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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **PRE-LITIGATION MEDIATION: A MISSING ORGAN OF THE CIVIL PROCEDURE CODE**

AUTHORED BY – KANISHKA

## **ABSTRACT**

Since time immemorial, human beings have had disagreements or disputes but with time, jurisprudence and laws evolved for conflict resolution. The earliest mentions of dispute resolution mechanism like the Puga, Shreni and Kula can be found in the *Bhradarnyaka* Upanishad. The Alternative Dispute Resolution Mechanism or out of court settlement includes the methods of arbitration, mediation, conciliation and other processes of resolving disputes. In light of the recent Mediation Bill promulgated by the Parliament, mediation is being regulated; the key feature of this legislation is that it is bringing in the concept of pre- litigation mediation that can serve as a tool for simplifying the delivery of justice and is also a cost- effective measure. It will also boost India's credential as a mediation hub as the bill calls for the creation of the Mediation Council of India, whose goals include promoting mediation and making India a strong hub for both domestic and international mediation. The research paper aims to analyze the current framework on mediation, the Mediation Bill 2023 while comparatively analyzing statutes pertaining to mediation in other countries, busting myths related to mediation and also assessing the need of mandatory pre- litigation mediation.

**Keywords-** Mediation, Alternative Dispute Resolution, Civil Procedure Code, Litigation, Mandatory

## **INTRODUCTION**

The pendency of cases in Indian Courts is one of the major problems grappling the Indian Judiciary. As per the information available on National Judicial Data Grid there are 59,87,477 cases that have been pending in high courts across the country. There are major challenges that need to be addressed in order to clear these judicial backlogs. The adjudication process can be reformed by the used Alternative Dispute Resolution (hereinafter referred as 'ADR') mechanisms like arbitration, conciliation and mediation. Mediation has gained significant momentum both in

India and globally as it has emerged as an effective tool for dispute resolution. It is fast, cost effective as well as extremely efficient. Mediation is an ADR mechanism in which a neutral third party efficiently helps the disputing parties to amicably arrive at a settlement outside the formal and rigid process of traditional litigation. The third party acts as a facilitator between the parties in order to reach a middle ground.

Section 89<sup>1</sup> of the Code of Civil Procedure (hereinafter referred as ‘CPC’) and the corresponding rules (Order 10 Rules 1A, 1B & 1C) were inserted through Section 7 and Section 20 of the Code of Civil Procedure (Amendment) Act, 1999. The Law Commission of India in its 129<sup>th</sup> Report proposed and emphasized on the value of conciliation/ mediation as a form of an ADR. Section 89 of the CPC mentions five different ADR methods including mediation where the Court can refer a dispute for mediation in order to effect a compromise between the parties.

## **THE MEDIATION BILL, 2023**

In view of this, the Mediation Bill, 2021 contemplated compulsory pre- litigation mediation for parties regardless of the existence of any agreement to mediate. However, the Mediation Bill that has been introduced in the Rajya Sabha and Lok Sabha and was passed by both the houses on 1 August 2023 and 7 August 2023 has decided to make pre- litigation mediation voluntary in nature.<sup>2</sup> The Bill also lays down in its First Schedule the matters in which Pre-Litigation Mediation is not allowed that mainly includes disputes involving allegations of serious and specific fraud, forgery, deities, persons with intellectual disabilities, disputes involving prosecution for criminal offences, disputes relating to the levy, collection, penalties in relation to direct or indirect tax. . Therefore, the Bill legalizes the concept of Pre-Litigation Mediation and also lays down a mechanism for organizing Mediation in the country. The Bill further seeks to subsume the concept of conciliation as laid down in Part III of the Arbitration and Conciliation Act, 1996.

