

Mediation Act, 2023: An Analytical Study

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Abstract

Mediation is an informal process of resolving the disputes where two or more parties arrive at a compromise with the assistance of impartial third party. Since the ancient time, the process of the mediation has been employed by the parties as an alternative dispute resolution. Mediation is an effective alternative mechanism for dispute resolution not only in respect of disputes pertaining to matrimonial or family discord but also for other types of disputes inter-alia civil, commercial, administrative and even for the resolution of certain insolvency issues. India has ratified the Singapore Convention and on that mpla, Meidation Act 2023 has come into picture. The Act is a progressive legislation which promotes the mutual cooperation between the parties. Act has certain shortcomings also. The reseracher has through this paper has analysed the provisions of the Mediation Act 2023. Various shortcomings or mplantati in the mplantati mplantation of the Act has been identified by the researcher.

sINTRODUCTION

Mediation is the art of finding creative solutions in the midst of conflict

-Kenneth Cloke

Mediation is an informal process of resolving the disputes where two or more parties arrive at a compromise with the assistance of impartial third party. Since the ancient time, the process of the mediation has been employed by the parties as an alternative dispute resolution. Mediation has a long history in India, particularly through the use of Panchayats for resolving community conflicts. Despite its effectiveness, mediation lost popularity during British rule leading to increase in the conflicts. Section 89(1) of the Civil Procedure Code, 1908 which has been inserted by the Amendment Act of 2002 provides about the settlement of disputes outside the Court. It provides that “where it appears to the Court that there exists the elements of settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations. Upon receipt of the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same either for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation”.¹

With the introduction of the Commercial Courts Act, 2015, the concept of pre- instituted mediation started in India. It was based on 253rd Law Commission Report. The Act has been amended in 2018 which makes the process of mediation mandatory. Parties must exhaust all other remedies mentioned under the Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018 before approaching the court for the adjudication of disputes. Mediation centers have been set up across India to facilitate settlement of disputes through mediation. Mediation is thus, an effective alternative

¹ Section 89, Civil Procedure Code, 1908.

mechanism for dispute resolution not only in respect of disputes pertaining to matrimonial or family discord but also for other types of disputes inter-alia civil, commercial, administrative and even for the resolution of certain insolvency issues.²

LEGISLATIVE FRAMEWORK CONCERNING MEDIATION IN INDIA

Mediation is a useful method to resolve disputes with the assistance of a third party but it lacked uniform structure and legal recognition. Mediation Act 2023 has been enacted to ensure the efficiency of the mediation process and establish a comprehensive legal framework for its practice in India. The Mediation Act has been formulated to promote and facilitate the mediation including the institutional mediation for the resolution of the disputes and to enforce the mediated settlement agreements. The Act provides for a body for the registration of mediators and to encourage the community mediation. It also provides for the process of online mediation which is acceptable and cost-effective process. The Act has received the assent of the President on 14th September, 2023.

Section 2 of the Mediation Act, 2023 provides for the application of the Act. It states that the provisions of the Act shall apply where the process of the mediation is conducted in India and all or both the parties are habitually residents of India or they have incorporated their place of business in India. The provisions of this Act shall also apply where the mediation agreement provides that any dispute between the parties shall be resolved in accordance with the Act. The Act also applies in the case of international mediation or where one of the parties to the dispute is the Central or State Government.³

Section 3(h) of the Act defines the term Mediation. It provides that mediation is a process in which the parties try to reach an amicable settlement of their dispute with the assistance of third party known as mediator. The parties are not bound by the decision of the mediator. The term mediation is an inclusive term which encompasses with itself the process of pre-litigation mediation online mediation, community mediation, conciliation.⁴ Mediator has been defined under Section 2(i) of the Act. It states that mediator is a person who is appointed by the parties or by the mediation service provider who undertakes the process of mediation and also includes a person registered as a mediator with the Council.⁵

