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SCOPE OF MEDIATION IN LEGAL SERVICES AUTHORITIES IN INDIA

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I. ABSTRACT:

Adoption of alternative dispute resolution mechanisms is the need of the hour. The Indian judicial system can be saved from a breakdown if it adopts the available alternative methods of settlement than the traditional litigation process in settling most of the cases. Mediation is one such mechanism that is adopted by the Legal Services Authorities so as to assist the courts in India in reducing the pendency of unsettled cases. The research article begins with the background of alternative dispute redressal (ADR) methods and the need to adopt them in consonance with Article 39A of the Constitution and Section 89 of CPC. It also mentions the attempts of the Judiciary and Law Commissions to elevate the status of ADR in India. It further elucidates on what Legal Services Authorities are, mediations and its pros and cons, various aspects of mediation in Legal Services Authorities and role of various players in mediation such as the referral judge, mediator and lawyers. The conclusion is an inference drawn by the author that the scope of mediation in Legal Services Authorities is narrow and includes suggestions to widen it and also to improve and increase the success rate of mediations in India thereby strengthening the legal system of the country.

II. BACKGROUND, INTRODUCTION AND JURISPRUDENTIAL ASPECT:

Efficient functioning of the judiciary is essential for every country and its citizens. The courts in India are bound to operate within the framework established by law and by no chance they can choose to skip or ignore the procedures laid down in law. It is important as everyone is equal before the eyes of the law and deserves a fair trial. However, this delays the litigation proceedings and makes it a cumbersome process. In this scenario, a need was felt to develop alternative mechanisms of dispute resolution so that the parties in a suit get an opportunity to settle their case without being subjected to shortcomings of a formal litigation proceeding. This requirement originates from the existence of Article 39A enshrined in Part IV of the Constitution that provides for equal justice and free legal aid to all. Keeping the provision of

Article 39A in mind, the Legislature passed the CPC amendment Act, 1999 by which Section 89 of the Code of Civil procedure was introduced with the aim of a peaceful, harmonious and mutual settlement between parties without the intervention of the court. It is Section 89 (1) of the CPC that states 'Settlement of disputes outside the Court' and empowers the courts to reformulate the terms of the possible settlement and refer the cases for - (d) mediation.[1]

The Law Commission in its 129th Report[2] advocated the need for amicable settlement of disputes between parties and the Malimath Committee[3] recommended to make it mandatory for courts to refer disputes, after their issues having been framed by courts, for resolution through alternate means rather than litigation/trials.

In ***Afcons infrastructure Limited and another v. Cherian Varkey Construction Company Private Limited and others***[4], the Hon'ble Supreme Court observed as follows: case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation.

It was elucidated by the Court in this case that the mandate which is cast upon the Courts is to ascertain whether the matter before it is one suitable to be referred to any of the ADR processes. Hence a hearing to determine this is mandatory. The 238th Law Commission Report advocated for the same changes as were specified in Afcons case[5] and called for a restructuring of the Section on the contours set out by the Supreme Court with certain reservations. It stated that an appropriate course would be for the Mediator to submit the terms of a settlement reached as a result of mediation to the court so that the court, after due scrutiny, can pass a decree in accordance with the compromise arrived at between the parties.[6] These reports and judgments laid down the foundation for settlement of cases outside court, especially through mediation.

III. WHAT ARE LEGAL SERVICES AUTHORITIES?

Legal Services Authorities at the centre, state and taluka level are statutory authorities established by The Legal Services Authorities Act, 1987 with the object to provide free and competent legal service to the weaker sections of the society and to ensure that justice is not

[1] Civil Procedure Code Amendment, Amendment No. 46, (1999).
[2] 129th Law Commission Report, Law Commission of India, (1988).
[3] Malimath Committee Report, Chapter VIII, (1990).
[4] (2010) 8 S.C.C. 24 (India).
[5] *Ibid.*
[6] 238th Law Commission Report, Law Commission of India, (2011).

denied to any citizen on account of economic or any other disability. National Legal Services Authority (NLSA) is the central body that receives cases for mediation from the Supreme Court. State Legal Services Authorities (SLSAs) are constituted in each state and they have mediation centres to which the respective High Courts refer matters for mediation and similarly, District Legal Services Authorities (DLSAs) have mediation centres for mediation of district court cases. These institutions form a major part of the Indian judicial system by working simultaneously with the formal court system.

IV. MEDIATION: PROS AND CONS:

Mediation has been in practice since ages. It is a process where a neutral third party assists the parties to a suit to resolve their disputes and difference of opinion resulting into a meeting of minds.[7] In mediation, a neutral mediator facilitates conversation between the parties allows the parties to compromise and resolve their dispute and misunderstandings by arriving at a negotiated settlement. The decisions of the mediator, however, are not binding on the parties and this is one of the major limitations of mediation. Mediation allows the hostile parties to communicate their issues with each other through the mediator which otherwise wouldn't happen in the normal litigation process. Mediation is one of the most flexible alternatives of dispute resolution as it does not follow any of the courtroom formalities and there is scope for the parties to negotiate with each other. Besides this, it also maintains the confidentiality of the details provided by the parties thereby making it a more reliable alternative. The negotiated settlement arrived at are more agreeable to the parties than the judgement delivered by the court.