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<sup>1</sup> The Civil Procedure Code, 1908, § 89, No. 5, Acts of Parliament, 1908 (India)

<sup>2</sup> Chakrapani Misra and Varshini Sunder, Mediation Bill, 2023, Khaitan & Co LLP, Mondaq, Available at: <https://www.mondaq.com/india/arbitration--dispute-resolution/1357380/mediation-bill-2023?login=true&debug-domain=.mondaq.com> (last visited: 11 September 2023)



## **STATEMENT OF PROBLEM**

In light of the Mediation Bill which gives a legal recognition to Pre-Litigation Mediation and also has laid a mechanism for organizing Mediation across the country, failure to make it compulsory shall defeat the purpose of introducing this legislation. Moreover, some of the lawyers may also delude their own clients for monetary gains and may suggest them to take the dispute for litigation rather than mediation. This will result in people suffering from the long tiring process of litigation in cases where their matters can be effectively solved by mediation.

## **RESEARCH OBJECTIVE**

This research is being done to assess the feasibility of making pre-litigation mediation by making the failure of undertaking a pre-litigation mediation as a ground for rejection of plaint under Order 7 Rule 11 of the CPC.

## **RESEARCH QUESTION**

Whether pre-litigation mediation should be made compulsory by including the failure to conduct a pre-litigation mediation as a ground for rejection of plaint?

## **JUDICIAL PRONOUNCEMENTS**

Mediation as a concept in India gained impetus due to the Supreme Court's judgment in the case of *Salem Advocate Bar Association v. Union of India*<sup>3</sup> where a committee was constituted by the Apex court in order to enable the implementation of Section 89 CPC by ensuring expeditious dispensation of justice. The Committee also drafted the Model Rules, 2003 that also served as the model for various High Courts in framing their mediation rules.

Justice R.C. Lahoti in 2005, the then Chief Justice of India further gave impetus to mediation in India by ordering the establishment of Mediation and Conciliation Project Committee (MCPC)<sup>4</sup>, the purpose of which was to establish court- annexed pilot mediation centres in several states and ensure that the mediation rules are adopted.

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<sup>3</sup> Salem Advocate Bar Association v. Union of India (AIR 2005 (SC) 3353)

<sup>4</sup> Tara Ollapally et al, *The Mediation Gap: Where India Stands and How Far It Must Go*, Daksh India, available at [https://www.dakshindia.org/Daksh\\_Justice\\_in\\_India/14\\_chapter\\_04.xhtml](https://www.dakshindia.org/Daksh_Justice_in_India/14_chapter_04.xhtml) (last visited: 11 September 2023)

In another landmark case of *Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd. and Ors*<sup>5</sup>, the Supreme Court while examining Section 89 of the CPC, 1908 held that having regard to the tenor of Rule 1A of Order 10 of the CPC, the court should always send the matters to the ADR procedure with the exception of certain cases. It went on to state that in cases where it is unsuited for reference to any of the ADR processes the court has to briefly record the reasons for not resorting to any of the settlement procedures.

The Indian Judiciary has also promoted the usage of mediation to settle matrimonial disputes. In *BS Krishnamurthy v BS Nagraj*<sup>6</sup> the Hon'ble Supreme Court of India had directed Family Courts to suggest the parties to settle matrimonial disputes via mediation.

Furthermore, in *Mohd. Mushtaq Ahmad v State*<sup>7</sup> the wife had filed a divorce petition and had also filed an FIR under Section 498A of the IPC. The Court directed them to undergo mediation following which the matter was settled and the FIR was withdrawn. Thus, mediation has proven to be extremely effective.

Mediation in the recent years has been given further impetus by the inclusion of a provision in the Companies Act, 2013 that makes it mandatory for the central government to maintain a mediation and conciliation panel.

## **ANALYSING MEDIATION IN OTHER JURISDICTIONS**

### **EUROPEAN UNION**

The European Union ('the EU') in 2008 adopted the Mediation Directive in order to provide guidance to the EU Member states so that they can develop legislation pertaining to mediation in civil and commercial matters. The Directive establishes the minimum regulatory standards for mediation legislation to be implemented.

### **ITALY**

Under the law in Italy, the parties must participate at the first meeting with the mediator, the meeting is expensive, and there are material penalties for non- attendance and there is no

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<sup>5</sup> *Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd. and Ors*, (2010) 8 SCC 24

<sup>6</sup> *BS Krishnamurthy v BS Nagraj*, (2011) 15 SCC 464

<sup>7</sup> *Mohd. Mushtaq Ahmad v State*, (2015) 3 AIR Kant 363

compulsion on the parties to pursue mediation after this initial meeting. The Italian experience thus substantiates the claim that an easy opt- out model of mandatory mediation is likely to increase the number of mediations whether mandatory or voluntary.

