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CARDINAL IMPORTANCE OF PRE -LITIGATION MEDIATION IN INDIA: A SOCIAL LEGAL STUDY

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Abstract- Before initiating the formal legal process, the pre litigation mediation is quite simple to resolve the case. Many people ponder the question that is it worth taking a crack at it before we pitch-in our heels. The greatest challenge as well as the opportunity for mediation to thrive as a mechanism for dispute resolution is the outbreak of Covid 19 has created instability and intricacy in the justice delivery system. This disturbance has radically exaggerated the performance of court system, it is the reason that the concept of pre litigation mediation is being realized more than ever. This piece of writing aims to find the way from beginning to end the road India has adopted in anticipation to establish the pre-litigation settlement regime. "The writer also makes an endeavor to find out the reasons of failure of mediation in India, different legislation supports pre litigation mediation and also throw the light on the process of pre-litigation in overseas countries, such as that of the United States of America, Italy, and the United Kingdom.

Keywords: Mediation, Pre-litigation, Pre- legislation globally and Covid 19

Overture

The emergent attention in pre-litigation arises because outcomes of the disenchantment so as to court case bring to the party. Tiny dispute while taken to courtyard go away throughout the span of outlay, delays, as well as occasionally hostile outcome which stair up the stepladder of appeals. This is relatively exasperating in support of parties whose lives are gripped in frolicsome lawsuit moreover this clash might still obtain a levy on top of their psychological condition. Although Pre-litigation offer a mode intended the parties to reconcile their dispute according to their appropriate timings, expenditure and procedure. The constructive upshot is typically an agreement among the parties. As a result, the discontent of orders and verdict of the court does not arise. As pre-litigation measures diverge transversely jurisdictions also there is no meticulous organization to be adopted and adhered to its accomplishment rates in achieving a end consequence is good enough for the parties and are far above the ground.

Concept of Pre-Litigation Mediation

To change the position conquering in the Indian legal framework, intercession as an unconventional dispute redressal (ADR) component and that can be look into as a way forward.

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For that purpose, the idea of pre - litigation intervention resembles a cherry on the cake. Pre - case intervention can be perceived as a consensual interaction by which the offended party and the respondent meet up to resolve the debate genially between them with the guide of a fair adjudicator, before the establishment of a suit or even prior to sending the notification to the court. It is a favored method of settlement in light of the fact that not at all like a suit, where an adjudicator is the adjudicator, in intercession the adjudicator is a decision of the party/parties and furthermore guarantees a success - win circumstance for the disputants since the fundamental instruments of the cycle are dialogue and considerate.

Pre - suit intervention covers a large number of cases family, business, buyer, property, minor criminal cases among others. In questions connecting with family matters, the family courts have been doled out the obligation to convince the parties to settle on intercession. Furthermore, the Indian regulations don't accommodate an obligatory intervention in the pre - suit stage. A proper acknowledgment of the equivalent was gotten on account of K. Srinivas Rao versus D. A Deepa[1] where the goal of a marital question was the issue being referred to.

Development and Jurisprudence that sustain Pre-case in India

When it came to mediating a dispute between two subjects' ancient rulers from small kingdoms to vast empires frequently served as the middlemen. We observe at home that the family unit's eldest member usually takes the lead in settling interpersonal conflicts. As we have already observed, panchayat offer assistance to groups of individuals. This demonstrates the intricate artistic relationship to intervention that India has developed. As a result, it appears that the agreement societies reached to resolve their differences outside of the courts is the most ancient and effective method.

Because the bench is overworked trying cases, there is a desire for pre-litigation settlement. Speaking at a global conference on "Arbitration in the Era of Globalization," Justice Arvind Bobde, a former Chief Justice of India, said that judging is undoubtedly a difficult profession because a panel of judges must carry out what each and every one of them abstains from doing, which is to make conclusion. Even while the conclusion is unsatisfactory for both parties, it opens the door to a series of appeals that cannot be rejected. He continued by saying that the ineffectiveness of an agreement struck during mediation ensures efficacy and reduces the amount of time that both parties and the courts must wait before proceeding to court.

