

MEDIATION: AN EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION MECHANISM

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Abstract

Our country's judiciary has always been overburdened and pendency in delivering judgments has one of the common problems from the very beginning. Every problem has an alternative solution, so the solution of the problem of litigation is an Alternative Dispute Resolution mechanism. An ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism is based on the UNCITRAL model of international commercial arbitration council. ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism used four procedures, which are different from litigation such as arbitration, conciliation, mediation and negotiation. This research work focuses on the mediation and its relevant aspects. Every ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism procedure has its own effectiveness and limitations but the research through this work tries to evaluate the effectiveness of mediation and its various aspects. Mediation is a non-binding process and the parties have ownership of the cases, it is a process where parties have to decide that they want to bind by this settlement or not. Mediation somehow differs from other mechanisms for non-binding in nature and full ownership has in the hands of parties of the case. The nature of the mediation process proves that this process has the social perspective and is based on the combination of socio-legal principles. This research article contains the brief history behind mediation in India and how it works till date. The researcher tries to appraise the effectiveness of mediation and tries to find out basic principles on which mediation is based. This research article focuses on the procedural part as well as conceptual clarity. The research mainly deals with the socio-legal perspective of the mediation and how it contains both social and legal aspects combined. At the last, the researcher gave the conclusion on the whole research and her opinions.

Keywords: ADR, Alternative Dispute Resolution, Mediation, Indian Judiciary, Pending litigation.

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INTRODUCTION

“Discourage litigation. Persuade your neighbours to compromise where you can. Point out them how the nominal winner is often the real loser – in fees, expenses and waste of time.”

- Abraham Lincoln

An Alternative Dispute Resolution is an outcome of all such problems, which are facing by the public constantly in the litigation. It is like a substitute to the traditional method of resolving dispute and justice. An ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism mainly focuses on delivering justice through mutual consent of the parties in the minimum time without any delay like in litigation. An ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism recognized four methods to resolve any dispute such as arbitration, conciliation, mediation and negotiation. Alternative methods are work on the mutual consensus and try to settle dispute with as early as practicable. ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism is an option to the public who do not want to go for conventional method or want to resolve their matter without courts interference. These mechanisms have their own advantage as well as flaws, like any other process have might do.

Yet, particularly in the context of mediation, it needs emphasis that this is only one of the important objectives. Mediation as a processual intervention in the legal system fulfils other instrumental and intrinsic functions, which are of an equal, if not greater importance. In its instrumental function, mediation is a means to fulfilling stated objectives. The intrinsic function of mediation emphasizes the value of mediation as an end in itself¹.

An impartial third party, the conciliator or mediator, assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute in a non – binding procedure. Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator².

Brief history

In India, the law and practice of private and transactional commercial disputes without court intervention can be traced back to ancient times. Arbitration or mediation as an alternative to dispute resolution by municipal

¹ M E D I A T I O N – realizing the potential and designing implementation strategies., Dr. Justice Dhananjaya Y. Chandrachud, available at http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf last visited on 21-07-2018 at 9:44 AM

² Avtar Singh, Law of Arbitration & Conciliation and Alternative Dispute Resolution system (Eastern Book Company, 10th edition) page no. 520

courts has been prevalent in India from Vedic times. The earliest known treatise is the *Bhradarnayaka Upanishad*, in which various types of arbitral bodies viz (i) the *Puga* (ii) the *Sreni* (iii) the *Kula* are referred to. These arbitral bodies, known as *Panchayats*, dealt with variety of disputes, such as disputes of contractual, matrimonial and even of a criminal nature. The disputants would ordinarily accept the decision of the *panchayat* and hence a settlement arrived consequent to conciliation by the *panchayat* would be as binding as the decision that was on clear legal obligations.³

PRINCIPLES OF THE MEDIATION

Every process of ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism has its own basic principles on which it is work and giving positive outcomes. Like as other process mediation has its own fundamental principles, which are helpful in settling disputes between the parties on their mutual consensus. Parties choose mediation process over litigation may be because of these principles, which have given effective way to the process. Mediation usually has seen in the family matters or any neighbouring issues, which could be resolve

by mediation process rather than go to court for justice.

In generally there are five basic principles usually seen in the mediation process and the mediator as well as the parties for an effective outcome should follow it strictly. Five basic principles of mediation process are as follows:-

Parties should participate voluntarily

It is necessary that no one should forced to mediate, it should be in the hands of parties and they have to decide whether they want to mediate or go to the courts. Parties have their voluntary participation in the mediation process. It is going to be more fruitful.

