



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Applicability and Scope of the Mediation Act 2023: An In-Depth Analysis

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Received 18 January 2024; *Accepted* 13 February 2024; *Published* 17 February 2024

Mediation Act 2023 is a significant advancement in the alternative dispute resolution system. Rooted in its historical practices of panchayat it has now become a voluntary and binding process. There are five modes of ADR and mediation is one of them recently mediation has become an act, on 14 September 2023, the act came into existence as Mediation Act 2023. The act is divided into 11 chapters, 65 sections, and 10 schedules. The Act has also included a section for pre-litigation mediation and introduces concepts like online and community mediation. A key feature is the establishment of a Mediation Council that will look after the mediation services, registration, and training of mediators. The Act applies to individuals, government entities, and commercial disputes; it also extends to the covering of international mediation. It promotes confidentiality, party autonomy, and the enforceability of mediated settlement agreements. Despite having some challenges, the coming of this act is viewed as a game-changing move, enhancing efficiency and effectiveness in dispute resolution, especially in civil and commercial matters.

Keywords: *mediation, adr, pre-litigation, online mediation, mediator, mediation council.*

INTRODUCTION: MEDIATION

Mediation in India is not new; it is something that has been there at the Indian grassroots for a long time. Mediation using panchayats for dispute resolution is an ancient, well-known practice

that is still preferred¹. This means mediation was available to us in the form of panchayat people were solving their disputes through it and were successful in doing so. Panchayat was a system in which certain respected elders of the village acted as mediators between the conflicting parties and helped to resolve their disputes. However, during the period of East India Company and with the other adversarial legal systems during that time the practice of mediation lost its essence and the people were more focused on filing suits and solving their matters through the courts. Section 89(1) of the Code of Civil Procedure 1908² also mentions about ADR. Mediation is one of the out-of-court settlement procedures, and an alternative conflict resolution method, which implies it, is an alternative to courts such as district courts, high courts, and so on. Therefore, an alternative is created for getting disputes resolved and providing easy and less time-consuming justice to needy people. Mediation is generally preferred in the cases of civil and commercial matters and matrimonial ones such as mediation in some property-related matters, divorce matters, etc. The parties in such cases generally prefer mediation but mediation is not only restricted to such cases. Though it is a part of a system where the matrimonial disputes are getting resolved along with that it is also helping and is becoming out as a successful mode of dispute resolution method in civil and commercial matters.

WHY MEDIATION OVER LITIGATION?

Mediation is a voluntary, binding process in which a neutral mediator helps conflicting parties in reaching an agreement³. The best part about the alternative dispute resolution mechanism is that it promotes party autonomy. Party autonomy simply means that the parties are being given the preference unlike the normal judicial system or the court system where the party does not have the autonomy to know who is going to be their judge, what procedure they are going to follow, what evidence would be there but in the case of alternate resolution or any of the form of ADR like the mediation the party autonomy is being followed and the person sitting over

¹ Soumya Gulati et al., 'Decoding the Mediation Act, 2023' (*Nishith Desai Associates*, 04 September 2023) <<https://nishithdesai.com/NewsDetails/10748>> accessed 17 January 2024

² *Ibid*

³ 'Mediation Act, 2023: Easing Judiciary Workload' (*Drishti IAS*, 27 September 2023) <<https://www.drishtiiias.com/daily-updates/daily-news-editorials/mediation-act-2023-easing-judiciary-workload>> accessed 14 January 2024

there who is going to resolve the dispute is one of the neutral people. The mediator does not force a solution, but rather creates an environment in which disputing parties may resolve all of their disagreements; it is an environment in which the parties feel extremely comfortable addressing their difficulties, which is not the case in litigation.⁴ In litigation, there is a very formal process parties are not free to express their emotions. This is not similar when we talk about mediation or any form of ADR people consider this as a platform where they can share their emotions and such evidence is also admissible that is not admissible in a court of law such as where evidence is considered in mediation but not in court of law. The mediator not only gives a comfortable environment but also a counseling session where they cannot only put their issues but they can also share their consciousness and what is going in their mind and discuss it with the mediator. Mediation is an established alternate way of dispute settlement. It has been a huge success in places like Delhi, Ranchi, Jamshedpur, Nagpur, Chandigarh, and Aurangabad.⁵ These cities have conducted a survey, which revealed that mediation is the most effective approach for resolving disagreements. Mediation is a planned procedure in which a neutral party employs specialized communication and negotiating strategies. Litigants involved in the mediation process have strongly supported it.⁶ The Mediation Act gives a broad definition of mediation, including pre-litigation mediation.