The Youth Bar Association [2]of India previously filed a Public Interest Litigation (PIL) before the Supreme Court in the form of a writ seeking certain guidelines or a method to establish pre-litigation mediation transversely with the world as a direction rather than a purely optional practise. The Supreme Court has now requested a response from the Centre regarding whether legislation in this area is being considered at this time.

[1] (2013) 5 SCC 226
[2] AIR 2016 SC 4136

The court has the right to conduct absurdly quick trials of matters. Justice hurried is justice buried, just as "Justice delayed is justice denied" is true. The fact that every matter must be thoroughly investigated by our courts involves a number of hearings and because the courts are already overburdened with ongoing lawsuits and trials, these hearings can drag on for years.

Later on, intervention as an unconventional dispute resolution mechanism may be considered as changing the status quo of the Indian legal system. Thus, the pre-argumentative intervention concept resembles a cherry on top. Pre-suit intervention may be thought of as a form of agreement when the complainant and respondent meet together with the aid of an impartial arbitrator to settle the dispute amicably before the establishment or even before submitting the notification to the court. In contrast to an activity where an appointed authority acts as an agent, intervention involves the decision of the party or parties.

Reasons for the failure of mediation in India

Despite all the advantages of mediation has over the litigation, it is still not recognized in India and has some flaws that hinder the development of pre-litigation mediation system. No doubt, the mediation process is to help the parties to comprehend their goals and their interests and plan them toward a mutually agreeable conclusion that benefits both sides. Other than being affordable and quick, it has a number of benefits, including maintaining relationships, mutual satisfaction, lessening the court's workload, avoiding needless delays, being entirely party-oriented, proceeding in a convenient and comfortable setting as chosen by the parties, and empowering the parties through their active participation. The non-recognition of mediation is one of current barricade to pre litigation mediation.

A settlement agreement may be enforced in India in three separate ways: under Order 23 Rule 3 of the Civil Procedure Code[3], under contract law, and under the Arbitration and Conciliation Act, 1996 as an arbitral decision, subject to adhering to the Act's prescribed procedure. Each of these approaches will essentially start a lawsuit, which compromises secrecy, which is frequently the reason for the parties to choose mediation.

Therefore, a legal framework is required to resolve these issues while keeping in mind the confidentially component of mediation. During pre-litigation mediation, the agreement reached is a contract which is reduced in writing and signed by the both parties to the dispute and the mediator. When parties freely sign an agreement, there is no disagreement; but there may be a problem if one of the parties chooses to violate the settlement agreement. As a rule, this settlement agreement cannot be enforced as a court order. Such a settlement arrangement will, at most, serve as the legal basis for the lawsuit; nonetheless, in order to bind the aforementioned settlement arrangement, the parties will need to resort to litigation. This is one of the ordeals to the enforceability of pre- litigation mediation settlement agreement.

Although the Supreme Court of India has published guidelines for mediation, a cursory review would show that they fall short and do not cover the whole scope of mediation. Indicative is that there is no legal assurance for confidentiality or any of the other characteristics of pre-litigation mediation such as maintaining goodwill between the parties or achieving mutual satisfaction. Contrary to arbitration and conciliation, mediation's procedural components are not exclusively governed by statute. All forms of mediation, whether

[3] Order 23 Rule 3 of civil procedure code

court-referred or private, struggle to succeed due to statutory overlooks. This is the big dearth of comprehensive legal framework.

Lack of support and inadequate public understanding of pre-litigation mediation advantages cause potential users of the mechanism to lack trust. As a result, parties frequently demonstrate a lack of collaboration and occasionally fail to show up for meetings. The absence of a mediation culture in India is a significant barrier to the acceptance of pre-litigation mediation. Pre-litigation mediation services are restricted to a small area with just a few centres providing them since there is no overarching framework for pre-litigation mediation which leads to a lack of standardization among mediation centres. On the other hand, there is also a requirement for the government to make investments in fresh programmes for constructing reliable infrastructure to increase the parties' comfort and familiarity with the procedure. There is a need for mediation centres to step up and promote and facilitate pre-litigation mediation services by establishing pre-litigation help desks and clinics that allow access to mediation on a pre-litigation basis and by developing a strong mechanism for the mediators' code of conduct to help build trust between the parties.

