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EFFECTIVENESS OF MEDIATION IN CORPORATE SECTOR AS AN ADR MECHANISM

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TABLE OF CONTENTS

SR. NO	DESCRIPTION	PAGE NO .
1.	INTRODUCTION	3
2.	EFFECTIVENESS OF ADR	3
3.	MEDIATION	4
4.	BASIC FEATURES OF MEDIATION	5
5.	ADVANTAGES OF MEDIATION	5
6.	EFFECTIVENESS OF MEDIATION IN CORPORATE SECTOR	6

7.	CONCLUSION	8
8.	BIBLIOGRAPHY	9

INTRODUCTION

The judicial system in India is the oldest and it is becoming inefficient day by day, due to piling up of the cases and delay in passing orders or judgements or settling the disputes. Even after the establishment of fast track courts there are millions of cases which are unresolved. To resolve this situation out of the court, ADR has come up with a solution which helps the parties to resolve their issue or conflict between them in a peaceful manner and the outcome is satisfactory to both the parties. Alternative dispute resolution (ADR), the name itself explains that it is an alternative form of resolving a dispute. Alternative dispute resolution helps the parties to resolve their disputes with the help of a neutral third party instead of going to court and all the process, ADR makes it faster and it is also less expensive. ADR helps to resolve all the matter pertaining to civil, family, commercial, and industrial, except for the matters which involve public interest which happens mostly in criminal cases. The main motive of ADR is to provide social, economic and political justice and also to maintain veracity in the society. Important provisions related to ADR are S.89 of Civil Procedure Code, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1987. Alternative dispute resolution has many forms of settlement. They are as follows¹:

1. Arbitration
2. Mediation
3. Conciliation
4. Settlement by Lok Adalat
5. Judicial settlement

¹<https://www.lawyersnjurists.com>

EFFECTIVENESS OF ADR:

There is development of Alternative dispute mechanisms all over the world and especially in India. ADR is very effective because it has lot of advantages such as, saving time by allowing resolutions in weeks or months, unlike court mechanism which takes years to resolve a dispute. It also saves lot of money for the parties and gives them an opportunity to narrate the facts and come to a consensual conclusion. ADR mechanisms mainly focus on the issues that are necessary and important to the parties in dispute instead of focussing on their legal rights and obligations. It also helps people to explore creative and flexible options. One of the main advantage in the whole process of ADR is, that it protects the relationship between the parties by settling the dispute in a peaceful manner and passing the award which is agreeable to both the parties. It is more of private in nature as it only invites people or the parties to the dispute can attend a session of ADR but in the court the proceedings are public and many people including media can attend and thus it is not private. Along with the advantages there are also disadvantages, like it does not produce legal precedents and there is no guarantee of resolution except in arbitration. There are also deadlines or limitation period when the dispute is in any of the ADR mechanisms. Sometimes the parties do not have choice but to opt for ADR because the contract made between the parties states so².

The main objective of this paper is to discuss about mediation and its effectiveness especially in corporate sector.

MEDIATION:

As discussed above mediation is one of the mechanisms in ADR process. It is a consensual form of resolving a dispute which falls outside the purview of court. Mediation is a process by which mediator who is appointed by the parties or by the court, mediates or settles the dispute between the parties by applying the provisions of Mediation Rules, 2003(Part II). He facilitates the discussion between the parties either directly or by communicating with each other. Mediator also assists the parties in identifying issues, reduction in misunderstandings, creating options, helping them to segregate their priorities, exploring new areas of compromise. In mediation, parties are at liberty for making their own decisions. In *Turning Point vs. Turning Point Pvt.*

²http://www.localcourt.justice.nsw.gov.au/Pages/adr/benefits_adr.aspx

*Ltd*³, The Delhi High Court held that the appellant and the respondent must negotiate their differences by mediation⁴.

