RESOLVING LABOUR AND EMPLOYMENT DISPUTES THROUGH MEDIATION AND CONCILIATION – A COMPENDIOUS STUDY

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ABSTRACT

The concepts of Mediation and Conciliation in law is a god sent boon with salutary features. These concepts have been consciously adopted as an alternative to traditional mainstream litigation by numerous industries, corporates and conglomerates. In the words of "Joseph Grynbaum", "An ounce of mediation is worth a pound of arbitration and a ton of litigation". However, an interesting question that elicits a great deal of response here is whether mediation and conciliation are as effective as the adversarial methods in resolving employment and labour related disputes in India. In a country where labour and employment propel the economy, disputes, conflicts and grievances between employer and employee or a dispute between an industry and an employee are inevitable and are an unceasing perpetual affair. While some may argue that labour and employment disputes are prominent only in developing economies, it is an irrefutable fact that post Covid-19 pandemic even the developed nations are suffering from a stupendous number of labour and industrial disputes, which in turn has a baleful effect on their respective economies. This article, in an earnest endeavour, analyzes the factors that impede mediation and conciliation and conceptualizes how mediation and conciliation would be an efficacious alternative to adversarial litigation in resolving labour and employment disputes in India.

Keywords: Labour, Employment, Disputes, Mediation, Conciliation

Introduction:

In India, mediation, conciliation, negotiation and arbitration existed since time immemorial and its popularity surged during the pre-British Rule in India.[1] Mediation and conciliation received its first legal recognition in the Industrial Disputes Act, 1947, which provided for the amicable settlement of industrial disputes.[2] Further, the Indian legislature enacted the Legal Services Authorities Act, 1987, which constituted the National Legal Services Authority, State Legal Services Authority and the District Legal Services Authority with the primary objective of promoting and encouraging the settlement of disputes by way of negotiations, mediation and conciliation. Further, the Arbitration and Conciliation Act, 1996, provided for the conciliation of disputes which arose out of legal relationships irrespective of being contractual or not and extended to all proceedings relating thereto[3]. Thereafter, the amendment which was brought to the Civil Procedure Code 1908, in the year 2002, provided for reference of cases pending in the courts to one of the alternative dispute resolution methods when the court was satisfied that there was an element of settlement.[4] Again in 2018, an amendment to the Commercial Courts Act, 2015 inserted Section 12A which mandated prelitigation mediation before initiation of a commercial suit.

It is hence apposite to state that there are statutes and provisions in India that govern and facilitate alternative dispute mechanisms for the amicable settlement of disputes. But the moot question in this juncture is whether mediation and conciliation are as effective as conventional litigation methods in resolving labour and employment disputes.

Current Status of Labour & Employment Disputes in India:

Though the Government and the Judiciary urge the public to adopt ADR methods in resolving labour and employment disputes, a data put together by the National Judicial Data Grid, still suggests that approximately around 82,400 main cases and 8,000 miscellaneous cases are pending before the labour courts and approximately around 41,200 main cases and 8,010 miscellaneous cases are pending before the industrial courts in India as on June 2022[5]. More

[1]Mediation and Conciliation project committee, *Mediation Training Manual of India*, Supreme Court of India, Delhi, (last visited May 24th 2022 at 05.45 AM) https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.
[2] Id at 6.
[3] Id at 7.
[4] Civil Procedure Code, 1908, Section 89
[5] National Judicial Data Grid (District and Taluka Courts of India), (last visited May 24th 2022 at 07.50 AM), https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard.

often than not, the cases that end up before the Labour Courts are under the acts of Industrial Disputes Act, 1947, The Workmen's Compensation Act, 1923, Employees State Insurance Act, 1948, Factories Act, 1948 etc. One contributing factor to the huge backlog of labour and employment disputes is the perception in the minds of the parties that adjudication of disputes through Courts and Tribunals would only yield appropriate results and any other alternative method of dispute resolution would not do expected justice to them. Presently, the most common and familiar forms of mediation are the Court annexed mediation under the Civil Procedure Code, 1908, mediation through Lok Adalat's and the family court mediation. The backlog cases can abate to a significant extent, if the Courts and Tribunal refer parties to mediation and conciliation at the preliminary stage of the matter.