### **UNITED STATES OF AMERICA**

The United States has one of the world's most advanced systems for settlement of disputes outside the formal legal system through alternative dispute resolution mechanisms like mediation and arbitration, even though there is no uniform policy on mediation, many courts in the United States have adopted mandatory mediation programmes as they reduce the caseload of courts.

### **AUSTRALIA**

Australia being a federal country has different states with their own models. In the Civil Dispute Resolution Act, 2011 the applicants who institute civil proceedings are required to file a statement explaining the steps that they took to resolve their dispute or the reasons why they did not take any such steps. Section 4 of the Act also incorporates a non- exhaustive list of examples of various steps that include alternative dispute resolution process.

The above analysis shows that there is no one particular way to implement mandatory mediation as there can be variations according to different countries. The best suited model for a country thus depends on the domestic factors that should be taken into consideration.

## **CRITICAL ANALYSIS**

Mediation as an alternative dispute resolution mechanism is being increasingly used for newer legislations. For instance, the Parliament, in the new Consumer Protection Act, 2019<sup>8</sup> included a provision for mediation of consumer disputes. Section 442 of the Companies Act, 2013<sup>9</sup> also provides for Mediation and Conciliation Panel to be maintained by the Central Government for mediating proceedings before the Central Government or National Company Law Tribunal ('NCLT') or National Company Law Appellate Tribunal ('NCLAT').

### **MANDATORY PRE- LITIGATION UNDER THE COMMERCIAL COURTS ACT**

An attempt to introduce mandatory mediation in the Indian context can be found in the

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<sup>8</sup> The Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India)

<sup>9</sup> The Companies Act, 2013, § 442, No. 18, Acts of Parliament, 2013 (India)

Commercial Courts Act under which a considerable emphasis has been on the plain text of Section 12A<sup>10</sup> that was introduced by The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018. The provision makes it mandatory for the disputing parties to attempt mediation before instituting the suit.<sup>11</sup>

The Supreme Court after engaging in an analysis relating to the statutory interpretation of mandatory statutory provisions concluded that Section 12A is mandatory and cannot be circumvented by the emphatic expression “shall” contained in the legislative provision. The Court found the statute a unique experiment in order to push the pace of disposal of commercial disputes. The Supreme Court’s ruling does pave the way for mandatory pre-litigation mediation in commercial matters, the true effect will manifest only when the mediation mechanism in India achieves institutional and professional robustness.

#### **PROBLEMS WITH THE EXISTING FRAMEWORK GOVERNING MEDIATION**

The Supreme Court in its landmark judgment in the *Afcons Infrastructure Ltd.*<sup>12</sup> case has highlighted some glaring drafting errors such as the mixing up of definition of terms such as ‘judicial settlement’ and ‘mediation’ in Section 89 and the lack of clarity as to the procedure to be followed by the court.

According to the Bangalore Mediation Centre, between 2011- 2015 only 4.29% of the cases freshly filed in the Bangalore High court were referred for mediation. During the same period, as per the Mediation and Conciliation Centre of the Delhi High Court only 2.66% of the total number of cases was referred for mediation.<sup>13</sup> It is clearly evident from these statistics that even the judges are not using the Section 89, CPC to its full potential. This happens due to various factors, first and foremost being that the judges are not incentivized to refer cases to ADR processes neither the data on Section 89<sup>14</sup> referrals tracked for the National Judicial Data Grid. This further deteriorates due to the lack of regular training sessions for judges to sensitize them about the benefits of mediation.