There are many mediation centres in India including Supreme Court, High Courts and District Courts. Madras High Court is the first court that annexed mediation centre in our country and other high courts followed. Our courts are institutionalizing mediation, providing training, referrals, certification etc. there are many other centres for all the ADR mechanisms but the following centres deals especially with mediation. They are⁵:

- Centre for Advanced Mediation Practice (CAMP), Bangalore,
- Mediators India, Chennai,
- Prachi Mediation Chamber, Mumbai

In today's technical world ODR, which is an upgraded technology for traditional ADR is also picking up. ODR is online dispute resolution. Mediation also has seen some progress in consumer disputes and also being setting up OCMC (Online Consumer Mediation Centre)⁶.

BASIC FEATURES OF MEDIATION⁷:

- The process of mediation is a voluntary process and the parties who enter into a contract can settle their dispute through mediation.
- The party who acts as a mediator is the neutral third party so as to avoid any kind of partiality or biasness towards one party and the mediation must be done impartially.
- The rules of evidence are not applicable in the mediation process and the parties are free to present any kind of evidence.
- The procedure of mediation is very useful for settling the disputes which are private in nature as it is very confidential. In *Moti Ram (D) Thr. L.Rs. and Anr. vs. Ashok Kumar and Anr*⁸, the Hon'ble Supreme Court held that the proceedings of mediation are strictly confidential and the mediator has to send the settlement agreement made between the

³FAO (OS) 263/2017

⁴<http://jciil.lsyndicate.com>

⁵<https://blog.ipleaders.in>

⁶<https://blog.ipleaders.in>

⁷<http://jciil.lsyndicate.com>

⁸(2011) 1 SCC 466

parties to the court without disclosing the contents of mediation, when it is successful and if in case it is not successful then the mediator has to just inform the court that the mediation is unsuccessful.

ADVANTAGES OF MEDIATION⁹:

- Compared to civil litigation process, mediation is fast process and it is also an informal procedure. If it is a formal procedure then there are lot of rules and regulations which are to be followed, whereas in mediation, the mediator can make up their own rules and regulations. There are no court fees and other expenses in the mediation. On the other hand civil litigation is more expensive than mediation.
- In court proceedings parties are represented by their advocates but in mediation parties are not represented by anyone and they can express their own opinions and concerns.
- Mediation protects the relationship between the parties in which they along with the assistance of mediator analytically separate the issues which are in dispute in order to build up options, consider other alternatives and try to reach consensual agreement that will accommodate their needs.
- Mediators are experts in the field and are aware of various problems of the disputes and it is a simpler process when compared to arbitration, litigation or any other ADR processes. There is also an availability of service of a lawyer at the request of the parties and has a structured process. In mediation, both the parties have an opportunity to check the background of the mediator before appointing him as a mediator to their dispute.

The only disadvantage in mediation is the consent of the parties is not mandatory for referring to mediation and the decision given by the mediator is not appealable. Mediation does not apply to the cases where there is an involvement of public interest, for example criminal cases. *State of Madhya Pradesh v Madan Lal*¹⁰, in this case the Supreme Court held that the proceedings of mediation could not be done between the accused and the victim in cases of rape as there is an involvement of public interest and it is a criminal case¹¹.

EFFECTIVENESS OF MEDIATION IN CORPORATE SECTOR:

⁹<http://jcil.lsyndicate.com>

¹⁰(2015) SCC OnLine SC 579

¹¹<http://jcil.lsyndicate.com>

Corporate sector is an important part of the economy. There are disputes in every sector, same way there are also disputes which arise between companies in the corporate sector. Companies Act, 2013 governs all the companies and they have to abide by the rules and regulations of the Companies Act. In simple words any kind business disputes can be referred to ADR processes which also includes mediation. Mediation is very effective because many companies and institutions which are dealing with banking, trading or insurance etc. have relied on mediation as it is very effective and flexible when compared to other ADR forms. Recently the partnership dispute which arose between the Amarchand Brothers who lead the famous law firm Amarchand Mangaldas in India, was settled through mediation. In the same way many disputes related to contract between both the companies or dispute related to families in the business are settled through mediation. The central government has issued an ordinance relating to the amendment of Commercial Courts Act, 2015 in which there is a specific provision which states that prior to instituting a commercial suit for the matter which do not require immediate interim relief, for such type of cases pre – institution mediation is mandatory. The government has taken this decision as mediation is very effective and the graph of success for mediation has been increased in recent days. Research shows that less than 1% of cases which are settled at mediation are reopening for litigation or arbitration, by this we can understand that how effective is mediation not only in corporate sector but also the mediation as a whole process of an ADR mechanism. Many high reputed companies such as Google, Amazon, Facebook, Oracle, Apple have gone through the process of private mediation in order to resolve their private disputes. The settlement made between the parties is as binding as an arbitral award¹².

