Mediation and it's recognition in the modern world

Pooja Bali,

Research Scholar of LPU, Jalandhar. Punjab.

Abstract

Mediation needs to be promoted as a mechanism that complements the judicial process. To achieve acceptance and popularity of Mediation as the first step before approaching the court or any other Alternative Dispute Resolution (ADR) method, it is crucial to develop confidence in the process of Mediation. Court-annexed mediation, to a certain extent, has been adopted as a measure of docket management and must go hand in hand with promotion of mediation as a successful, revolutionary, economical and time-saving method for all the stakeholders. Mediation has been recognized as the fastest growing method to resolve disputes worldwide. Mediation allows parties to relook at mutual interests and rights of each other, and to come up with amicable and innovative solutions. This helps in maintaining cordial relations between the parties.

Introduction

Disputes are a part of everyone's life. Disputes are inevitable and are sure to arise in any personal or commercial association. Every dispute has three aspects- people, process and problem. There is nothing wrong in having a dispute but what is important, how the parties handle that dispute. There could be two modes of addressing a dispute- adversarial like litigation and arbitration and non- adversarial like mediation and conciliation.

The adversarial system of dispute resolution is one in which the competing claims of parties are represented by legal representatives who have interest in the outcomes of dispute, to an impartial third party, with power to impose authorities. As against the adversarial mode of dispute resolution, non-adversarial ADR mechanisms like mediation is informal, people friendly, less complicated and allows the parties to communicate with each other to the root cause of their conflict, identify their underlying interests and helps them focus on finding out the solution themselves. It helps in strengthening and rebuilding of the relationships. Such non-adversarial modes of dispute resolution help in saving time and money of the parties.

It has been rightly said by Albert Einstein, "*In the middle of every difficulty lies opportunity.*"[2] In the light of aforesaid grim situation, the courts have risen to the occasion and gradually evolving the virtual hearings by way of video conferencing in urgent matters and having online filings. So, it is time that we understand the merits of mediation and resort to mediation as a professional and sophisticated mode of settlement of disputes between the parties. There is a need to change the mind set about mediation. It should be mandatorily resorted

to as a mode of addressing the disputes between the parties. If mediation does not work out, then and then only the parties should approach the courts by way of litigation or arbitration as the case may be.

In the light of the foregoing, it is therefore important to understand the cardinal points about mediation, the difference between mediation and conciliation, the current jurisprudence about mediation, judicial precedents and the path ahead for mediation.

Mediation

Mediation has been defined in the Cambridge Dictionary as **"the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems."**

Black's Law Dictionary has defined Mediation as **"A method of non- binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution."**

It has been rightly said by Joseph Grynbaum **"An ounce of mediation is worth a pound of arbitration and a ton of litigation."**

It has been rightly quoted by Abraham Lincoln, **"Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."**

It is important to understand as to why mediation should be resorted to as a means of dispute resolution as against the traditional mode of litigation. Dispute Resolution Centre of Thurston County has enumerated 10 main reasons to choose mediation[7]:

1. Mediation is affordable.
2. Mediation is fair and impartial.
3. Mediation saves time and money.
4. Mediation is confidential.
5. Mediation avoids litigation.
6. Mediation fosters cooperation.
7. Mediation improves communication.
8. Mediation identifies underlying issues.
9. Mediation allows personalized solutions.
10. Mediation works.

Basic Stages in a Mediation Process are as follows:--

1. Introduction and Opening Statement;
2. Joint Session;
3. Caucus or Separate Session and
4. Closing

The objective of these stages is to establish neutrality, create an awareness and understanding of the process, develop rapport with the parties, gain confidence and trust of the parties, establish an environment that is conducive to constructive negotiations, motivate the parties for an amicable settlement of the dispute and establish control over the process.

Difference between mediation and conciliation

'Mediation' and 'Conciliation' are both regarded as the same. Both mediation and conciliation involve a neutral third person seeking the parties to communicate, evaluate and understand each other's viewpoint, and agree to a settlement. But there lie differences between the two. Mediation is a structured negotiation process. In mediation, the mediator controls the process through different and specific stages: introduction, joint session, caucus and agreement, while the parties control the outcome. The conciliator on the other hand, may not follow a structured process. The conciliator may carry out the process of conciliation as a traditional negotiation, which may take different forms. The differences between mediation and conciliation are essentially of degree rather than of kind. In practice, conciliation shades into mediation.