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<sup>10</sup> The Commercial Courts Act, 2005, § 12A, No. 4, Acts of Parliament, 2005 (India)

<sup>11</sup> Juvraj Singh and Pragya Jain, Compulsory Pre-Litigation Mediation for Commercial Suits- A Boon or a Bane?, India Corporate Law, Cyril Amarchand Mangaldas, Available at: <https://corporate.cyrilamarchandblogs.com/2022/10/compulsory-pre-litigation-mediation-for-commercial-suits-a-boon-or-a-bane/>

<sup>12</sup> Supra Note No. 1

<sup>13</sup> Deepika Kinhal et al, *Mandatory Mediation in India – Resolving to Resolve*, Indian Public Policy Review 2020, 2(2), pages 49-69


<sup>14</sup> The Civil Procedure Code, 1908, § 89, No. 5, Acts of Parliament, 1908 (India)



## LEGITIMACY OF MEDIATION: BUSTING ASSOCIATED MYTHS

Despite major efforts for spreading awareness about mediation and its inclusion as a part of legal education curriculum, the knowledge of mediation is still sorely lacking among the people. Even if parties are aware about mediation, the lack of incentives is a major challenge for them to attempt mediation.

Another myth associated to mediation is that it yield lesser form of justice and comes secondary to litigation.<sup>15</sup> Moreover, in some cases the client's expressed desire to punish the opposition through litigation becomes a barrier to initiate mediation and in such cases it also becomes increasingly difficult for the lawyers to suggest mediation because of the fear of risking loss of the client.

 **47 TABLE 1. CITY AND STATE-WISE REFERRAL OF CASES TO MEDIATION AND DISPOSAL RATES**

State/City	Duration	Number of cases referred	Settlement rate (in percentage)
Delhi <sup>30</sup>	2005–2016	1,64,674	56.6
Bengaluru <sup>31</sup>	2007–2017	56,759	65
Tamil Nadu <sup>32</sup>	2005–2015	38,592	16.5
Gujarat <sup>33</sup>	2008–2017	17,451	18.9
Kerala <sup>34</sup>	2009–2015	1,05,783	24.8
West Bengal <sup>35</sup>	2012–2016	3,126	17.1
Chandigarh (referred by High Court of Punjab and Haryana) <sup>36</sup>	2008–2017	12,080	19.4

### *Statistics of cases referred for Mediation<sup>16</sup>*

As shown in the chart above, it has been observed that out of the huge numbers of cases referred for mediation, a sizeable amount of them were resolved via mediation. If attention is placed at the

<sup>15</sup> Raj Panchmatia et al, *Legitimacy of Private Mediation in the Pre-Legislation Era: Busting Myths with Facts*, 2021 SCC OnLine Blog Exp 87

<sup>16</sup> Supra Note No. 2

statistics obtained from Delhi and Bengaluru, one can observe the impressive statistics of the settlement rate. Therefore, it can conclusively be stated that if the litigants in those strata would have opted for mediation, then their cases would not be backlog in the judiciary and would have been resolved in a speedy manner. Therefore, from the data, it is inferred that mediation is a great tool for dispute resolution and now that an entire system for the same shall be governed by the Government of India then pre-litigation mediation should be made compulsory so as to avoid trivial matters from approaching the Court.

### **UNDERSTANDING MANDATORY MEDIATION**

‘Mandatory Mediation’ is often misunderstood mandating parties to settle their disputes through mediation; it simply means mandating parties to rather *attempt* mediation. The parties are just required to try and settle the disputes through mediation. One of the ways of doing this is making laws that make mediation compulsory for particular kinds of disputes prior to the institution of proceedings and are in the nature of ‘mandatory pre- litigation mediation.’

It is pertinent to note from the statistics shown above that mediation as an alternative dispute resolution mechanism is indeed capable of resolving disputes amicably in an efficient manner while eliminating the tedious process of litigation and ends in a win- win situation for both the parties as none of the sides are compromised and each of the party is given a fair stand.

The parties can get over the initial inertia associated with voluntary mediation through mandatory mediation as the myth of mediation being secondary to justice is busted by the legitimacy that is afforded to mediation once mandated by the law. This process of making mediation mandatory will not only be beneficial for the parties but also for the Indian legal system. Training lawyers in mediation will help in overcoming the shortage of mediators and improve the ‘legal health’ in the country.

