

IS MANDATORY MEDIATION THE FUTURE OF
DISPUTE RESOLUTION IN INDIA?

SUSMITA MANDAL

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Abstract

In this paper, we will explore the necessity of mandatory mediation to solve the issue of numerous suits pending in the courts which can easily be solved by the alternative dispute resolutions. We will specifically focus on the concept of the mediation process, prevailing issues in the extant legislative framework in India and how these issues can be resolved by the process of mandatory mediation. We will study the various advantages and disadvantages of making mediation compulsory in certain cases. Therefore, we will attempt to suggest the most suitable framework for mandatory mediation in India, after studying the existing structures in other States like the UK and the US. Finally, we will try to justify how far mandatory mediation can be regarded as the future of mediation in India.

INTRODUCTION

One of the biggest challenges that is existing in the traditional adjudicatory system is the pendency of suits. The statistics received from the National Judicial Data Grid states that as of 12.11.2020, the number of suits pending (both criminal and civil) throughout the nation is approximately 3.6 lacs out of which, the civil cases, alone, comprises almost 27% of the cases yet to be adjudged. As per the Ease of Doing Business Ranking conducted by the World Bank, India stands in the 163rd position among 190 nations when it comes to the issue of enforcement of contracts.

This hurdle can be dealt with in two important ways. Firstly, certain reformatory changes should be brought

about in the adjudication process to make it more speedy and more effective. Secondly, certain alternative processes should be proposed so that the suits do not have to go to the courts at all. These processes, also known as alternative dispute resolution mechanisms, include arbitration, mediation and conciliation. These mechanisms play a crucial role in preventing the cases to reach the courts and trying to settle them out of the courts, thereby reducing the burden of the judiciary. Thus, it is high time that these mechanisms should be recognised as valid substitutes to the formal adjudicatory system. Considering the huge number of cases still pending in the courts and the appropriateness of certain categories of disputes to be settled by such methods, these mechanisms should be given an equal footing as the ordinary courts. In certain circumstances, they should be treated as the first preference for dispute resolution. Therefore, in this paper, we will analyse how mandatory mediation can be brought into the justice system prevalent in India.¹⁶¹

REVIEW OF LITERATURE

The literature reviewed for this research project are as follows:

- **Dr. P.C. Markanda, Mediation: Step by Step, (Thomas Reuters 2021).**

This book is a comprehensive study of the various aspects of mediation in India. This book describes the implementation and strategies to be applied in the process of mediation in depth and is an indispensable guide for mediators.

- **Deepika Kinhal et al Apoorva, Mandatory Mediation in India - Resolving to Resolve, 2(2) Indian Public Policy Review (2020)**

This paper explores the concept and implementation of mandatory mediation in India, its necessity and application, how it is implemented in the world's various countries, and

¹⁶¹ Deepika Kinhal et al Apoorva, *Mandatory Mediation in India - Resolving to Resolve*, 2(2) Indian Public Policy Review 49, 49-69 (2020).

finally, why it is the need of the hour in our country and how should we pave the path towards making mediation mandatory.

- **Aashna Reddy et al Udai Nanda, *Mandatory Mediation in India - A Step Forward?*, *MEDIATE* (2022)**

This research paper discusses how the concept of mandatory mediation is slowly emerging towards being the future of dispute resolution in India. The author has explored the concept as applied in other States and compared the models with the Indian model and what necessary changes should be brought in to accommodate this concept in the Indian judicial system.

RESEARCH OBJECTIVES

The main objectives of this research project are:

- To understand the concept of mediation and the extant legal framework in India.
- To study the provisions for mandatory mediation in India.
- To scrutinise why mandatory mediation is crucial for our country.
- To analyse how mandatory mediation can be promoted in India.

RESEARCH QUESTIONS

The research questions which are covered in this research project are:

- What is the concept of mediation and how is it implemented in India?
- What are the current provisions relating to mandatory mediation in India?
- Why mandatory mediation is the need of the hour in our country?

- How should we go about familiarising the Indian population with the concept of mandatory mediation?

METHODOLOGY

The study is analytical and descriptive. It is non-empirical. The sources for the research are secondary sources consisting of books, journals and online articles. The mode of citation used is Harvard Bluebook (20th edition).

DISCUSSION

Mediation and the Prevailing Legal Framework in India

Mediation is an alternative dispute resolution mechanism where a disinterested third party helps the disputants to reach a mutual and amicable agreement. This disinterested third party, also known as the mediator, facilitates the disputants to come to a mutually acceptable conclusion. The mediator is expected to be unbiased in his/her conduct just a medium for the parties to arrive at a settlement. As per Rule 4 of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003, “*the mediator facilitates discussion between the parties by assisting them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options*”. In contrast to arbitration, mediation is generally ideal for specific suits which do not revolve around complicated questions of law or questions of facts. It is also more favourable in mutual settlement of disputes out of the traditional adjudicatory system.

