorized institutions. However, the LS Act was formed to provide competent and free services for weaker sections of society.²² It, therefore, cannot be competent to deal with commercial disputes through mediation which would require learning a different skill-set. Furthermore, the 2003 rules were formulated under the constituted committee by the then Honorable Chief Justice Lahoti to “*uniformize mediation throughout the country and prepare training manuals and a uniform training curriculum for standardizing mediation training.*”²³ These rules though non-

²¹ Vidhi Centre for Legal Policy, “Strengthening Mediation in India: A Report on Court Connected Mediations” (2016), at pp. 25 https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf.

²² Supra Note 18, Ireland Alternative at pp.6.

²³ Rashika Narain and Abhinav Sankaranarayanan, “Formulating a Legislative Framework for Mediation in India”, 11(1) NUJS L. Rev. 75, 77 (2018) at pp. 75-84, <http://nujlawreview.org/wpcontent/uploads/2018/04/11->

binding were aimed at boosting the court-annexed mediation.

Though attempts of various Indian statutes have iterated the need for mediation to settle disputes, it will be profitable to have a uniform and centralized legislative framework on the mediation process for its effective implementation. This legitimacy will help strengthen the faith of the parties in the mediation process and its efficacy.

Learning from Ireland: From Directive Principles to Mediation:

The codification of the mediation process has become all the more pertinent in light of India signing the 'United Nations Convention on International Settlement Agreements Resulting from Mediation' ('Singapore Convention'). The Convention makes international or cross-border mediation settlements enforceable in India. India, if ratifies, may have to enact a legislation due to its constitutional obligations under Article 253²⁴ which requires legislation to enact laws for the enforcement of conventions. The uncertainties regarding enforcement of mediation agreements will cease to exist only through the enactment of an Indian mediation law. This shall also help streamline and restructure the process which will only ensure its regular use in settling disputes.

Reliance for mediation legislation has been placed on Ireland who plays a regulatory role because even though Ireland and India, polar opposite at the culture and economy spectrum, have a similar legal system. Their similarity is visible in terms of "both countries following the common law system and have similar hierarchized court structures."²⁵ With a similar legal system, both the countries' judiciary suffers from inordinate delays and overburden of cases. Mediation is a dispute redressal mechanism that has been used by "18 other jurisdictions including Malaysia, Singapore as an 'effective dispute resolution system' due to its efficient, cost-effective and confidential nature."²⁶

According to a comparative study between Ireland and India's legal system, one of the striking similarities deduced is that in both countries the legislature and the judiciary have made equal

[%E2%80%931-%E2%80%93Rashika-and-Abhinav.pdf](#)

²⁴ Article 253, Constitution of India, 1950.

²⁵Supra note Ireland at pp. 80. Also see, "The Courts System" (The Bar of Ireland), <https://www.lawlibrary.ie/Legal-Services/The-Courts-System.aspx>.

²⁶ Supra Note 2, SCC Expert Corner article.

attempts to embolden mediation through various enactments. Neither Ireland nor India had a specific law on mediation. However, this was changed with the recent codification of the Mediation Act, 2017 by Ireland. As per the study, the enactment has led to a “tangible positive impact of using mediation in Ireland”²⁷ which was a work in progress before the codification, with the combined efforts of the judiciary and the legislature.

Drawbacks and Recommendations vis-à-vis Indian

mediation regime:

India currently lacking a mediation statutory framework has not experienced a similar boost of the mediation regime despite the combined efforts of the judiciary and legislature. Mediation be it court-annexed or private requires practical recognition by the legislature and the judiciary. With no legislative backing, mediation is at the risk of having the status of an ‘alternative’ and not the go-to mechanism for the parties. The author contends that a statutory framework will essentially entail a list of rules to follow, which in turn would be an advent to regulate the mediation practice in India. Parties would have a credible source laying down a transparent process thereby increasing their confidence in the mediation regime. However, the main contention that drafters ought to keep in mind is the essential underlying principles of mediation namely its flexibility and its voluntary nature. The legislative framework should aim to streamline what is provided in various statutes into a uniform framework governing mediation. To start with, it can outline the role of the mediators and their qualifications, the process in general; situations in which the mediator shall declare his/her conflict of interests and recusal.