PRE-LITIGATION MEDIATION

Pre-litigation mediation⁷ emphasizes that before going towards the litigation the parties must go for the mediation this helps the party to come to a conclusion faster ensuring that the procedure does not involve litigation. Section 89 of the CPC consists of an element of settlement of compromise which itself suggests to the parties that the nature of the case only needs a kind of settlement which needs a kind of compromise and there is no requirement of litigation so the court itself is suggesting if the case is of mediation nature. Now it has been included as a very first step after this Mediation Act of 2023 it simply states that between any of the proceedings or

⁴ *Ibid*

⁵ *Ibid*

⁶ *Ibid*

⁷ Rajat Rajan Singh, 'Mediation Act 2023: Highlights and Key Features' (*Law Trend*, 17 September 2023) <<https://lawtrend.in/mediation-act-2023-highlights-and-key-features/>> accessed 15 January 2024

before the proceeding the party is free to opt for the mediation. Suppose if the party had to opt for litigation now with the one condition before going to the litigation, they should go for the mediation the initial stage will get resolved where there is a need for discussion and compromise. This is a stage where half the case is resolved which saves the precious time of court. When the parties have gone to the mediation it helps not only the court to come to a solution but also the parties to exactly know what their case is about.

HINDRANCE IN THE GROWTH OF ADR OR MEDIATION

The problem in our country that why ADR methods are not growing is because of the non-awareness of the parties of the existing out-of-the-court settlement procedures and the greed of the lawyers to make money that they do not tell the parties that their case is of such nature that can be resolved in two or three sitting now the matter which can be resolved quickly is going to take two to three years now because of the litigation procedure and how does it help the parties, it is not helping the parties it is going to help the lawyers because they are getting the money out of it. This also leads to the pendency of cases.

However, with the introduction of the Mediation Act of 2023, the presence of the Arbitration Conciliation Act of 1996,⁸ and the efforts that Hon'ble Chief Justice of India DY Chandrachud is taking in making a system where awareness is being created amongst the parties and as well as the lawyers to make them aware about ADR, mediation is a growing method which will be opted very usually in the mere future. Therefore, this act is particularly focusing on institutional mediation, a new concept of online mediation, and community mediation and ensures the implementation of mediated settlement agreements.

APPLICABILITY OF THE MEDIATION ACT, 2023

The legislation applies to people, the central government, the state government, or any of their agencies, public bodies, corporations, or local bodies, as well as entities controlled and owned by such governments, in cases involving commercial disputes. The dispute is deemed

⁸ 'The Mediation Bill, 2021' (*PRS Legislative Research*, 20 December 2021) <<https://prsindia.org/billtrack/the-mediation-bill-2021>> accessed 17 January 2024

appropriate and notified by the Central or State governments regularly for settlement through mediation under this Act⁹. The act also focuses on international mediation which is important because many commercial disputes are not limited to territorial jurisdiction so it covers the international aspect also

KEY FEATURES OF THE ACT

- The Mediation Act recognizes pre-litigation mediation as a voluntary approach for resolving disputes before bringing a civil or commercial lawsuit to court. Section 5 of the legislation allows the parties to participate in voluntary mediation for the resolution of civil or commercial disputes before beginning formal legal actions.
- The Act creates a Mediation Council under Section 31 to monitor and regulate mediation services. The council serves as a mediator for the parties involved. This council will train more registered mediators and accredit them, after which they will be trained in both civil and commercial matters.
- The Mediation Act allows for community mediation to address issues that may disrupt peace and harmony among local inhabitants. A panel of three mediators must perform community mediation. Section 43 of the Act covers it.¹⁰

Section 43 of the Act introduces community mediation to settle conflicts that are likely to disrupt peace, harmony, and serenity among residents or families in any region or neighborhood. Disputes under this provision may be brought to mediation only with the party's previous mutual content. If no authority has been established, the parties must apply with the appropriate authority established under the Legal Services Authority Act of 1987¹¹, or a District Magistrate or Sub-Divisional Magistrate. They will form a panel of three community mediators. The panel will consist of the following people¹².