'In mediation, the parties retain the right to decide for themselves whether or not to settle a dispute and also the terms of any settlement and furthermore, any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.'[8] As it is very evident that court proceedings are not only lengthy but also expensive and that makes it unaffordable for some sections of society. Mediation, on the other hand, is a simple and inexpensive proposition. Mediation does not always result in a settlement agreement and it is very subjective depending upon the nature of cases and parties involved in the same thereby making it impossible to set legal precedents.

[7] Shruti Desai, *Mediation Practice and procedure and related laws in India*, 1 (2005).
[8] Sankalp Jain, *What Every Indian should know About Mediation*, iPleaders NUJS, Kolkata, (2017).

V. MEDIATION IN LEGAL SERVICES AUTHORITIES:

The Courts at different level refer cases for mediation in the respective legal services authorities that fall within their jurisdiction. The cases are referred during the pendency of the judgement and while the proceeding is still going on in that particular court. Mediation centres at various legal services authorities contribute to a great extent in reducing the burden of courts. The process of mediation for settlement of disputes in Legal Services Authorities is adopted with the sole purpose of relieving the High Courts of the cases that can be settled outside the court. Courts are overburdened with many such cases that have a possibility of being settled outside the courts, so why not at least attempt to resolve such cases through mediation.

In ***Afcons infrastructure Limited and another v. Cherian Varkey Construction Company Private Limited and others***[9], the Hon'ble Supreme Court observed as follows: "Resort to alternative disputes resolution processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts." The cases pertaining to matrimonial disputes, property disputes, business transactions, tenders etc. are referred for mediation by the courts. NALSA is bound to promote all forms of dispute settlement mechanisms. Accordingly, NALSA has taken steps for the setting up of Mediation Centres in all States. The Mediation and Conciliation Project Committee of the Supreme Court of India (MCPC) conducts training programmes on mediation for lawyers and judicial officers, in furtherance of the newly added Section 89 of the Code of Civil Procedure. Furthermore, Legal Services Authorities are supposed to organize training programmes for mediators as well as referral judges to make the mediation process more efficient.

a) BINDING NATURE OF AGREEMENT IN MEDIATION:

It is very pertinent to note that once a settlement is done by the mediators at Legal Services Authorities, it is binding on the parties and the litigation proceedings that are subsequently going on in the courts come to an end. Only a decree is passed by the referral judge as per the terms and conditions of the negotiated settlement. Since mediation at legal services authority is referred to by the courts, there cannot be any appeal or revision against the decree on the basis of such settlement.

[9] *supra* note 4.

b) AN ATTEMPT TO REGULATE MEDIATION IN L.S.A.:

The Supreme Court in ***Salem Advocate Bar Association (II) v. Union of India***[10] ruled that when the parties come to a settlement upon a reference made by the Court for mediation and the parties want the same, there has to be some public record of the manner in which the suit is disposed off, and, therefore, the Court must first record the settlement and pass decree in terms thereof and, if necessary, proceed to execute it in accordance with law. The need for some sort of regulation was recognized by the Supreme Court in this case that mediation was majorly an informal proceeding, and that 'modalities' for the manner in which proceedings must take place needed to be formulated. Pursuant to this, the Mediation and Conciliation Project Committee was formed. This led to the formulation of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 which are non-binding in nature. As a result, the success of mediation as an alternative form of dispute resolution has been different for different state's Legal Service Authorities.[11] This is the reason why no uniformity could be achieved in mediation in Legal Services Authority even though an attempt was made to regularize the process.

c) NATURE OF CASES THAT CAN BE REFERRED FOR MEDIATION IN L. S.A.:

Matters pertaining to matrimonial disputes such as cruelty, custody and maintenance of child dowry, divorce, judicial settlement, etc., property dispute cases, torts, consumer disputes, partnership, trade, commerce and contracts disputes, etc. Apart from these categorized cases, all those that the referral judge thinks suitable to be settled through mediation can be sent to the mediation centres of legal Services Authorities.[12]

d) CURRENT STATISTICS:

More than 1 lakh seven thousand cases have been settled through mediations by State Legal Services Authority in India from April, 2017 to March, 2018 as compared to approx. twenty-two thousand cases that were settled in 2016-17.[13] According to the data available on National Judicial Data Grid, the total number pending cases in India till date is over two

[10] A.I.R. 2005 S.C. 3353 (India).
[11] Avaneesh Satyang & Shohin Mandal, *Mandatory Pre-Institution Mediation: Commercial Courts*, Novo JurisLegal, (2018).
[12] *supra* note 4.
[13] National State Legal Services Authority, Government of India, nalsa.gov.in.

crores eighty-seven lakhs.[14] It is very evident from these statistical records that there is a dire need for the adoption of alternative dispute resolution techniques in India.