In Afcons case,[4] though looking at Section 89 of the Code of Civil Procedure (CPC), 1908, which empowers the court to go into the matters to Alternate Dispute Resolution (hereinafter, "ADR"),[5] the Supreme Court held that every single common case, for certain exemptions, should be mentioned to an ADR system. There is insufficient information on the consequence of this finding over references to alternative dispute resolution machinery[6] this is an indication that disagreeable the Indian general set of laws has been to alternative dispute resolution instruments.

As a result of concentrating on the quantity of cases that are being implied to dispute resolution strategies along with dissecting their success rate, it could possibly assess how well the ADR methods underneath the Indian legal framework. Adjudicators and attorneys are distrustful about the case of intervention to determine legitimate questions in India also there are deep uncertainties with regards to the connection between the legal phase and intervention.[7] Section 89 of Civil Procedure Code has the forthcoming to boost alternative dispute resolution method then again it has not been utilized proficiently.

Furthermore, there isn't a single regulation that covers intervention in India; instead, there are a number of arrangements of laws that mention it, such as Section 89 of the Civil Procedure Code, Section 12A of the Commercial Courts Act of 2015, Section 37 of the Consumer Protection Act of 2019, and Section 442 of the Companies Act of 2013, Companies Mediation Rules of 2016, and Pre-Institution Mediation Rules under The Commercial Courts, Commercial Division, and Commercial Appellate Division of High courts(Amendment)Act,2018. It is true that the absence of enforceability in India has impelled diminish in

[4] (2010) 8 SCC 24

[5] Section 89 of civil procedure code

[6] Deepika Kinhal & Apoorva, *Mandatory Mediation in India – Resolving to Resolve*, 2 IPPR 49, 49-69 (2020), https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf(last visited on 14.05.2022)

[7] Hiram E. Chodosh, *Mediating Mediation in India*, law commission of India, available at https://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf

the feasibility and significance concurred to intercession, which represents a trial. No particular regulation guaranteeing the enforceability of an intervention choice sparkle vulnerability and tension, among members, simultaneously. The main conceivable choice to implement a settlement is the agreement strategy that is, upholding the settlement understanding as an agreement by means of case, which would nullify the point of intercession.

Lacking regulations and unsatisfactory preparation of judges/legal advisors/middle people has additionally horribly misrepresented the accomplishment of intercession in India. Furthermore, because of the vast majority of procedures and absence of information, legal counselors as well as client approach intercession incredulously as here is a fantasy that the party suggestive of or starting intervention has a more susceptible instance."[8] A further confidence is that prospering intercession brings about a compromised type of equity and, thus, it is less beneficial than a successful claim. The absence of confidence in legal counselors can make them deliberately impede an intercession continuing.

India needs judges who are powerful and impartial and the appointed officials and attorneys are not being encouraged to benefit from their intercession. Due to the National Legal Services Authority's inability to locate a suitable business intermediary from their list of middlemen the petitioner in Daramic Battery[9] brought the case to the Delhi High Court. Regulations like Section 12A of the Commercial Courts Act, 2015 are flawed because of these deficiencies because there are not enough middlemen and the pre-suit intercession system isn't effective overall. Pre-case intervention must be coordinated by State and District Legal Services Authorities (hereafter, "LSA"). Furthermore, Legal Service Authority are somewhat accustomed with an adjudicatory/unfavorable process[10] but have virtually little insight into or preparation for intercession. [11]

In order to increase interest in the field of mediation it is needed to address the shortage of mediators, the profession must be promoted and made more lucrative. India additionally needs modern infrastructure and capacity creation. However, legislation that prohibits parties from unjustifiably contesting mediation agreements should be enacted.