Current position of Mediation

The concept of Mediation is ancient and deep rooted in India. From Lord Krishna mediating between Kauravas and Pandavas in the Mahabharata, to family elders resolving domestic issues, to the resolution of disputes at the community level through Panchayats, there exists a strong culture of mediation in India. With the passage of time, there are certain statutes which provide for mediation as a mode of settlement of disputes between the parties. Such statutes comprise of, but not limited to the following:

1. **Section 4 of the Industrial Disputes Act, 1947**

Conciliators appointed are assigned with the duty to mediate and promote settlement of industrial disputes with detailed prescribed procedures for conciliation proceedings.

2. **Section 89 read with Order X Rule 1A of the Code of Civil Procedure, 1908 ("CPC" hereinafter)**

The insertion of Section 89 in the CPC is in itself a welcome step towards promoting mediation and other means of alternate dispute resolution. As per Section 89 read with Order X Rule 1A of the CPC, after recording the admission and denial of documents, the Court shall direct the parties to the suit to opt for any of the modes of settlement outside Court as specified in Section 89 (1) of the CPC that is arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. Therefore, it provides for the reference of the cases pending before the courts to the aforesaid modes of dispute resolution.

3. **Order XXXIIA of CPC**

Order XXXIIA of CPC recommends mediation. This is evident from Rules 3 and 4 of Order XXXIIA. The legislators have very thoughtfully inserted this provision because the matters comprising of, but not limited to, personal, family, matrimonial, guardianship, custody and maintenance matters can be more aptly resolved through non- adversarial means. There may be divergent positions by the parties but the effort has to be to protect the underlying interest, which can be done through mediation.

4. **Legal Services Authority Act, 1987 read with Section 89 of CPC**

Legal Services Authorities at the centre, state and taluka level are statutory authorities established by the Legal Services Authorities Act, 1987 with the object to provide free and competent legal service to the weaker services of the society and to ensure that justice is not denied to any citizen on account of economic or any other disability.

As per Section 89 (2) of CPC, where a dispute has been referred to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Section 20 (1) of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.

Further, it has been provided under Section 21 of the Legal Services Authority Act, 1987 that a settlement before a Lok Adalat is enforceable as a court decree.

5. **Section 442 of the Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016**

Section 442 of the Companies Act, 2013 provides that the Central Govt. shall maintain a panel of experts called the Mediation and Conciliation Panel consisting of such number of experts, having such qualifications, as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or Appellate Tribunal under this Act.

Rule 3 of the Companies (Mediation and Conciliation) Rules, 2016 provides for a Panel of Mediators or Conciliators.

The aforesaid provisions provide for referral of disputes pending adjudication before the National Company Law Tribunal and Appellate Tribunal, to mediation.

6. Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006

It has been clearly provided under Section 18 of the aforesaid Act that any party to a dispute with regard to any amount due under Section 17 (disputes regarding the payment of amount to MSMEs), make a reference to the Micro & Small Enterprises Facilitation Council. On receipt of a reference, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of Sections 65-81 of the Arbitration and Conciliation Act, 1996 shall apply.

7. Section 14 (2) of the Hindu Marriage Act, 1955 and Section 29(2) of Special Marriage Act, 1954

As per Section 14 (2) of the Hindu Marriage Act, 1955, in disposing of any application under Section 14 for leave to present a petition for divorce before the expiry of one year from the date of marriage, the court shall have regard to the reasonable probability of a reconciliation between the parties before the expiry of one year. Therefore, the intent of the legislators is that the court should in the first instance attempt mediation between the parties.

Similar provision is contained in Section 29 (2) of the Special Marriage Act, 1954.

Unlike the adversarial system in which the competing claims of parties are represented by legal representatives who have interest in the outcomes of dispute, in matrimonial and family matters, it is important to visualize and analyse the underlying interest of the parties, no matter however diverse may be their positions. It is the skill of the mediator to facilitate the parties to try to arrive at an amicable settlement.

8. Section 32 (g) of the Real Estate (Regulation and Development) Act, 2016

Section 32 of the aforesaid Act provides for the functions of the Authority for the promotion of real estate sector. Sub clause (g) of Section 32 of this Act states that the Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority as the case may be, to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations.