V.I ROLES PLAYED IN MEDIATION IN L. S. A.:

a) REFERRAL JUDGE:

The referral judges play the role of sowing the seeds by encouraging the parties and their clients to go for mediation. He has to decide if the matter is suitable for mediation. Even if the parties are reluctant and not inclined to agree for mediation, the referral judge must try to ascertain the reason for such disinclination in order to motivate and persuade them to go for mediation. Even after successful mediation, the referral judge has to examine if the agreement is legally enforceable and then pass a decree as per the terms and conditions of the agreement.

b) MEDIATOR:

The mediator has an active role but it is quite limited concerning the legal aspects. He is a facilitating intermediary who has no authority to make any binding decisions, as he is not a judge, but the one who adopts various procedures, techniques and skills to help the parties resolve their dispute and arrive at a negotiated agreement without adjudication or imposition of an award.[15] A mediator's role is different from that of an adjudicator and it is his duty to make the parties comfortable. Mediators are not aware of any facts of the case, it is up to them how they take it out from the parties and understand what the conflict is all about. It is often witnessed that parties are very adamant and refuse to compromise at any cost. In such cases, the mediator has to be vigilant enough not to make the situation worse and tactfully make the parties understand the perks of mediation so that they are ready to compromise.

c) LAWYERS:

The process of mediation in legal Services Authorities is not feasible because most of the advocates who accompany the parties serve their own interests and are not interested in a settlement through mediation. They have a scope to earn more in the normal litigation proceedings of courts that take years to deliver a final judgement due to appeals and cross-

[14] National Judicial Data Grid, Ministry of Law and Justice, Govt. of India, www.njdj.gov.in.
[15] *Statutory Provisions Governing Legal Aid*, Chapter 5, http://shodhganga.inflibnet.ac.in.

appeals by the parties. The advocates who are aware of the benefits of mediation should ideally advise their respective clients and voluntarily inform them about the benefits of the one-time settlement over a court's judgement which can otherwise cause the parties wastage of their valuable time, energy and money. There are many instances when the parties heavily and blindly rely on the words of their lawyers and any piece of misleading advice by them might ruin the entire mediation process. This is extremely dangerous even in situations where there is the slightest possibility of arriving at a settlement between parties which proves how crucial the role of an advocate is in making mediation successful. Some lawyers even interrupt the mediation process by not letting the parties speak; the mediator has to be strict enough to disallow such actions. A change in trend has been seen recently observed wherein a few lawyers are in support of mediation and actually want the parties to settle outside the court. Having known the parties better than the mediators they themselves can attempt the mediate thereby exhibiting traits of a peacemaker and resolver.

VI. SUGGESTIONS AND CONCLUSION:

Mediation in Legal Services Authorities serves the dual purpose of reducing the burden of courts and creating awareness about the existence of an alternative dispute resolution mechanism in India. Mediation procedures can be tailored to a variety of factors such as the personality of the mediator; the nature of the dispute; the time or resources available; the hostility between the parties, etc. and the scope of mediation in Legal Services Authorities is narrow owing to these anomalies and the poor success rate but it can be broadened and made more comprehensive. The mediation rules should be made uniform for all corresponding Legal Services Authorities at different levels to achieve successful results. The mediators have to be stern with respect to conduct of lawyers in mediation centres so that they do not interrupt the process and reduce the chances of a settlement. The referral judges have to make the parties aware about the merits of mediation and persuade them to opt for mediation. Section 89 of the CPC provides an effective method to resolve disputes, however, the Section suffers from many anomalies, which have reduced its efficiency and act as a hindrance in delivering justice to the people. Apart from the legal aspect of the inefficiency of the provision, lack of legal knowledge among the people is another major reason for section failing to serve its purpose. In spite of going for alternate means which are cheap and less time consuming, citizens continue to go for trial hoping to secure a larger award from the Court. It is important to make the people aware of the existence of such convenient means

that can resolve their disputes. The problem of judicial delay and the urgency of reforms needed in the legal system can only be resolved if alternative dispute redressal methods are adopted and this has to be understood by the people.

As per the above-mentioned statistics, a lot of improvement has been observed with respect to the number of successful mediations done by Legal Services Authorities in the past few years. This proves that there is the scope of improvement. Legal services Authorities have a huge responsibility and a lot to contribute to finding solutions as to the problems of the Indian Judicial System. They have to put in efforts to increase the number of successful mediation in India and for that, they can set monthly and annual targets make the training programmes for mediators more effective and create awareness about mediation and its merits among all classes of people in society. Although mediation as an alternative to litigation suffers from some restraints, but, however, with consistent efforts and dedication of the legal services authorities, it can emerge as one of the most fruitful, constructive and successful methods of resolving disputes outside the court.