Legislative framework that supports pre-litigation settlement

The Justice Malimath Committee Report recommended that the parties be persuaded to divert their disagreements to alternate dispute settlement institutions in light of the proliferation of Indian judicial systems. A report by the 129th Law Commission, also known as the Justice Malimath Committee's report was handed out in 1988 regarding urban litigation and mediation as alternatives to adjudication. By the end of the rules Section 89 of the Code of Civil Procedure (CPC) 1908 as amended by the Act of 1999 was prepared. The

[8] Kinhal & Apoorva, *supra* note 3

[9] W.P(C) 7857/2018

[10] Juhi Gupta, *Mandatory Pre-Institution Commercial Mediation In India: Premature Step In The Right Direction?* Kluwer mediation blog (Sept. 1, 2018), http://mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/(last visited on 12.07.2022)

[11] Deepika Kinhal et al., *ODR: The Future of Dispute Resolution in India* (July, 2020), https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_ODR-The-future-of-dispute-resolution-in-India.pdf/(last visited on 12.07.2022)

Court will instruct the parties to follow the procedures after recording affirmation and dismissal of the reports in order to select a method of settlement that is outside of court, as stated in Section 89(1) of the CPC, which is discretion, mollification, legal settlement, settlement by the Lok Adalat, or intercession. [12]

A settlement presented before a Lok Adalat is, in accordance with Section 21 of the Act, essentially just as enforceable as a court order. [13] According to the provisions of Section 20(1) of the Legal Services Authority Act, 1987 to Lok Adalat, the Court will evade the matter, and with regard to such discussion, any other provisions of the Act will also be relevant.

As the court handles the dismissal of any application in accordance with Section 14 for pass on to present a request for separation, the fair likelihood of an agreement between the life partners before the expiration of one year from the date of marriage will be assessed. Additionally, officials believe that in every case, the court should attempt to mediate between the parties. [14]

The Commercial Courts Act of 2015 was amended in 2018 to include Chapter IIIA. Pre-establishment intercession and settlement are advanced by Section 12A of the Act. It states that a lawsuit requiring no immediate assistance would be filed until the aggrieved party fails to find a pre-institutional intercession solution in accordance with guidelines authorized by the Central Government. In this method, pre-case intervention is made mandatory for the meetings before a lawsuit is filed. [15]

A worldwide approach toward pre litigation mediation

The laws governing intercession in different nations mandate intercession with favorable results by focusing on specific factors. It illustrates how the necessary intervention isn't coercive in nature and adopts specific techniques to provide parties with a safety net in the event that a goal in the pre-case stage isn't achieved.
The different types of phases are included in pre-case. It contrasts as seen by various legislation in many countries around the world, but more so with regard to the choice of parties.

In USA

Pre-suit particularly in the west, refers to an agreement reached between the parties with the help of their respective attorneys. Typically, this phase can be divided into the following three stages : (i) **Pre-suit settlement notice** the most important step in the pre-prosecution procedure occurs when a party has a question with another party. The written notification from a lawyer, sometimes in the form of a letter from the legal counsel to the lawyer of the other party, is necessary. The pre-suit notification outlines the problem and may also ask whether it's crucial. [16] (ii) **Examination process** the following stage is to explore, as a common defendant should know all important information about a case. This is where the attorney gathers generally

[12] Section 89 of CPC Order X Rule 1A
[13] Section 89(2) of the CPC
[14] Section 14 (2) of the Hindu Marriage Act of 1955
[15] Section 12A of Commercial Courts Act of 2015
[16] Available at https://blog.ipleaders.in/status-pre-litigation-mediation-india/(last visited on 14.07.2022)

vital and significant subtleties. The pre-prosecution examination stage is where current realities, documentation, records, or some other significant insights about the case are gathered by the lawyer. The attorney is additionally depended with conversing with and ousting observers. [17] (iii) **Formal interest for compensation** to the affected party until the request is finished; the solicitation for pre-case can either be a simple letter or a lengthy report that includes a duplicate of the information obtained by the legal advisor during the request. An offer for settlement, a counteroffer, or a refusal is included in this last action. [18]