Chapter III of the said Act talks about the process of mediation. Section 4 of the Act provides for the essential conditions for the mediation agreement. Mediation Agreement has been defined under Section 2(j) of the Act. A mediation agreement shall be in writing between the parties and should contain all or certain disputes which have arisen or which may arise between the parties. The Act does not mention any specific form for the mediation agreement. It can either be in the form of a mediation clause in a contract or in the form of a separate agreement. A written agreement can be any document signed by the parties or an exchange of communication or letters including electronic communication as defined under Information Technology Act, 2000. In addition to this, if one party alleges the existence of a mediation agreement in any pleadings or other pleadings, it would also be considered as an arbitration agreement. Reference in any agreement containing a mediation clause shall constitute a mediation agreement if the

² Mediation in India: Charing the Road Ahead, Available at <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> (last accessed on 11th June, 2023).

³ Section 2, Mediation Act, 2023.

⁴ Section 3(h), Mediation Act, 2023.

⁵ Section 3(i), Mediation Act, 2023.

agreement is in writing and the reference is such as to make the mediation clause as part of the agreement.⁶

Section 5 of the Act mandates pre-litigation mediation, irrespective of the existence of a mediation agreement before filing any suit or proceeding of civil or commercial nature in any court. It provides that irrespective of any mediation agreement, the parties may voluntarily, and with mutual consent, refer the dispute for settlement by mediation before filing any case of civil or commercial nature in any court. This excludes commercial disputes of specified value that are subject to compulsory pre-litigation mediation under the Commercial Courts Act, 2015. Further, any court/tribunal may at any stage of a proceeding, refer the parties to undertake mediation, irrespective of whether there is a mediation agreement or not.⁷

Section 6 of the Act mentions the kinds of dispute which can be referred for the mediation. It states that the mediation under this Act shall not be conducted for resolution of any dispute or matter contained in the indicative list under the First Schedule. It does not limit the power of the Court to refer the dispute relating to compoundable offences including the matrimonial offences to mediation.⁸ The First Schedule of the Act provides a comprehensive list of disputes that are not suitable for mediation. It includes disputes involving minors, person with disabilities, criminal prosecutions, tax matters etc.

Power of the Courts to refer the disputes to the mediation has been provided under Section 7 of the Mediation Act, 2023. It states that the court or tribunal may, at any stage of proceeding, refer the parties to undertake mediation. If the court or tribunal refers the parties to undertake mediation, it may pass suitable interim order to protect the interest of any party.⁹

Chapter IV of the Act provides for the procedure for the appointment of the mediators. Section 8 provides for the appointment of arbitrators. It states that arbitrator of any nationality may be appointed by the parties. The parties are given the choice under the Act to agree on the name of the mediator and the procedure for their appointment. If the parties do not reach any agreement, then the party seeking initiation of mediation shall make an application to a mediation service provider for the appointment of a mediator. The mediation service provider shall, within a period of seven days, appoint the mediator as agreed by the parties. In case the parties fail to reach any settlement as to the appointment of the mediator, the mediation service provider shall appoint a mediator from the panel maintained by him with his consent. The person so appointed as an mediator shall communicate his willingness or otherwise within a period of seven days from the date of receipt of communication of such appointment.¹⁰ The mediation service provider shall, while appointing any person from the panel of mediators maintained by it, consider his suitability and the preference of the parties for resolving the dispute.¹¹

Section 11 of the Mediation Act talks about the termination of the mandate of mediator. It provides that the mediation service provider may terminate the mandate of a mediator upon the application by the party or on receiving the information that he is involved in a matter of conflict of interest from participants or any other person or he has withdrawn from the mediation for any reason. Upon

⁶ Section 4, Mediation Act, 2023.

⁷ Section 5, Mediation Act, 2023.

⁸ Section 6, Mediation Act, 2023.

⁹ Section 7, Mediation Act, 2023.

¹⁰ Section 8, Mediation Act, 2023.