9. 129th Law Commission of India Report

The aforesaid Law Commission Report recommends courts to refer disputes for mediation compulsorily.

10. Section 12A of the Commercial Courts Act, 2015

Section 12A of the aforesaid Act under Chapter IIIA deals with Pre-Institution Mediation and Settlement. Chapter IIIA has been inserted by 2018 amendment to the aforesaid Act. Section 12A clearly states that a suit, which does not contemplate any urgent interim relief shall not be instituted unless the plaintiff exhausts the remedy of pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

It is therefore, mandatory for parties to exhaust remedy of pre-institution mediation under the Act before the institution of a suit.

11. The Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018

The Central Government has framed and thereafter notified these Rules on July 3, 2018 in exercise of its powers conferred by sub-section (2) of Section 21A read with sub-section (1) of Section 12A of the Commercial Courts Act, 2015.

12. Sections 37-38 and Chapter V of the Consumer Protection Act, 2019

The aforesaid provisions provide for disputes covered under this Act to be first referred to mediation. It has been clearly provided under Section 37 (1) of the aforesaid Act that at first hearing of a complaint after its admission or at any later date, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, it may direct the parties to give in writing within 5 days, their consent to refer the matter to mediation and the provisions of Chapter V of the Act shall apply.

13. Mediation and Conciliation Rules, 2004

In exercise of its powers under Part X and Section 89 (2) (d) of CPC, the Hon'ble High Court of Delhi has framed these rules.

It is further pertinent to note that India is a signatory[9] to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) which gives mediation settlements the force of law.

On the analysis of the aforesaid statutory provisions, it cannot be said that India does not have provisions concerning mediation or use of conciliation. But the discrepancies between mediation and conciliation impede these provisions from being successful. A uniform legislation concerning mediation would create legal sanctity and avoid the inconsistencies between the various pieces of existing legislations. Even though various statutes have given the parties the autonomy to get their disputes resolved via mediation and there exist court referred as well as private means of engaging in mediation, there is lack of procedural guidance in this regard.

The Hon'ble Supreme Court of India has, through a unique step, set up a panel to have a draft legislation to give a legal sanctity to disputes settled through mediation, which would then be sent to the government as a suggestion from apex court. [10] An 'Indian Mediation Act' as suggested by the Hon'ble Supreme Court is indeed a promising proposal in India.

Judicial Interpretation related to Mediation

1. **Salem Bar Association v. Union of India (2003) 1 SCC 49**

In this matter, Writ Petitions were filed challenging the Amendments made to the Code of Civil Procedure by way of Amendment 46 of 1999 and Amendment 22 of 2002. Amongst other amendments, the attention of the Hon'ble Supreme Court was drawn to Section 89 of the Code of Civil Procedure.

The Hon'ble Supreme Court observed that the provision of Section 89 of the Code of Civil Procedure has been inserted to ensure that all the cases which are filed in the courts need not necessarily be decided by the courts. The Hon'ble Supreme Court opined the need to promote Alternate Dispute Resolution. It therefore, considered Section 89 to be a welcome step. It was therefore suggested by the Hon'ble Supreme Court, that a Committee be constituted so as to ensure that the amendments made to the Code of Civil Procedure become effective and result in quicker dispensation of justice.

The relevant portions of this judgement read as follows:

"8. Our attention was then drawn to a new Section 89 which has been introduced in the Code of Civil Procedure. This provides for settlement of disputes, etc., and reads as under:

"89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for--

(a)arbitration;

(b)conciliation;

(c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

(2) Where a dispute has been referred--

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or persona shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

"9. It is quite obvious that the reason why Section 89 has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delay and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refer to different acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation."

"10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be

made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

"11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for setting the disputes, this has not really reduced the burden on the courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constituted so as to ensure that the amendments made become effective and result in quicker dispensation of justice."

"12. In our opinion, the suggestion so made merits a favourable consideration. With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyer's clarified.."

"12.....*This Committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar or Association. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d).*"

"24. ...The Committee would consider the said difficulties and make necessary suggestions in its report. It is hoped that the amendments now made in the Code of Civil Procedure would help in expeditious disposal of cases in the trial courts and the appellate courts."