In Italy

Italy has chosen to "leave" mandatory intercession in response to the rapid pace of upcoming procedures. Pre-suit intercession regulations were introduced in 2010 and 2013. The development of compulsory intercession with a quit condition in Italy may have prompted policymakers in India to take a leaf out of that book. However, given that, India may have adopted the strategy of poorer nations by deciding on a mandatory intervention and then reconsidered and adapted to the essential principle of keeping intercession purposeful. For instance, countries like Ireland, Singapore, and Scotland have made it mandatory for the legal organisation to be conscious of client intervention as a prerequisite to filing a lawsuit. Before they can start taking official action the attorneys and professionals must inform the court of this impact. While this certainly can't subsist an answer for every one of the issues that could emerge, it would address one of the basic worries specifically the support of the legitimate local area, which would assume a significant part in the progress of the intercession system. It is unnecessary to make reference to the yeoman endeavors taken by the legal executive in advancing intercession which has brought about sensibly effective court-attached intercession, even in muddled and long forthcoming questions. Nonetheless, the outcome of intercession beyond court intercession, for example, private or local area intervention lies to a great extent in the possession of the legitimate local area. [19] The mindfulness about the meaning of intercession in the legitimate brotherhood is still exceptionally low. In a circumstance of absence of adequate assets with the essential expert mastery, with a couple of master middle people in the Country, summoning obligatory intervention would prompt a blast of cases. [20]

This standard combines the beneficial aspects of the system that simultaneously call for mandatory intervention. The parties on both sides of the issue must attend a mandatory intervention meeting with their attorneys. Following the party it is conceivable for at least one of the parties to decide to end the intercession or for the parties to decide to pursue their case in court. Parties who reach an agreement through mediation are eligible for tax benefits.

The technique brings about empowering results. Disputants have fostered an incentive for intervention and proceeded with the goal cycle. This is on the grounds that the system was figured out in the main obligatory

[17] ibid
[18] ibid
[19] Available at https://www.thehindubusinessline.com/business-laws/mandatory-pre-litigation-mediation-needs-lot-of-ground-work-before-rollout/article38204536.ece(last visited on 12.07.2022)
[20] ibid

meeting. After an intervention meeting was tried, almost half of those cases were settled in the event that the gatherings proceeded with intercession. Unbelievably, certain groups of cases requiring compelled intercession have decreased by 30–60% in Italy since they were last filed. [21]

In UK

Mediation in the United Kingdom is remarkable as an alternative dispute resolution methodology. Despite the fact that parties going to court thinking about suit don't need to fundamentally intervene, they are compelled by a sense of honor to inspect whether ADR can determine their contention. There is an extent of capacities in the ownership of the courts to help mediation. One such power is to compel costs upon a party who purposefully and ridiculously failed to try the mediating framework. The reasonableness standard is settled considering a couple of elements, for instance, the reality of the occasion of the party, the substance of the conflict, the mediation expenses, the stake of conceding the primer and the probability of convincing intervention. [22]

Awake of the mediation in corona virus pandemic

In order to continue living our normal lives we have been forced by the pandemic to adapt and tolerate the better way of doing things. Our transition from conventional to innovative and modern practices is gradual and constant. Intercession is a useful solution for resolving the conflicts. It will be beneficial for all parties to engage rather than act negatively in the current situation as the restricted approach may not always have a great conclusion.

Legal advisors assess the existence of many conflicts about the comprehension of power majeure provisos, end rules, and significant unfavorable impact statements in light of the infection's flare-up. It isn't suitable to thump at the entryways of the courts to seek after equity, especially on the off chance that these fundamental provisions are missing or deficiently phrased. In this way, there is a change in how business concerns are resolved or are resolved with more emphasis on intervention while the courts deal with the existing case load and security limitations as well as the new resolution of disputes arising from the current scenario.

There are just a few high courts in India that have previously planned rules on intervention including those in Bombay, Delhi, and Kerala. International organizations including the International Chamber of Commerce, the London Court of International Arbitration, and the Singapore International Arbitration Center have all outlined effective intervention procedures that can be followed by parties.