¹¹ Section 9, Mediation Act, 2023.

termination of the mandate of mediator the parties may appoint another mediator within a period of seven days from such termination.¹²

Chapter V of the said Act provides for the proceedings of the mediation. Section 14 provides for the commencement of the mediation. It states that the mediation proceedings with respect to a particular dispute shall be deemed to have commenced on the date on which a party or parties receives notice from the party initiating the mediation, to refer such dispute to mediation or from the date of the appointment of the mediator by the parties or the mediation service provider. The conduct of the mediation has been provided under Section 15 of the Act. It states that the mediator shall assist the parties in an independent, neutral and impartial manner in their attempt to reach an amicable settlement of their dispute. The mediator shall not be bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872 but shall be guided by the principles of objectivity and fairness. The mediator with the consent of the parties shall determine the language or languages to be used in the mediation process.¹³

The role of the mediator has been explained under Section 16 of the Mediation Act, 2023. The mediator attempts to facilitate the voluntary resolution of disputes and communicate the views of one party to the other. He assists the parties in identifying issues, advancing better understanding, clarifying priorities, exploring areas of settlement and generating options in an attempt to resolve the dispute expeditiously. The parties shall be informed expressly by the mediator that he only facilitates in arriving at a decision to resolve a dispute and that he shall not impose any settlement nor give any assurance that the mediation may result in a settlement.¹⁴ In addition to this, the mediator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject matter of the mediation proceedings. He shall not be presented as a witness by the parties in any arbitral or judicial proceeding.¹⁵ Section 18 of the Mediation Act, 2023 imposes a time limit for the completion of mediation proceedings. It states that the mediation under this Act shall be completed within a period of 120 days from the date fixed for the first appearance before the mediator. The period for mediation may be extended for a further period not exceeding sixty days.

Section 18 and 19 of the Act deals with the registration of the mediation agreement. It provides that the mediated settlement agreement includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator. Where a mediated settlement agreement is reached between the parties, the same shall be reduced in to writing and signed by the parties. The mediated settlement agreement signed shall be submitted to the mediator who shall, after authenticating the mediated settlement agreement, provide a copy to all the parties. Any mediated settlement agreement also includes a settlement agreement resulting from online mediation.¹⁶

Registration of mediated settlement agreement is provided under Section 20 of the Act. It states that the mediated settlement agreement arrived at between the parties at the option of parties may be registered with an Authority constituted under the said Act. Such Authority or body shall issue a unique registration number to such settlement agreements. The registration may be made by the parties or mediation service provider within a period of 180 days from the date of receipt of authenticated copy of

¹² Section 12, Mediation Act, 2023.

¹³ Section 15, Mediation Act, 2023.

¹⁴ Section 16, Mediation Act, 2023.

¹⁵ Section 17, Mediation Act, 2023.

¹⁶ Section 19, Mediation Act, 2023

mediated settlement agreement¹⁷ Moreover, where no agreement is arrived at between the parties the mediator shall prepare a non-settlement report and provide a signed copy to all the parties, The report shall not disclose the cause of non- settlement, or any other matter or thing referring to their conduct, during mediation.¹⁸

Chapter VI of the said Act talks about the enforcement of the mediated settlement agreement. Section 27 provides that the mediated settlement agreement resulting from a mediation signed by the parties and authenticated by the mediator shall be final and binding on the parties. The mediated settlement agreement shall be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it were a judgment or decree passed by a court.¹⁹ The parties may challenge the mediated settlement agreement under Section 28 of the Act. It provide that the parties may challenge the agreement on the following grounds-

- a) Fraud
- b) Impersonation
- c) Corruption
- d) where the mediation was conducted in disputes or matters not fit for mediation under section 6

An application for challenging the mediated settlement agreement shall be made within the period of ninety days from the date on which the party making that application has received the copy of mediated settlement agreement. If the court or tribunal is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of ninety days, it may entertain the application within a further period of ninety days.²⁰

Online Mediation has been dealt under Section 30, Chapter VII of the Mediation Act, 2023. It provides that the Online mediation may be conducted at any stage of mediation with the written consent of the parties including by the use of electronic form or computer networks The conduct of online mediation must ensure that the confidentiality is maintained at all times and the mediator may take such appropriate steps in this regard as he deems fit.²¹

