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MEDIATION: PROCESS, MECHANISM & EVOLUTION.

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“The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as setting to resolve their disputes is incorrect. People with problems, like people in pain, want relief, and they want it as quickly and inexpensively as possible.” - Warren Earl Burger (15th US Supreme Court Chief Justice).

I. ABSTRACT:

As has rightly been expressed by the 15th US Supreme Court Chief Justice Warren E Burger, resolution of conflicts or dispute has been of prime importance for the society since time immemorial. Mediation, as an alternative dispute resolution method, has been hugely acclaimed worldwide recently. In India, though the process has been in use since the ancient past, steps for development of the same was considered after the judicial recognition was granted. The method, traditionally, works in a four-stage process, the stages being an opening statement, joint session, caucus or individual session and settlement. A mediator plays a very quintessential role in the process which is neither of adjudication nor of judgment but of facilitating communication for negotiating a win-win case for both the parties. In the present day scenario, mediation is becoming highly famous and successful as a method of alternative dispute resolution.

II. INTRODUCTION:

In all societies, irrespective of their location or organization and formation, the need to deal with conflicts or disputes has always been of prime importance for proper growth and evolution of the same. Conflict, as understood by a layman, pertains to the opposing ideas and actions of different entities, thus resulting in an antagonistic state. Generically, a conflict exists whenever anyone holds at least two ends, goals or desires that can't be satisfied at once.¹ It may be perceived as an advancement for growth and can be an effective means of opening up among groups and individuals. However, when it begins to draw back

¹ What is Mediation, Scott Ryan, www3.uakron.edu, (Last accessed on 21st November, 2018)?

productivity and gives way to the arousal of more conflicts, management or resolution of the same becomes a necessity. In the present day scenario, mediation is becoming increasingly widespread as a way to resolve conflicts and disputes.

III. WHAT IS MEDIATION?:

*Black Law Dictionary*² defines “mediation” as a private informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement. It is another of the methods of alternative dispute resolution which places the parties to a conflict under the facilitative function of a mediator who then enables them to explore their interests and to consider various options for negotiating settlements. It is a flexible and party-centred process that can be used to settle disputes in a myriad of domains such as consumer disputes, health-care, the case of civil negligence, contracts, commercial, family matters, etc. In common parlance, mediation can be described as a confidential process of negotiations and discussions in which a “neutral” third-party, known as “mediator” assist in resolving a dispute between two or more parties. The mediator has no advisory or determinative role; he is only involved with the process of facilitating negotiations between the parties to a dispute so as to advance a win-win situation to both of them. Mediation is a tool for personal empowerment for self-determination.³

IV. WHAT IS THE ROLE OF MEDIATOR?:

A mediator is a person, the third party in the process of conflict resolution using mediation, who facilitates communication between the parties and helps the mediation participants reach a mutually satisfactory solution. The mediator’s ultimate role is to do anything and everything necessary to assist parties to reach an agreement. In serving this ultimate end the mediator may take on any or all of the roles of a convener, educator, communication facilitator, clarifier, adviser, stimulator, negotiator, etc. He is expected to ensure that the nature of the process, i.e it’s fluidity, flexibility, non-binding, arbitrariness, voluntary, confidentiality, etc. is vehemently protected. It is considered very crucial that the mediator practices non-partiality throughout the process of mediation. Neutrality of a mediator is considered necessary condition not only for conducting proper mediation but also for the very

² Black’s Law Dictionary. (9th ed. 2009).

³ Report 3rd National Conference, Mediation, CJI Altamas Kabir (Page No. 2).

existence of the process called mediation.⁴ He should have sufficient knowledge of relevant procedural and substantive issues to be effective. The mediator attempts to facilitate voluntary resolution of the disputes by the parties, communicates the views of each party to the other, assists them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasising that it is the responsibility of the parties to take decision which affects them and he does not impose any terms of settlement on the parties. In the context of ethical guidelines for mediation in India, Kitchener's basic principle theory holds good. In case of mediation, "competence" stands for "Beneficence", "no harm to self/other's" for "non-maleficence", "self-determination" for "autonomy", "impartiality" for "justice" and likewise "confidentiality" for "fidelity".

V. WHAT ARE THE TYPES OF MEDIATION?:

Mediation proceedings prevalent in India are of many types:

a) **Court referred Mediation:**

The Court may refer a case for mediation under section 89 of the Code of Civil Procedure, 1908⁵. This type is commonly advocated for matrimonial disputes.

b) **Private Mediation:**

In private mediation qualified personnel works as mediators on a fixed-fee basis. Anyone from courts, to the general public, to corporates or the government sector as well, can appoint a mediator to resolve their disputes.

c) **Statutory Mediation:**

In India, rules prescribed in the Civil Procedure: Mediation Rules⁶ provides for this type of Mediation where some kinds of disputes such as those of labour and family law are required by the law to be subjected to such proceedings, through recourse to it is rare.

d) **Contractual:**

Parties to a contract may introduce a mediation clause to resolve conflicts as part of the terms of their agreement.

⁴ The Disempowering relationship between Mediator Neutrality and judicial Impartiality: Toward a New Mediation Ethic, 11 Pepperdine Disp. Res. L.J. 467(2011), <https://heinonline.org>, (last accessed on 21st November, 2018).

⁵ The Code of Civil Procedure, 1908.