People will cooperate more fully if they know they are free to leave at any point. This engages their own free will and sense of purpose and enables them to drive the process towards agreement rather than to be led to an understanding by a third party. If they drive the process, they are more committed to the outcome.⁴

Confidentiality matters in the process

Within the mediation itself - the mediator must not divulge any confidences that are shared with them unless given permission to do so. Unless someone shares a criminal

³ ADR in India: Legislations and Practices, *S. Chaitanya Shashank, Kanshalya T. Madhavan*, available at <https://www.lawctopus.com/academike/arbitration-adr-in-india/> last visted on 21-07-2018 at 10:11 AM

⁴ Principles of mediation, available at https://rhizomenetwork.files.wordpress.com/2010/12/principles_of_mediation.pdf last visited on 21-07-2018 at 12:15PM

intent or act that involves harm to self or other.

- In respect of further proceedings (except with the express permission of both sides)
- In order for people to feel safe to explore their fears and anxieties the process must be perceived to be entirely confidential.⁵

All the information given in the mediation shall be kept confidential and it cannot be used in the court proceedings neither by the mediators nor court can ask why the mediation did not work.

Mediators are impartial

The mediator must act impartially and neutrally. He/she should observe all principles of mediation and consider only matters of procedure. He/she should not comment, value judgments, nor give advice or suggesting solutions. Impartiality of a mediator should ensure that the parties accept him/her as a person who is sincerely dedicated to resolving the dispute and who favors both sides in the dispute, seeking solutions that would satisfy both sides in the dispute. The mediator must keep in mind that his/her behavior, attitude, and sometimes the techniques of mediation can bring a sense of sympathy towards one side. When that

happens, then the mediation went the wrong way. The mediator cannot perform the function if there are circumstances that indicate doubts about his impartiality and objectivity.⁶

An agreement has to be settled with the satisfaction of parties concerned

The responsibility for defining the problem, setting the agenda and agreeing the solution rests with the people in the dispute.⁷ The mediation procedure can be started only if there is an agreement between the parties. Mediation will not be started without both parties intending to resolve the dispute. In such cases, mediation is misused only as a mean of withholding the court process and keeping the situation at the "status quo". A mediator needs to know how to explain the advantages of such dispute resolution to the parties, so that they themselves voluntarily agree to be part of such process. The parties should be informed on the possibility to interrupt the mediation process at any stage, if they express need for such. The principle of willingness applies at all stages of the proceedings. A party or the mediator may at any time withdraw and then transfer the case to the judge. A mediator can interrupt mediation if he/she feels that party's turn away from the solution or that are even more opposed than they were at the start of

⁵ Ibid

⁶ Basic principles of mediation, available at <http://www.posredovanje.me/en/posredovanje/osnovna->

nacela-posredovanja last visited on 21-07-2018 at 12:26 PM

⁷ Supra 3

mediation. The basic principle in the process of mediation is that the mediation procedure should not harm the parties in any way, but to contribute to the resolution of their dispute. Given that mediation is only a supplement to the court proceedings, it must not prevent a party from exercising the right of access to court and use of judicial protection.⁸

Mediation is without prejudice to other procedures

It is important that people reserve the right to invoke other measures. If the mediation were seen as an enforced procedure or one that removes an individual's rights, it would constrict the creativity and increases the potential for resistance.⁹

Is mediation an effective ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism or not?

The use of the term "mediation" is well known in International Law. It is the technical term in International Law, which signifies the interposition by a neutral and friendly state between two States at war or on the eve of war with each other, of its good offices to restore or to preserve peace. The term is sometimes as a synonym for

intervention, but mediation differs from it in being purely a friendly act.¹⁰

Mediation at one level of perception is a means of avoiding the pitfalls of litigation. The problems which arise in the resolution of disputes through litigation are well known. These are, broadly (i) delay; (ii) expense; (iii) rigidity of procedures; and (iv) a reduction in the participatory role of parties.¹¹ In the path of resolving these pitfalls of litigation, mediation is the most frequently adopted ALTERNATIVE DISPUTE RESOLUTION (ADR) procedure.