⁹ Apporva Misra and Nishant Rewalia, 'Mediation Act 2023 latest amendments: A complete guide' *Bar and Bench* (18 October 2023) <<https://www.barandbench.com/law-firms/view-point/mediation-act-2023-latest-amendments-guide>> accessed 15 January 2024

¹⁰ 'The Mediation Bill, 2021' (*PRS Legislative Research*, 20 December 2021) <<https://prsindia.org/billtrack/the-meditation-bill-2021>> accessed 17 January 2024

¹¹ *Ibid*

¹² The Mediation Act 2023

- 1- Individuals of status and integrity who are reputable in the community;
2. Any local individual whose contributions to society have been recognized;
3. Representative of regional or resident welfare groups.
4. A mediator with relevant experience in mediation; and
5. Any other suitable individual.

Online Mediation: Mediation conducted via internet-based communication tools is permissible under the Mediation Act, Parties can engage in online mediation upon any dispute. This is a new concept and this is going to help a lot in the settlement of disputes.

The mediation act has covered the important concept of online mediation where it talks about the flexibility for the parties in any stage of their proceedings or at any stage of mediation that if they cannot appear in court in person then they can go for online mediation. However, the consent of both parties must be there and must always be in written form and that too in electronic form. In addition, these online proceedings will not be recorded to maintain the integrity and confidentiality of the proceedings.

Now, the question is how the enforcement of this mediated settlement agreement will happen. Therefore, if we talk about commercial matters then definitely there will be a contract in that contract there is going to be a clause that in case there is a dispute that arises then it will be resolved through arbitration or conciliation. Now after the Mediation Act, the contracts will also have one clause for mediation through which they can solve their dispute if it arises and this settlement will be known as a mediated settlement. The mediation settlement agreement will not only be considered final and binding but it will be also enforceable.

CHALLENGE TO MEDIATED SETTLEMENT AGREEMENT

Where the party autonomy is there to appoint the mediator, the party autonomy is again there to challenge the settlement agreements also among the parties if they had been on the grounds of fraud corruption impersonation, and those disputes that are not fit for the mediation. Section

6 of the act also talks about various things that won't be covered under the mediation like if the offense is against the minor, if it would have been a criminal offense, etc. so these kinds of things they won't be covered for mediation and if it reaches a mediated settlement, it can be challenged.¹³ The act has also fixed the time limit within which the dispute needs to be resolved. It has fixed 90 days within which the mediated settlement can be challenged.

DISPUTES NOT FIT FOR MEDIATION

Section 6¹⁴ of the Act, read with the First Schedule, gives an illustrative list of conflicts or matters that are unsuitable for mediation, which includes:

- a) Disputes involving juveniles, deities, and people with intellectual limitations
- b) Prosecution of criminal offenses,
- c) Disputes regarding tax levy, collection, penalties, or refunds,
- d) Complaints or proceedings initiated before any statutory authority or body regarding the registration, discipline, or misconduct of any practitioner or other registered professionals,
- e) Disputes affecting the rights of a third party who is not a party to the mediation proceedings, except in matrimonial disputes.
- f) Any investigation, inquiry, or procedure brought before the Telecom Regulatory Authority of India, Telecom Disputes Settlement Commissions, Securities and Exchange Board of India, Securities Appellate Tribunal, Appellate Tribunal, and Under the Competition Act of 2002, among others.
- b) Land acquisition and compensation determination under land acquisition legislation or any other provision of law that authorizes land purchase.