Take on the Mediation Bill:

In the wake of complex commercial disputes and the never-ending accumulation of cases in the Courts and Tribunals**,** the Ministry of Law and Justice has understood that an exclusive mediation statute is indeed a desideratum. Accordingly, the Mediation Bill, 2021, consisting of 65 provisions and 10 schedules was proposed and is yet to be passed by the parliament. The Bill had noble intentions of making parties to a civil or commercial dispute undergo pre-litigation mediation before initiating action before the Court[6].

Striking Features:

The Bill for the first time had a very peculiar feature of enabling the parties to approach a Court or a Tribunal for interim reliefs[7] like the principal Arbitration and Conciliation Act, 1996 of India[8]. The Bill, inter alia other salient features, with respect to labour and employment disputes, makes it lucidly clear that the provisions of this bill would have an overriding effect on all enactments that had mediation and conciliation as a dispute resolution mechanism except for the enactments mentioned in Schedule 2 of the Bill[9]. This paramount importance to mediation and conciliation makes it clear that even labour and employment disputes can be amicably and efficiently resolved, reducing the burden of the Courts.

[6] Mediation Bill 2021, Section 6, (last visited May 27th 2022 at 10.30 AM) http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Mediation-RS%20int-20%2012%2021-E.pdf.
[7] Id at Section 8.
[8] Arbitration & Conciliation Act, 1996, Section 9.
[9] Mediation Bill 2021, *supra* note 6 at Section 56, See also Schedule 2 of the Bill.

Apart from the salient features of the Mediation Bill, the quandary that exists at this juncture is that while some view prelitigation mediation as a highly beneficial ADR method, many view that the mandatory overtones given to prelitigation mediation under the said Bill would hamper and pose a hindrance to a person who wants to approach the Court for justice.[10]

When the main element of mediation is voluntariness, making it mandatory, would defy the objectives and would be tantamount to the coercion of a party into taking mediation for their dispute resolution. The origins of mandatory prelitigation mediation of commercial disputes can be seen in the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018[11] which the Mediation bill refers to often, makes it mandatory for a plaintiff to first exhaust mediation before initiating a commercial suit under the Act when there is no urgent interim relief claimed by the plaintiff.[12] The problem here in this setup is that the intention of the plaintiff who wants to institute a commercial suit is diverted and thereby mandating that individual to proceed with an alternative remedy, in a way curtails their access to justice. Likewise, it can be argued that in the labour and employment sphere, when a party has to approach a statutory forum for addressing his/her grievance, mandatory mediation would be an unnecessary hurdle to surmount for the party.

Though mediation and conciliation in the employment and labour sphere have their perks like confidentially, lower litigation costs, more reasonable compensations, expeditious and efficient adjudication of disputes etc, the mandating nature makes mediation a complicated and delicate procedure as by objective and principle it is a voluntary process.

Mandatory prelitigation mediation as provided under the Mediation bill, leads to the question of whether there is an adequate proper and efficient infrastructure to conduct mediation and most importantly whether the mediators are qualified and possess the required knowledge in

[10] Siddhi Gupta, *Compulsory Mediation In India - A Blessing Or A Burden To The Judicial System In Our Country?,* Viamediationcentre, (last visited May 27th 2022 at 12.10 AM) https://viamediationcentre.org/readnews/NTg1/Compulsory-Mediation-in-India-A-blessing-or-a-burden-to-the-Judicial-system-in-our-country.

[11] National Legal Services Authority, Government of India, Pre-Institutuion Mediation in Commercial matters, (last visited May 27th 2022 at 10.30 AM), https://nalsa.gov.in/services/mediation/pre-institutuion-mediation-in-commercial-matters.