The ministry of corporate affairs (MCA) has notified “Companies (Mediation and Conciliation) Rules, 2016”. According to these rules the central government is introducing a structure of setting up a panel of mediators or conciliators, who will have the role to communicate the view of each party in the dispute, identifying the issues, reduction of misunderstandings and resolving the dispute based on the consent of parties. Earlier, S.442 of the Indian Companies Act, 2013 dealt with the mediation and conciliation panel, which used to mediate the dispute between the parties while the case or dispute is pending before the tribunal, appellate tribunal or central government. At any time during the proceedings before the above said authorities, the parties are

¹²<https://www.thehindubusinessline.com>

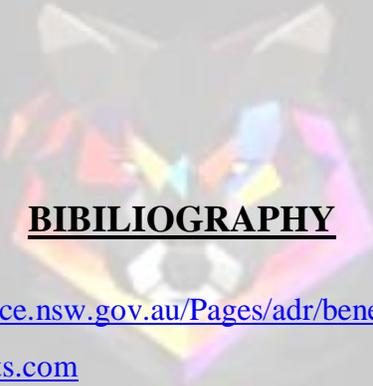
free to choose to be referred to the mediation and conciliation panel. Sometimes even without the consent of the parties the central government, tribunal or appellate tribunal can refer the matter to mediation and conciliation panel if it feels so. So providing a proper structure with these rules under the Companies Act is very useful and parties can resolve their disputes through mediation themselves with the help of a mediator. According to the Companies (Mediation and Conciliation) Rules, 2016 the mediator helps the parties to arrive at a resolution but he shall not impose any kind of settlement or decision on them and the parties are their liberty to make their own decisions which shall affect them. Parties to the dispute, has to face the consequences for the decisions taken by them and mediator is not the person who has to be blamed. This kind of mediation is more of international style and is known as facilitative mediation. There are also rules regarding the eligibility of the mediator in the panel and if all the eligibility criteria are satisfied then the person can become a mediator. In mediation there is a win- win situation for both the parties and this is missing in other ADR processes, which is why the effectiveness of mediation in corporate sector is increasing day by day and this is the reason why the process of mediation is effective as an ADR mechanism in India¹³.

CONCLUSION

Effectiveness of mediation can be figured out by the advantages that mediation has as an ADR mechanism. Mediation actually allows the parties to think out of the box solutions and it creates a win- win situation so that both parties are happy with the settlement as they themselves create the solutions, make decisions and face the consequences for the same. The role of mediator is also very important in mediation, even the decisions are taken by the parties it is the mediator who solves the issues and misunderstandings between the parties and help to come on the same level and explore various options to the parties thereby making it easy for them to take decisions which are beneficial for both the parties. The main advantage in mediation is the relationship between the parties is preserved as they amicably decide and come at one solution instead of combating with each other. Mediation is effective by its very own nature and is also effective in the corporate sector because most of the companies now a days are opting for mediation as it is private and confidential in nature. Through the procedure of mediation both the companies are benefitted unlike the court proceedings or any other proceedings where one company has to pay

¹³<http://mediationblog.kluwarbitration.com>

huge compensation to other company. But in mediation both are companies sit and talk and arrive at one solution which is beneficiary for the both the companies. Encouragement for mediation is very much needed and awareness among the people has to be increased in relation to mediation as the most effective ADR mechanism. It is a change in our judicial system and through this even the courts are not burned by many cases and it will also help to reduce the already pending cases in the court. Mediation is financially beneficial also. Court can refer the parties to mediation or parties can also choose mediation and mediator can be appointed by the parties according to their will and wish. Lawyer can also be a mediator. All these advantages have made mediation effective as an ADR mechanism especially in corporate sector.



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