In the midst of the pandemic, the Singapore International Mediation Center saw an opportunity to regenerate intercession and as a result the SIMC COVID-19 Protocol was established. The assisted intercession cycle can

[21] ibid

[22] Available at https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/uk*(last visited on 13.07.2022)*

help organizations from all over the world identify their issues? The Georgian International Arbitration Center has launched a similar initiative with Resolve, the assistance of the European Union, and the UN Development Program, enabling groups to avoid their disputes either by assistance or intervention. The availability of diverse organizations to agree that intercession would take on the new dawn the universe of discussion goal both during and after the epidemic is addressed by these changes.

Conclusion

India's economy has been steadily declining since the lockdown, and recovery is proving difficult. People and organizations are vying for them and trying to prosper from them. Market pioneers view the current situation as a hotbed for conflicts. For these new inquiries, prompt and practical arrangements are needed. As the COVID-19 pandemic draws closer, a number of regulatory restrictions and modifications have been made that disrupt the operations of companies all across the world. According to the current situation, intercession has all the makings of being a viable and effective alternative to traditional conflict resolution techniques since it can achieve shrewd and appropriate dispute resolution, particularly in corporate situations. It anticipates that intervention will alter the question asking process in light of the epidemic and its effects. The people should be prepared for this change, and it is therefore critical to ensure that we receive the necessary preparation and skills to meet the changing needs. Intervention is the main debate resolution stage where we can discuss the social and business complexities of the many arising questions. While not in every case, we should expect intercession to be the "recent fad" either on the web or in disconnected structure. Indian regulation must achieve a national intervention strategy that is consistent. On the one hand, it successfully determines how to reduce the burden on the legal arm of the public authority, while on the other, it pays due regard to the selection of parties. Examples can be drawn from the Italian model, where the strategy underlying its intercession instrument achieves some degree of harmony between intention and requirement.

Suggestions

Additionally, India should allow cases in which a poor person has gone through intercession procedures to be dismissed on procedural grounds. This would encourage congregations to persevere through the intercession procedures. A multi-week time limit on intercession procedures, similar to Turkey, could be extremely beneficial to Indians who are anticipating that intervention will coincidentally burn through their time. India requires regulations similar to those in Turkey which can establish a quality control framework for middlemen. Like the Turkish and Canadian models, India could enact regulations that penalize parties who refuse to attend required intervention meetings.

Indian courts, like those in the United States and Canada must effectively uphold and empower the use of intervention. Recognizing the issue of lack of uniform regulation, the Indian Supreme Court has established a board to draught regulations for intervention (an Indian Mediation Act) to be shipped off to the public authority which is an extremely encouraging proposition. India has a few intervention arrangements; in any case, mistakes among the equivalent impede the progress of intercession in general. The following examples of Italy, Canada, and Turkey clearly uniform regulation would aid in the establishment of legitimate holiness

and the overall success of intercession in India. All the way through such zeal the Court has demonstrated its willingness to intervene which will encourage lower courts to see everything to completion.

Even though there has been a negligible change in how Indian courts or potential judges view intervention, Indian legal advisors still don't effectively encourage its use, regardless of whether they are accustomed to intervention through programmes. India might adopt the Italian approach, which calls for professionals to notify customers of the need for intervention if they don't want to be barred from working with them, to convince them to behave in this way. This issue should be addressed by the Bar Council of India (BCI) which will make intervention an obligatory course in graduate schools. This will not only educate aspiring attorneys, but will also persuade them to utilize intervention as a means of dispute resolution.

A Family Court Mediation Drive that was organized and conducted in 21 Family Courts in Delhi ended up being a great success and demonstrating how the proper and effective implementation of mandatory intervention and the advancement of it can help to lessen the duty of the legal administration. Online intercession or various forms of ODR (online dispute resolution) may prove to be significant areas of strength in the current circumstances despite the fact that actual and personal intercession is ideal in ideal situations, such as a worldwide epidemic.