### **CHANGES THAT CAN BE BROUGHT IN THE CIVIL PROCEDURE CODE**

Order 7 Rule 11 of the CPC sets the grounds on which a plaint should be rejected. The Supreme Court also in the case of *K. Akbar Ali v. Umar Khan*<sup>17</sup> made an observation that the ground rules for rejecting a plaint are not exhaustive in nature. In order to make a law for the implementation of compulsory pre- litigation mediation an amendment to Order 7 Rule 11 of the Civil Procedure Code has to be made. The recent Mediation Bill if given assent to by the President of India will

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<sup>17</sup> K. Akbar Ali v Umar Khan, Special Leave Petition No. 31844 of 2018

become enforceable. Schedule 1 of the Bill enumerates different subject matters that are not fit for mediation, so post the implementation of this act if an amendment is introduced to the said Order of CPC making mandatory pre-litigation mediation compulsory, the plaint will be rejected if the party has not gone under the process of mandatory mediation if his case does not fall under the ambit of Schedule 1 of the Mediation Bill. Thus, the compulsion of attempting mediation will become necessary as the lawyer will be compelled to reveal to the litigant at all costs that mediation has to be done as it is a requirement and once the common man understands the efficiency of mediation and is comfortable with its idea, the word about the success and reliability on mediation will spread through people and mediation will become a sought after tool to resolve disputes.

## **CONCLUSION AND SUGGESTIONS**

As per the Legal Information Management and Briefing System (LIMBS), an online database of court cases in which the Government of India is a party, around 40% of the cases across the country deal with the Government of India as a party. Mr. Sanjeev Sanyal and Mr. Jayasimha KR, Member and Consultant respectively of the Economic Advisory Council to the Prime Minister (EAC-PM) strongly argue that it is the observation of the Courts themselves that a sizeable chunk of the abovementioned cases are frivolous in nature and only add to the present backlog of the Indian Judiciary<sup>18</sup>. This glaring issue has also been pointed out by the Law Commission of India in their 100<sup>th</sup> (1984), 126<sup>th</sup> (1988) and 230<sup>th</sup> (2009) reports.

However, Indians have slowly started embracing the concept of mediation. Due to the efforts of the Indian Legislature, the newly passed Consumer Protection Act, 2019 allows for consumers to settle their dispute via mediation. Furthermore, in Family Courts, the judges encourage the parties to first try resolving their matters by mediation. In addition to the above, under powers granted to them by Section 89 of the Civil Procedure Code, judges of the District Courts as well as the High Courts refer certain matters for mediation and the litigants are assisted for the same by the respective District Legal Services Authorities and State Legal Services Authorities. Thus, the parties who can resolve their disputes by word of mouth spread their preference and liking of mediation to their connections which has slowly albeit effectively contributed to the rise of mediation in India.

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<sup>18</sup> Sanjeev Sanyal and Jayasimha KR, *Mediate, Don't Litigate*, The Economic Times, 13<sup>th</sup> September, 2023

## **WAY FORWARD**

However, as stated above, if pre-litigation mediation is made compulsory in India, then it will not only ensure that the litigants get justice in a speedy manner, it will also ensure that the backlog of cases in the courts decrease and shall also create new employment opportunities for lawyers looking forward to make mediation a field of their expertise. Furthermore, as followed in various states wherein retired District Court and High Court judges are offered positions in Tribunals, the Government can also offer the posts of mediators to retired judges to ensure that the mediation process is efficient. With the upcoming advent of the Mediation Bill, a proper process will be laid down for dealing with mediation matters.

Thus, for proposing pre-litigation mediation as compulsory under the Civil Procedure Code, an amendment (e) should be made to Order 7 Rule 11 which would read as follows: -

### *Rule 11: Rejection of Complaint*

*The complaint shall be rejected in the following cases: -*

*(e) where the plaintiff has not undergone pre-litigation mediation if the nature of the case is not an entry of the First Schedule of the Mediation Act, 2023.*

The amended section takes into consideration the importance of the First Schedule of the Mediation Bill and hence has been drafted accordingly.

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