⁶ The Civil Procedure - Mediation Rules, 2005 Rule 5(f) (iii).

e) **Voluntary:**

Parties to a dispute may also resort to this method on their own accord without being compelled by law, the court or a contract. This can be done by con-sensually agreeing to resolve their disputes by the process of mediation.

f) **Mandatory:**

In May, 2018 the Government of India introduced the Commercial Courts, Division and statutes⁷ with the purpose of making pre-institution mediation mandatory before filing a commercial dispute under the Commercial Courts Act, 2015.

VI. WHAT IS THE MECHANISM OF MEDIATION AS A PROCESS?:

Traditionally, the mediation process involves different stages such as the introduction, joint session, caucus, agreement, etc.⁸ The stages of a conventional process are therefore neither rigid nor inflexible and can be modulated to achieve the desired outcome.⁹ The mediation process starts with *opening statement* wherein the mediator briefs the parties about the purpose and benefits of mediation, the role of the mediator and the general details about the mediation process. The object of the opening statement of the mediator is also to commence to develop credibility and trust relationship with the parties and bonding between the mediator and the parties.¹⁰

The next stage in the mediation proceeding is that of a *joint session* where the mediator jointly and simultaneously interacts with both the parties, who in presence of each other open and affirm their case with respective angles and thereafter they are also provided with a platform to respond to the case of the other party, though not from an adversarial perspective necessarily. The mediator also utilizes this opportunity to learn about parties' interests and priorities, close the gap between the facts and the parties differing perceptions of them, to demonstrate the positive aspects of the relationship and the goals that the disputants have in common and encourage and model negotiating behaviours more likely to produce

⁷ Commercial Appellate Division of High Court (Amendment) Ordinance, 2018.

⁸ Jeff & Hessa Abrams, *Anatomy of Mediation: What to expect, How to prepare & How to Win*, 2(3) *The Indian Arbitrator* (March 2010).

⁹ D.Y. Chandrachud, *Mediation: Realizing the Potential & Designing implementation strategies*, <http://lawcommissionofindia.nic.in>, (last accessed on 24th October, 2018).

¹⁰ Tom Arnold, *Mediation Outline: A Practical How-to-Guide for Mediators and Attorneys*, 1997.

settlements.¹¹ Further, facilitation of negotiation and generation of options is done by means of caucus or individual sessions where the parties are heard out individually. Finally, the matter is settled after a detailed analysis of the solution reached the final joint session.

VII. EVOLUTION IN INDIA:

In India, statutory amendments were made to the Code of Civil Procedure, 1908¹² (“CPC”) to include different forms of dispute resolution, including mediation for civil cases.

In *Salem Advocate Bar Association v. Union of India*¹³ (“Salem I”), the Supreme Court of India recognized that despite the existing ADR framework, there was insufficient case management in place to implement the methods that were envisaged by the section 89 of CPC. Almost a decade before the amendments to the CPC, the Law Commission of India (“Law Commission”) had suggested mediation as an alternative method of dispute resolution¹⁴.

It was in 2005, based on the obiter dicta in *Salem Advocate Bar Association v. Union of India*¹⁵ (“Salem II”) that mediation came into focus. Owing to the framework set out in Salem II, model rules to be implemented by High Courts, and case management guidelines, were adopted and court-connected mediation centres were established. The Civil Procedure-Mediation Rules, 2003 provide for mandatory mediation under r. 5(f) (iii). These allow the court to refer cases for mediation even when the parties are not ready for reference for mediation if there is an element of settlement. For the purpose of regulating the process of mediation as a method of dispute resolution, the Mediation and Conciliation Project Committee (MCPC) was constituted. MCPC has been taking the lead in evolving policy matters relating to the mediation. Mediation Training Manual of India¹⁶ drafted by the MCPC

¹¹ Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers & S.R. Cole, *Dispute Resolution: Negotiation, Mediation and other Processes* 128 (Aspen Law & Business, New York, 3rd Edn.).

¹² The Code of Civil Procedure (Amendment) Act, 2002.

¹³ *Salem Bar Association v. Union in India*, (2003) 1 SCC, 49.

¹⁴ Law Commission of India, *Urban Litigation: Mediation as alternative to Adjudication*, Report Number: 129 (1998), Justice D.A. Desai.

¹⁵ *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC, 344.

¹⁶ *Mediation Training Manual (Mediation and Conciliation Project Committee, Supreme Court of India)*, 16, <http://supremecourtsofindia.nic.in/>, accessed 19th October, 2018.

issued by the Apex Court prescribes guidelines for the conduct and nature of the process. However, it has been made clear that such guidelines would not be exhaustive but inclusive.

VIII. CONCLUSION:

Mediation, as a process of dispute resolution, has always been looked forward to since ancient India. Its development, however, started after the judicial recognition made available to it via the amendment of Code of Civil Procedure. The Judiciary of India has time and again promoted the importance of mediation by granting orders in favour of it. In India, after a history of usage of the method of mediation as a means of dispute resolution and then of judicial evolution, issues regarding regulations, structure, principle and methodology is being looked after by the MCPC or the Mediation & Conciliation Project Committee and some individual institutions are also involved in the mechanism.

A mediator plays a very quintessential role in the process which is neither of adjudication nor of judgement but of facilitating communication for negotiating a win-win case for both the parties. The mechanism of the process depends on a stage-wise resolution of conflicts starting from opening statements to achieving a consensus of solution through negotiation. In the present day scenario, mediation is becoming highly famous and successful as a method of alternative dispute resolution.

As has rightly been expressed by 15th Chief Justice of US Supreme Court Warren Earl Burger-

“The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as setting to resolve their disputes is incorrect. People with problems, like people in pain, want relief, and they want it as quickly and inexpensively as possible.”