¹³ Singh (n 7)

¹⁴ Misra (n 9)

THE MEDIATION COUNCIL OF INDIA

The Mediation Council of India¹⁵ registers and trains mediators and the council includes a chairperson, two full-time members with mediation or ADR expertise, three ex-officio members (including the law secretary and spending secretary), and one part-time member representing an industry association. The Council's functions include registering mediators and recognizing mediation service providers and institutes. The Mediation Council would also be responsible for promoting international and domestic mediation in India, facilitating and conducting ongoing mediation training, education, and certifications, and maintaining a depository of mediation settlement agreements reached in India.

One thing that this act has added if the dispute has been settled through mediation, they are going to provide a unique ID, registered mediation number will be there to identify the settlement.

INSTITUTION OR AUTHORITY TO CONDUCT MEDIATION

Section 40¹⁶ states that mediation procedures may be undertaken by:

- a.) Mediation Service Provider, a Mediation Service Provider is an organization that follows Mediation Act requirements and is recognized by the Mediation Council of India to conduct mediation procedures.
- b.) an authority established under the Legal Services Mediation Act, 1987;
- c.) a court-annexed mediation center.
- d.) Any other body as specified by the Central Government.

The authorities established under the Legal Services Act of 1987, court-annexed mediation facilities, and entities designated by the Central Government the Mediation Council recognize

¹⁵ 'The Mediation Bill, 2021' (PRS Legislative Research, 20 December 2021) <<https://prsindia.org/billtrack/the-mediation-bill-2021>> accessed 17 January 2024

¹⁶ Gulati (n 1)

considered mediation service providers. Therefore, these kinds of institutions will be there which will help conduct the mediation.

APPOINTMENT OF MEDIATOR

Section 8 of the legislation states about the appointment of mediators. Any individual of any nationality can be appointed as a mediator, but only with the permission of both parties. Foreign mediators must meet specified credentials, experience, and accreditation requirements. The disputing parties are allowed to agree upon the name of the mediator and the procedure for their appointment, if the parties cannot reach an agreement, they may request the appointment of a mediator from the Mediation Service Provider's panel, taking into consideration their preferences and the mediator's suitability for resolving the dispute.

After receiving an application, the mediation service provider will make an appointment within 7 days.

- The mediator agreed by the parties must confirm within 7 days of receiving notice of the appointment.
- If parties cannot agree on a mediator or the mediator refuses to act, the mediation service provider shall appoint a mediator from its panel with their approval.
- The mandate of the mediator will be terminated if there is a conflict of interest, personal or professional relationship.

ROLE OF THE MEDIATOR

The mediator is someone who is going to assist the parties, independently, neutrally, and impartially and is guided by the principles of objectivity and fairness. This means a neutral person who will assist the parties in settlement rather than compelling them to agree to his decision and this will help the parties to come to a conclusion with the assistance of the mediator. The mediator can meet with the party separately or together as needed. The mediator is not bound by the procedural rules of the CPC 1908 or the Indian Evidence Act 1872. In mediation, there is also flexibility, unlike the rigid process of litigation. Mediation proceedings will be

conducted as per the parties the only requirement is that it should be within the jurisdiction of the competent court or tribunal.

CONFIDENTIALITY IN MEDIATION

Section 22 of the Mediation Act requires the Mediator, Mediation Service Provider, and parties to mediation proceedings to keep several aspects secret, including statements, proposals, documents, and any other information exchanged throughout the mediation process. Furthermore, recording mediation processes on audio or video is banned to maintain confidentiality. Importantly, the information shared during mediation cannot be used as evidence in court, arbitration, or other legal processes. This protection is granted to the parties to encourage them to engage in conversations and reach acceptable solutions.

CONCLUSION

Earlier when the act was not passed mediation was only a concept known to people, it was not even defined anywhere also before this act it did not hold any authority it was not considered binding upon the party, and it was not even enforceable but with the coming of this act, this concept of mediation is becoming enforceable. Now if the parties are opting for the mediation, then the solution that is being suggested to them is considered to be binding on them. Now the mediation has the authority of being binding.

Mediation is going to be a game-changing development it is going to help commercial and civil matters and it will ensure the confidence among the corporate sector among the foreign companies to get established to have their institutions in India for getting the dispute resolved and to ensure these easy and timely disposals of the matters.