The biggest advantage of mediation is that it offers a platform to the disputants to discuss, negotiate, bargain and finally reach a mutual settlement that would be appropriate for both sides. One more significant characteristic of mediation is that it gives autonomy to the parties to decide the course of action they would like to embark upon and

thereby preserves amicability between the disputants. Internationally, mediation has developed a lot and has been recognised by most people as an effective out-of-court method to settle disputes. However, in India, mediation is yet to get its due recognition.

Currently, there are 3 ways to initiate mediation in India – i) by incorporating a mediation clause in the contract and invoking it. It can be either institutional or *ad hoc*; ii) by court-referred mediation provided under Section 89 of the Code of Civil Procedure, 1908 or other statutes such as Section 37 of the Consumer Protection Act, 2019; and iii) by mandatory pre-litigation mediation as given in Section 12A of the Commercial Courts Act.

In the following discussion, we will get an overview of how mandatory mediation should be introduced in India and why is the need of the moment in our justice system.

Mandatory pre-litigation mediation under the Commercial Courts Act, 2015

An instance where the Indian legislators have attempted to establish mandatory mediation as an alternative is seen in the Commercial Courts Act, 2015, which was subsequently amended in 2018, to insert a provision regarding “*pre-institution mediation and settlement*”. Section 12A deals with this aspect and it mandates the disputants to resort to mediation before they would initiate a litigation process. The settlement agreement signed by the disputants “*shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996*”.¹⁶² The Division Bench of the Bombay High Court in the case of **Deepak Raheja v. Ganga Taro Vazirani**¹⁶³ observed, Section 12A of the Act is mandatory in case of a commercial suit of a specified value, which does not contain any application for urgent interim relief, as such a proceeding cannot be instituted unless pre-institution mediation has been

exhausted by the plaintiff. The Calcutta High Court in **Laxmi PolyFab v. Eden Realty**¹⁶⁴ observed, a plaintiff does not have an unconditional right to approach the Commercial Court or a Commercial Division of a High Court to have an issue involving a 'commercial dispute' within the meaning of the Act of 2015 decided by such Court without adhering to the provision of Section 12A of the Act of 2015. The same court in **Dredging and Desiltation Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium**¹⁶⁵ held, the object of the Act of 2015 is to expedite the disposal of a commercial dispute. Such an object is achieved through compulsory pre-institution mediation. The time frame provided under the compulsory pre-institution mediation allows a commercial dispute to be successfully resolved to consume such a period within which it is not possible for the Court to finally adjudicate the suit.

Why is Mandatory Mediation Required?

Abraham Lincoln had rightfully said, Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. An ordinary person can get entangled in a lengthy litigation process which defeats the very purpose of justice because it is a well-known fact that justice delayed is justice denied.

In India, it is a common practice among the citizens to approach the Court for the settlement of every kind of dispute, which in turn overburdens the courts and results in the case file simply piling up. This leads to a great amount of displeasure among the individuals as they lose faith in the judiciary to give them justice.

In the case **Hussainara Khatoon v. Home Secretary, the State of Bihar**¹⁶⁶, the apex Court held that the right to a speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of Indian

¹⁶² Ibid.

¹⁶³ 2021 SCC OnLine Bom 3124.

¹⁶⁴ 2021 SCC OnLine Cal 1457.

¹⁶⁵ 2021 SCC OnLine Cal 1458.

¹⁶⁶ 1979 AIR 1369.

Constitution, thereby making mediation *sine qua non* in the access of speedy justice.

Benefits of Mandatory Mediation

Speedy: The time taken in the course of mediation is comparatively less than the time taken in formal litigation or an arbitration process. Therefore, the parties can resort to mediation at the stages of the dispute. It also assists the mediator to focus only on the important issues and disregard the others.

Cost-effective: As mediation essentially takes less time than the formal litigation process or an arbitration process and is also less formal and complicated at the same time, it can be resorted to in the early stages of dispute settlement thereby, reducing the cost of trial.

Relationship-friendly: As per Order 32A of the Code of Civil Procedure, 1908, mediation is advised in cases of family matters or matters of a personal nature that requires the building of trust and confidentiality. These may not be availed in the case of traditional adjudication. In mediation, the parties have complete autonomy to resort to any course of action they would like to take. There is victory or defeat in such cases but it is usually a win-win situation for both parties. This helps in preserving the relationship and sanctity of the familial bonds.

Supreme Court on mandatory mediation

The Honourable Supreme Court of India observed in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*¹⁶⁷ that referring to mediation, conciliation and arbitration is mandatory for court matters. This will help in the acceptance of mandatory mediation as a solution to existing problems in our legal system.

Possible disadvantages of mandatory mediation

Some of the possible disadvantages of mandatory mediation are discussed as follows.

Firstly, the very term mandatory implies that the parties do not have any freedom to choose but to accept mediation as their choice alternate dispute resolution method. Where on one hand, mediation offers complete party autonomy, it also deprives them of the choice between their preferred method of dispute resolution. In contending on this aspect, one can also say that mandatory mediation is just to compel the parties to resort to the method of mediation for their advantage. However, there is no compulsion within the process itself, and the parties are free to terminate the proceedings anytime they want and resort to some other dispute resolution method, including litigation.

Mandatory mediation is highly criticised by practising advocates as they are of the view that the parties are deprived of their consensus in the very first place and are forced to resort to mediation. However, the agenda behind such criticism is that it adversely affects the income of the lawyers as more and more would prefer settling disputes out of the Court rather than indulging in a years-long tedious litigation process.

In a nutshell, we can say that mediation is a very effective tool in reducing the burden of the Courts and pendency of suits. It is beneficial to the parties in every possible way, be it expenses, time, consensus or confidentiality. The parties are also free to file a suit in case they are dissatisfied with the outcome of the mediation process. Many cases can easily be resolved out of court with the help of mediation but due to the lack of awareness among the people, they opt for a lengthy and expensive litigation process.¹⁶⁸

The Path Ahead for Mandatory Mediation in India

¹⁶⁸168 Karthik Adlakha, *Mandatory Mediation in India - A boon or a bane to the legal system in the country?*, CIARB, (Apr. 30, 2019), <https://www.ciarb.org/resources/features/mandatory-mediation-in-india-a-boon-or-a-bane-to-the-legal-system-in-the-country/>.

¹⁶⁷ AIR 2003 SC 189.

The Bar Council of India, in August 2020, incorporated mediation as a compulsory topic of study in legal institutes in India. This marks the significance of the process from the very beginning of one's legal career. The Union Law Minister, in September 2021, stated, the national government is ready to introduce a bill on mediation in the upcoming 2021 winter session of parliament. All eyes are keenly set on this new law with high hopes to turn a new leaf in the overwhelmed Indian judicial system.

Quite surprisingly, mediation has not yet arrived at its highest potential in India mostly because of lack of awareness, lack of proper statutory rules and regulations, inadequate number of trained mediators and lack of trust in dispute resolution mechanisms other than formal adjudication.

N.V. Ramana C.J. says, Prescribing mediation as a mandatory first step for resolution of every allowable dispute will go a long way in promoting mediation. Perhaps, an omnibus law in this regard is needed to fill the vacuum.

The legal society in India has a very crucial role to play when it comes to achieving the highest potential of mandatory pre-litigation mediation in India. However, it is *per se* a Herculean task to accomplish. We have seen in the above discussion the various reasons why mandatory mediation has such stunted growth in India. The minimum requirements for promoting mandatory mediation in India would be to educate the mass about mediation and other alternative dispute mechanisms and to train lawyers and law students in the mediation process. The Mediation Bill, 2021 has not yet been enforced which implies that there is yet a void in the statutory framework of mediation. This Bill, when enforced, would remove many ambiguities and loopholes in the provisions. The ambit of mediation should not be restricted only to the commercial sector but also to other civil matters. There needs to be a radical change in the perspective of the population so that people should opt for mediation before they go to court.

Summing up we can say that, mandatory mediation would bring about a huge difference in availing speedy and effective justice as the courts would not be bothered with the trivial matters which can be easily resolved out of the court. We should assess the importance of mandating mediation, the benefits and the possible risks by taking the example of countries like the US, Australia and New Zealand and how mediation has proved to be an efficient tool in the justice delivery system in these countries.¹⁶⁹

SUMMARY OF FINDINGS

In this paper, we have observed the necessity to incorporate mediation in India as the first option for dispute resolution. Through the course of the study, we have determined the answers to our research questions, which are the major findings of the study as listed below:

- Mediation, as defined by Black's Law Dictionary is 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. There are various provisions under the legal framework by which mediation can be invoked – by mediation clause in an agreement, by court-referred mediation under certain statutes or by mandatory pre-litigation mediation.
- Pre-litigation mediation under Section 12A of the Commercial Courts Act is a mandatory provision which that no suit (other than those requiring immediate interim relief) would be entertained unless first availing the remedy of mediation. The mediation settlement would be treated as an arbitral award.
- This would not only reduce the burden of the court but also increase client satisfaction and give adequate justice. The Mediation Bill, 2021 has introduced certain changes and removed much of

¹⁶⁹ Aashna Reddy et al Udai Nanda, *Mandatory Mediation in India - A Step Forward?*, MEDIATE, (last visited Feb. 13, 2022, 09:21 PM), <https://www.mediate.com/articles/reddy-nanda-mandatory-mediation.cfm>.

the ambiguity and inadequacy in the provisions. However, it is yet to be enforced.

- The option of mediation has always been open for people but due to lack of awareness, people try to reach the Court for settlement. If mandatory mediation is introduced in the country, it would be the best way to propagate and spread awareness among the people about alternative dispute resolution methods.

We must take a lesson from other countries as to how they have implemented mandatory mediation in their countries and how it has proved to be efficient in the justice delivery system. In India, this concept will reduce the backlog of pending suits and also help people to save their time and resources. Therefore, we must consider mandatory mediation to be the future of dispute resolution.

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