2. Afcons Infrastructure v. Cherian Varkey Construction Co. Ltd. (2010) 8 SCC 24

The Apex Court observed although it is not possible to lay down an exhaustive list concerning the matters which may be mediated, yet an illustrative list was laid down. This list comprises of all cases related to trade and commerce, all cases arising from stained relationships, all cases where there is a need of continuation of the pre- existing relationship, inspite of the disputes, all cases related to tortious liability and all consumer disputes. All such matters as laid down supra may be mediated. Further, the Apex Court explained the anomalies in Section 89 of the Code of Civil Procedure, when it may be invoked, the categories of cases which are not suitable for Alternate Dispute Resolution and the scope and ambit of conciliation.

The relevant portions of this judgement reads as follows:

"*11. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' under Clauses (c) and (d) of Sub-section (2) of Section 89 of the Code. Clause (c) says that for "judicial settlement", the court*

shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in Clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in Clause (c)."

"12. "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See: Black's Law Dictionary, 7th Edition, Pages 1377 and 996)."

"13. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in Section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in Clauses (c) and (d) of Section 89(2). If the word "mediation" in Clause (d) and the words "judicial settlement" in Clause (c) are interchanged, we find that the said clauses make perfect sense."

"14. The second anomaly is that Sub-section (1) of Section 89 imports the final stage of conciliation referred to in Section 73(1) of the AC Act into the pre-ADR reference stage under Section 89 of the Code. Sub-section (1) of Section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes."

"15. If Sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours."

"24. Section 89 has to be read with Rule 1A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said

rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to Section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes."

"26. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under Section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must."

"27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences."

*"28.*All other suits and cases of civil nature ..... (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes.."

"35. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of AC Act followed by appointment of conciliator/s as provided in Section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under Section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial."

3. MR Krishna Murthi v. New India Assurance Co. Ltd. 2019 SCC Online SC 315

The Hon'ble Supreme Court while considering a plea seeking reform in the Motor Vehicle Accident Claims system, asked the Government to consider the feasibility of enacting Indian Mediation Act to take care of various aspects of Mediation in general and issued several directions to the Government. The Hon'ble Supreme Court further directed the Government to examine the feasibility of setting up a Motor Accidents Mediation Authority (MAMA) by making necessary amendments in the Motor Vehicles Act. The Apex Court further directed National Legal Services Authority (NALSA) to set up Motor Accident Mediation Cells (MAMC), which can function independently under the aegis of NALSA or can be handed over to Mediation and Conciliation Project Committee (MCPC).

The relevant portions of this judgement reads as follows:

"29. *Time is ripe now to have similar mechanism for settling accident claims as well. Therefore, the suggestion of establishing MAMA is laudable. We recommend to the Government to examine the feasibility of setting up MAMA by making necessary amendments in the Motor Vehicles Act itself. In fact, the way mediation movement is catching up in this country, there is dire need to enact Indian Mediation Act as well."*

"30. Till the time such an amendment is made by the Parliament, National Legal Services Authority (NALSA) should take up this work as a project. A complete report/module be made about the functioning of Motor Accident Mediation Cell (MAMC). This exercise be completed within a period of two months.."

"31. There is Mediation and Conciliation Project Committee (MCPC) in the Supreme Court which takes various policy decisions for better working on mediation, including court annexed mediation. Broadening the structure of MCPC, so as to have proper coordination with High Court Mediation Centers as well as Mediation Centers at District Court Level is achieved.."

"41. ...(a) We impress upon the Government to also consider the feasibility of enacting Indian Mediation Act to take care of various aspects of mediation in general.

(b) The Government may examine the feasibility of setting up MAMA by making necessary amendments in the Motor Vehicles Act...."

In the light of the aforesaid judicial precedents laid down, it is amply clear that the judicial approach has been towards promoting mediation as a mode of dispute resolution. The Hon'ble Supreme Court has in the aforesaid judgements in a succinct and candid manner emphasised the need to resort to mediation in respect of those matters which can be mediated. Through mediation, the underlying interests of the parties are taken care of rather than the divergent positions or competing claims and a settlement, if arrived, may result in a win-win position for the parties.