The process of mediation may have to pass through several stages such as :-

- opening statement
- opening statement to the parties
- summarizing and agenda setting.
- exploration of issues.
- private sessions or caucuses
- joint negotiation session
- agreement

Practitioners in this field adopt their own perfected styles. They differ in their basic steps. A lot depends upon the nature of the dispute. The more complicated a matter, the more private meetings would be necessary to pave the ground for a joint meeting.

A mediator may adopt either a facilitative or evaluative approach. Mediators try to avoid

⁸ Supra 5

⁹ Supra 3

¹⁰ Supra 2

¹¹ Supra 1

opinions and judgments. They rather facilitate and encourage parties to open up their communications and disclose their interests and priorities. In this process the mediator gets the opportunity of locating the points of difference and the area of controversy or dispute. He may then help the parties to bridge the gap between them.¹²

The essence of mediation lies in the role of the mediator as a facilitator. The mediator is not an adjudicator. Unlike the Judge in a traditional Court setting or for that matter even an arbitrator, the mediator is neither a trier of fact nor an arbiter of disputes. The role of the mediator is to create an environment in which parties before him are facilitated towards resolving the dispute in a purely voluntary settlement or agreement. The mediator is a neutral. The neutrality of the mediator is akin to the neutrality of a Judge but the role of the mediator is completely different from that of a Judge. The mediator does not either deliver judgment or dictate to the parties the terms of the agreement.¹³

Mediation is an effective ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism can be seen by these four benefits of the process such as:-

- **Informality:** - no court rules or legal precedents are involved in mediation. The mediator does not impose a decision upon the parties. As opposed to adversarial forums, the mediator helps to maintain a business-like approach to resolving a dispute. There are no fixed solutions in mediation. Parties can look to developing creative solutions to resolve matters and the solution rests with the parties themselves.
- **Privacy and confidentiality:** - the mediation conference takes place in a private setting such as a conference room at any of the Arbitration Associations. Mediation is not a matter of public record. Its confidentiality is maintained.
- **Time and cost savings:** - Mediation generally lasts a day. Complex matters may require more time due to highly technical issue and/ or multiple parties. Without the formalities found in litigation, mediation usually results in substantial costs savings.
- **Control:** - Parties have control over their participation in mediation. A party can decide to terminate their participation at any point in mediation. Mediators help parties

¹² Avtar Singh, Law of Arbitration & Conciliation and Alternative Dispute Resolution system (Eastern Book Company, 10th edition) page no. 521

¹³ Supra 1

maintain control over the negotiation that takes place.¹⁴

Implementation strategies

For an effective implementation, there is always a need of strategies and policies. The public frequently uses mediation process but there is lack of implementation and strategies should be needed. Intervention of court as a supervisor is being necessary for an implementation of mediation positively. More mediation centers have to be set up by High courts and particular sect of cases should be giving to the mediation by courts.

The development of mediation as a viable alternative to litigation is still in the incipient stages in India. Mediation center's have recently been set up by a few industry and trade associations. Similarly, professional lawyers have in certain isolated instances attempted to develop into full-fledged professionals with expertise in mediation. These instances are, however, sporadic and the overall potential of mediation remains to be explored. Strategies for successful implementation of mediation must, be carefully assessed and a conscious effort has to be made towards the evolution of a process that will be acceptable to the society. In achieving a high level of acceptability for the mediation process, several issues need be focused upon and these include:

- a. Developing awareness;
- b. Advocacy;
- c. Building capacities;
- d. The creation of an institutional framework; and
- e. Actual implementation.¹⁵

Conclusion

There is no necessary interference of court in ALTERNATIVE DISPUTE RESOLUTION (ADR) techniques but in different stages court would have discharge some important functions. Mediation process is focuses only to reduction in arrears and a flexible technique of ALTERNATIVE DISPUTE RESOLUTION (ADR) mechanism. The mediation believes not in the adjudication of cases but in the settling dispute. Mediator is also not allowed to adjudicate but can only try to settle dispute or could communicate with the parties. Implementation of the process does not mean to take every case under mediation but initially it should apply on the small plot of cases and after witnessing the success implementation could be done on large no. cases. Mediation is a significant process for reducing burden from the judiciary and it is capable enough to shifts the focus from adjudication towards resolving or settling dispute under fundamental legal system. It is more facilitative for the development of law to approach preventive process unlike

¹⁴ Supra 12 pg 524

¹⁵ Supra 1

litigation oriented approaches only. Above all, confidence in the mediation process will be fostered only if the mediator discharges in

positive terms the ethical concerns of a process to which the role of the mediator is central.