Chapter VIII of the Act provides for the Mediation Council of India, The Mediation Act establishes the Mediation Council of India (MCI) as a corporate body responsible for various duties, including the development of India as a strong centre for domestic and international mediation. The Council will also oversee the conduct of mediation proceedings, handle the recognition, renewal, cancellation, or suspension of Mediation Service Providers, maintain an electronic depository or mediated settlement agreements, and submit an annual report on the implementation of the Mediation Act's provisions to the Central Government. Additionally, this Council also will have the authority to create rules and regulations in alignment with the Mediation Act.²²

Section 40 of the Mediation Act, 2023 provides that mediation proceedings may be conducted by a Mediation Service Provider which includes a body or an organization or an authority constituted under the Legal Services Act, 1987. It also includes a court annexed mediation centre or any other body for conduct of mediation proceedings. The Mediation Service Providers are entrusted with the duty to accredit mediators and maintain a panel of mediators and provide all facilities such as secretarial

¹⁷ Section 20, Mediation Act, 2023.

¹⁸ Section 21, Mediation Act, 2023.

¹⁹ Section 27, Mediation Act, 2023.

²⁰ Section 28, Mediation Act, 2023.

²¹ Section 30, Mediation Act, 2023.

²² Section 38, Mediation Act, 2023.

assistance and infrastructure for the conduct of mediation proceedings, facilitate registration of mediated settlement agreements.²³

CRITICAL ANALYSIS OF MEDIATION ACT, 2023

The Mediation Act is a progressive legislation which encourages dialogues over discord. It offers freedom of choice to the parties to resolve their differences creatively resulting in preserving relationships and saving the time and resources. Mediation is considered as a preferred and viable mode of dispute resolution. But there are certain challenges that are required to be reconsidered. The First Schedule of the Mediation Act, 2023 mentions the list of the disputes which cannot be resolved through the process of mediation. It includes disputes involving the minors, deities, people with disabilities, persons of unsound mind, and persons with disabilities are not fit for mediation. This classification of the groups creates discrimination as it restricts the access of justice to these groups. It is not a reasonable classification and it violates Article 14 of the Constitution of India.

The Mediation Act, 2023 has significantly curtailed the scope of interim measures only to such mediations which have been referred by a court or tribunal, and thereby omitted the mediations arising out of a Mediation Agreement. Further the Act does not provide for the appeal in respect of the interim measures. Section 37 of Arbitration and Conciliation Act, 1996 provides for the appeal in the case of interim measures provided by Court or Tribunal. Moreover, it is essential for the law to provide certain guiding principles in respect of the necessary qualifications and competencies expected of trained mediators.

CONCLUSION AND SUGGESTIONS

The process of mediation has been recognised from the ancient times when the disputes were resolved by the Panchayats in the rural areas. The process of the mediation is voluntary and optional. Full autonomy is given to the parties in the mediation. It ensures the speedy and cost-effective justice. The Mediation Act is a significant step which encourages the alternative dispute resolution in India. The main object of the act is to promote and facilitate mediation. The Mediation Act emphasizes institutional, online, and community mediation as an effective means of resolving disputes in a timely manner. Its applicability spans a broad spectrum of cases, encompassing parties residing or doing business in India, as well as international commercial disputes involving foreign entities.

The Mediation Act has made an effort to strike a balance between voluntary participation and minimal judicial intervention. Certain provisions of the Act protect the confidentiality and privileged communications of parties intending to settle disputes amicably. The establishment of Mediation Council of India, Mediated Settlement Agreements, and the role of mediation service providers collectively laid the groundwork for a comprehensive mediation framework. There is a pressing need for ratification and adoption of the Singapore Convention by India. The Mediation Act is a welcome step towards transforming the landscape of dispute resolution by offering parties an effective and efficient avenue to resolve conflicts voluntarily and without any form of adjudication.

²³ Section 40, Mediation Act, 2023.