Efficient functioning of the judiciary is essential for every country. The courts in India are bound to act in accordance with the procedure established by law. Everyone is equal before law but the delays in litigation makes it a cumbersome process. So, it is important that the parties must get an opportunity to settle their case without being subjected to formal litigation. Giving an opportunity to the parties to do so is clearly in consonance to the legislative intent of Article 39A (equal justice and free legal aid for all) in Part IV of the Indian Constitution. Promoting mediation is not just in the interest of the parties but is also the need of the hour.

Conclusion

A Five Judge Constitution bench of the Hon'ble Supreme Court of India ordered a court-monitored mediation in the Ayodhya dispute (M. Siddiq (D) v. Mahant Suresh Das, Civil Appeal No. 10866-10867 of 2010) vide its Order dated March 8, 2019. The relevant portion of the aforesaid Order dated March 8, 2019 reads as follows:

"*3. We have considered the nature of the dispute arising. Notwithstanding the lack of consensus between the parties in the matter we are of the view that an attempt should be made to settle the dispute through mediation."*

"6. Considering the provisions of CPC, indicated above, we do not find any legal impediment to making a reference to mediation for a possible settlement of the dispute(s) arising out of the appeals."

"7..*mediation proceedings should be conducted with utmost confidentiality so as to ensure its success which can only be safeguarded by directing that the proceedings of mediation and the views expressed therein by any of the parties including the learned Mediators shall be kept confidential and shall not be revealed to any other person. We are of the further opinion that while the mediation proceedings are being carried out, there ought not to be any reporting of the said proceedings either in the print or in the electronic media.*"

The reference of the highly sensitive Ayodhya dispute to mediation by the Hon'ble Supreme Court of India has brought the mediation process to the attention of the people. In order to take the mediation ahead and use it in the best possible manner, it is important to spread its awareness amongst the public. Those engaged in mediation must acquire mediation skills in a scientific and structured manner. Many relationships can be saved through mediation and also the burden of cases upon the courts will reduce.

Recommendations

1. Uniform statute for resolving disputes through mediation is the need of the hour. Such a statute should make it mandatory for the parties to resort to mediation first before addressing their disputes before courts by way of litigation or arbitration before an Arbitral Tribunal.

2. In all the commercial, contractual, consumer disputes and those having tortious liability, it should be mandatory to make efforts to resolve such disputes first through mediation before approaching the courts or Arbitral Tribunal.

3. Need to have mediation focused institutions with trained professionals. Additionally, there is a need to have a regulatory body which lays down the qualifications for a person to be a mediator and reviews the performance of existing mediators from time to time.

4. Requirement of public awareness about mediation. Such an awareness may be created through training sessions, courses, webinars and legal discourses by experts and qualified mediators.

Lack of public awareness about non-adversarial modes of dispute resolution is the key reason people are inclined to the adversarial process by default. In the case of arbitration, this changed when the Arbitration and Conciliation Act, 1996 was enacted. Today, there is a much better arbitration culture in India than 1996 because of a specific statute in regard to the same. A mediation-specific statute may similarly make India more open to mediating disputes. Even though various statutes have given the parties the autonomy to get their disputes resolved through mediation and there exist court-referred as well as private means of engaging in mediation, there is a scarcity of clear procedural guidance on this aspect.

In the light of the current scenario as it stands today, mediation is considered as one of the Alternate Dispute Resolution modes. The need of the hour is to resort to mediation not as an Alternate Dispute Resolution mode but as a Primary or First mode of Dispute Resolution. Encouraging mediation may well be the way forward for ensuring speedy delivery of justice. 'Indian Mediation Act' as suggested by the Hon'ble Supreme Court of India is indeed a promising proposal for India.

Footnotes

1. https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

2.http://www.adrtoolbox.com/library/adr-quotes/

3. https://www.google.co.in/amp/s/dictionary.cambridge.org/amp/englih/mediation

4. Black's Law Dictionary Eighth Edition, First South Asian Edition 2015

5. http://www.adrtoolbox.com/library/adr-quotes/

6. https://www.brainyquote.com/quotes/abraham_lincoln_132544

7. https://www.mediatethurston.org/10reasons.html

8. https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-report-no-1-liability-state-tort/law-commission-report-no-129-urban-legislation-mediation-alternative-adjudication/

9. https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

10. https://m.economictimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms