

Mediation: The Appropriate Dispute Resolution Mechanism & not merely an Alternative

A Critical analysis of the Mediation Bill 2021

Conflict is inevitable, but combat is optional. To quote the Dalai Lama: *“The planet does not need more successful people. The planet desperately needs more peacemakers, healers, restorers, storytellers and lovers of all kinds.”* Mediators can be the best peacemakers and restorers of fractured relationships as mediation is a process which provides peace with satisfaction and peace with honor. With over 4.70 crore cases pending in various Courts in India, the Mediation Bill 2021 is a welcome measure by the Government giving statutory framework to the concept of mediation in India. The expenses of litigation are too high not only in terms of money and expenses but also in terms of the time and the permanent damage to relationships. It has been observed that that there is a trend of civil litigation transcending into criminal litigation, as there is a growing tendency among the parties to convert civil disputes into criminal disputes and misusing criminal proceedings as a shortcut to pressurize and arm twist the opponent. As a result, one civil litigation generates criminal cases as well and adds to the already overflowing dockets of the Courts. To illustrate a party filing a suit for the cancellation sale deed also files an application u/s 156 (3) CrPC or a criminal complaint claiming that the offence of forgery has been committed or in civil or commercial disputes pertaining to simply breach of contract, a criminal complaint is filed claiming that cheating has been done as there was no intention to comply with the contract. This is not a healthy trend which needs to be checked as apart from harassing the parties it is an abuse of the criminal procedure to fast-track civil cases, thereby multiplying litigation. Mediation can play a major role in

settling such commercial disputes which will not only reduce such litigation but will also give a solution with satisfaction and peace to the parties.

The Mediation Bill 2021 is a welcome first step in the right direction; not only does having a dedicated enactment legitimise mediation, but it also serves to promote public confidence in what is a very useful tool to settle disputes expeditiously outside of a court. The Bill has made provision for **mandatory pre litigation mediation** in civil and commercial matters under S.6, which is a welcome step as parties will have an opportunity to *nip in the bud* the very dispute even before entering the Court and this will relieve the already overburdened Courts. If used effectively this provision has the power to transform India's position in the ease of doing business index and can go a long way in creating a positive environment inviting International investments in India. The only challenge is to have trained mediators who have expertise in handling commercial matters as such matters cannot to be handled effectively by the conventional mediators or advocates. The Bill reflects the basic tenets and enforceability of mediation by ensuring confidentiality and voluntariness in the process by virtue of Ss: 23 (2) & 24 which provides that the acknowledgements, opinions, suggestions, promises, proposals, apologies and admissions made during the mediation and its acceptance and the documents prepared during the process shall be confidential. The provision also bars any audio or video recording of the process. This ensures the credibility and acceptability of mediation process in the parties, and the fact that a mediation settlement can be executed like a judgment or a decree ensures its enforceability. The Bill is forward looking and introduces the novel concept of '**community mediation**' under Chapter X. Community mediation may be attempted to resolve disputes likely to affect the peace and harmony amongst residents of a locality. It will be conducted by a panel of three mediators (may include persons of standing in the community, and representatives of resident welfare associations). The persons of standing in the

community which may be the local pandit, priest, or maulvi or even a pradhan, who can play a major role in resolving local disputes as their decisions will be respected in the community. Community mediation has been embraced as an *'empowerment tool'* for individuals and communities to take back control over their affairs from the Courts. The ultimate objective is to create a parallel, citizen-run, and community-centred dispute resolution system. The only issue lies with the enforceability of such settlements. To ensure that mediation can penetrate across the country, a *'mediation cell system'* can be created across gram panchayats in rural areas, and to further strengthen the mediation process, elders can be trained to carry out effective mediations. The para legal volunteers of the District Legal Service Authorities (DLSAs) in each district can play a major role here. Another novel concept introduced by the Bill is 'online mediation' under S. 32. It provides that online mediation including pre-litigation mediation may be conducted at any stage of mediation under this Act, with the written consent of the parties including by the use of electronic form or computer networks. The use of online mediation is of much importance as it will address infrastructural issues to a great extent and also ensure the virtual presence of parties if they cannot attend a session physically due to any constraint. The Bill also provides for the establishment of the Mediation Council of India. Its functions include registering mediators, and recognising mediation service providers and mediation institutes (which train and certify mediators). The Bill provides that the Central Government will establish the Mediation Council of India. Functions of the Council include: (i) registering mediators, (ii) recognising mediation service providers (institutions administering mediations) and mediation institutes (providing training, education, and certification of mediators), (iii) grading mediation service providers, and (iv) laying down standards for professional conduct of mediators, mediation service providers, and mediation institutes. The Council will consist of seven members, including two full-time members with experience in mediation or ADR, and ex-officio members such as the Law and

the Expenditure Secretaries. The Bill applies to international mediations (i.e., where at least one party is a foreign party) of commercial disputes as well, if they are conducted in India. However, the Bill places international mediation in the part dealing with domestic mediation being conducted in India, which will result in these settlements losing the benefit of the Singapore Convention for enforcement of commercial mediation settlements across the world. Hence, the parties in such cases would prefer to mediate their disputes out of India, and our hopes to build a robust capacity to handle such disputes will come to naught.

The benefits of the Bill outweigh the challenges. Mediation, being the cheapest and simplest option available to the public at large, can be described as a *tool of social justice*. A separate legislation for mediation and rules will indubitably address most concerns around the mediation process and pave the way for making mediation the first-stop dispute resolution method for domestic and international disputes. In addition to the reforms discussed above, a great deal of shift in mindset of stakeholders, awareness about the process, and redefining our approach to mediation is essential for growth and sustainability of the mediation practice in India. In essence it needs to be understood that *a lean compromise is always better than a fat law suit and the pursuit of peace and happiness and the sustenance of society must be ultimate object of mankind.*