Furthermore, the new enactment can also make pre-litigation mediation mandatory by also following the Ireland regime. In India, with the number of administrative barriers, lack of qualified practitioners, low literacy rate, and time-consuming, expensive litigation parties are the risk of disadvantage and harassment. Thus, they are unlikely to opt for ‘non-adjudicatory’ mediation towards the end of the process. With the new legislation, mandatory mediation shall be included wherein it should be upon the lawyer to make their parties aware of the process. Mediation is often perceived as a threat to their profession as well as a learning experience by Indian lawyers. For this, the new legislation can maybe cater to incentives such as mediation training at subsidized rates to lawyers. The above-stated enactments which aimed at streamlining

²⁷ Supra Note 18, Ireland Alternative at pp. 80.

the mediation process have an inherently conflicted stance. For instance, S. 12A of the Commercial Courts Act provides a wide exemption of ‘urgent relief sought’ which is prone to misuse by the lawyers to negate mediation. Uniform legislation will be helpful to tend to such inconsistencies as well.

Another impediment in Indian mediation is the quality and qualification of mediators. Even with *Amarchand* split and the *Ayodhya* mediation, the drawbacks that have come forth are the qualifications of the mediators. India in its ‘Mediation and Conciliation Project Committee’ guidelines provide for training for 40-hours which includes refresher courses, training sessions, and assessments to be accredited as a mediator. However, these guidelines are non-binding and not mandatory which in turn impede mediation progress. For instance, while the three mediators in the *Amarchand* firm split were luminaries in their field, they were not known for their mediation skills²⁸. Similarly, the mediator in the *Ayodhya* judgment was known to have a biased position even before his appointment and held a compromised position towards the Hindus.²⁹ Thus, mandatory training and accreditation of mediators will help ensure the sanctity and boosting credibility in the mediation process.

Another drawback in the Indian mediation regime is the unenforceability of the mediation agreements. Unlike other dispute resolution mechanisms such as arbitration or litigation, the parties perceive mediation as a pro-bono service rather than a ‘compromise’ or a ‘non-binding contract’ by the court to settle disputes with trivial issues. A mediator is perceived as a ‘guidance counselor’ making “an illegal, under-the-table, deal-making process”³⁰ due to its unenforceability in a court of law as compared to a judgment or an arbitral award. For its execution, the mediated agreement has to be written as a court order or consent award meaning the court still retains its jurisdiction and control over the matter. This goes contrary to mediation’s underlying principles as this not only increases the financial burden on the parties by moving to the court but also encroaches on the confidentiality of the settlements. Thus, treating mediation settlements as a final decree will only result in enhancing its value as a trusted dispute resolution mechanism in India.

²⁸ See supra Note 6

²⁹Jonathan Rodrigues, “Reintroducing Mediation to Millennial India Part- II”, International Mediation Institute August 2019 <https://imimmediation.org/2019/09/10/reintroducing-mediation-to-millennial-india-part-ii/>

³⁰Jonathan Rodrigues, “Reintroducing Mediation to Millennial India Part- I”, International Mediation Institute August 2019, <https://www.imimmediation.org/2019/08/22/reintroducingmediation-to-millennial-india/>

Conclusion:

In India, mediation's prominence is increasing, however, is stagnant at the same time. While there was a plethora of cases pre-Covid, the pandemic has re-initiated a discussion for a swift redressal mechanism to which mediation is a viable solution. The hindrance is mainly attributed to the lack of a mediation statutory framework amongst the various challenges. The existing scattered mention of mediation in various statutes and multiple rules by different High Courts is only furthering the uncertainty surrounding mediation. Thus, a concrete step towards making mediation an effective dispute resolution mechanism can be initiated only through a separate statute. Empirical reliance can be placed on the growth of arbitration as a process since its statutory enactment. Thus in India, boosting of mediation regime requires an efficient regulation mechanism streamlining the process, enhancing its credibility to build the party's faith to entrust it as an efficient dispute settlement mechanism.

However, the underlying principles of mediation should be kept in mind while enacting the new separate statute. It shall attempt to address the uncertainty of enforcement as well as quality control of mediation. The framework should engage in utmost precaution to preserve the sanctity, flexible, confidential nature of the mediation process. Voluntariness and party autonomy of the parties shall also not be compromised. Additionally, the legislature should also attempt to make mediation mandatory before litigation as seen in Ireland to enhance the mediation regime which would initiate a change in heavy dependency on the litigation regime in India. The need for legislation seems rather immediate with mediation's recognizable underlying benefits of settling the disputes expeditiously and amiably along with cost-effectiveness.