[12] Ameen Jauhar and Vaidhehi Misra, *Commercial Courts Act, 2015: An Empirical Impact Evaluation*, Vidhi Centre For Legal Policy, (last visited May 27th 2022 at 04.30 PM), https://vidhilegalpolicy.in/wp ontent/uploads/2019/07/CoC_Digital_10June_noon.pdf.

the said field of law to conduct the mediation.[13] These requirements undoubtedly remain a primary requirement for the successful implementation of mandatory mediation.

Rationale for Mediation & Conciliation in Labour & Employment Disputes:

The primary objective of mediation and conciliation which are both non-adversarial mechanisms are to promote the settlement of disputes between the parties. When disputes arise in a labour and employment setup, it is imperative for the parties to hammer out their differences and work in a congenial environment[14]. Mediation and conciliation are viewed as a tool that bolsters future relationship between the parties and sidesteps unnecessary complications[15]. With the help of mediation and conciliation, both the parties to the dispute can avoid elongated legal proceedings which could save time, money and uncertainty and also unnecessary hostility between the parties which might concomitantly frustrate their relationship.

Collective Bargaining:

Another popular form of ADR that is prevalent in the labour and employment sphere is "collective bargaining" which is a type of negotiation that has proven to be highly effective in resolving disputes between an employer and an employee through trade unions. By virtue of collective bargaining, disputes relating to the conditions of employment, wages, working hours, etc., are resolved amicably by eliminating coercion and through mutual agreement.[16] The concept of collective bargaining is used as a negotiating tool between the employee and the employer with respect to disputes that concern the interests of the employees at large. However, when a dispute is not a collective dispute and individual-specific such as termination, absenteeism, misconduct, breach of employment contract, non-performance, etc., the same could be effectively resolved through mediation and conciliation.[17]

Unlike Courts and Tribunals, in a labour and employment setup, mediation is beneficial to both the parties as a resolution to the dispute is arrived at together with the assistance of a mediator

[13] Manisha T Kataria, *Effective implementation of Mediation in India: The way forward*, Bar&Bench, (last visited May 28th 2022 at 07.00 AM), https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward
[14] Industrial Dispute Act, 1947, Section 5.
[15]Rochelle Gunn, *Alternative Dispute Resolution in a work setting*, Mediate.Com, (last visited May 28th 2022 at 09.30 AM) https://www.mediate.com/articles/gunn.cfm.
[16] Karol Leather Karamchari Sangathan Vs. Liberty Footwear Company, (1989) 4 SCC 448.
[17] Robert Heron and Caroline Vandenabeele, *Labour dispute resolution, An Introductory guide*, International Labour Office, (last visited May 28th 2022 at 11.30 AM), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_110527.pdf.

who acts as the neutral third party and a facilitator. The resolution thus arrived by the parties is not imposed on the parties like a judgment from a Court/Tribunal[18]. The informal atmosphere in mediation and conciliation gives the parties the convenience and opportunity to represent their case more efficiently and satisfactorily as compared to a typical Courtroom setup wherein factors such as time, merits of the case, temperament of the judge, presence of the lawyer are quintessential for the adjudicating authority to arrive at an appropriate judicial decision.

Legal Impediments:

It is an irrefutable fact that mediation has not commanded the attention of the public and the legal fraternity like Arbitration since the enactment of the Arbitration and Conciliation Act, 1996. This lack of awareness of the non-adversarial modes of dispute resolution (Mediation & Conciliation) amongst the public and the absence of an exclusive statute for mediation and conciliation is a contributing factor as to why mediation and conciliation is not the most preferred dispute resolution method in a labour and employment setup and as to why the parties are still inclined to take up the conventional methods of dispute resolution. Even the Mediation Bill 2021 has not come into effect and is yet to be approved by the houses of the parliament.

There is a glaring lack of awareness in the legal fraternity as many disputes which are trivial in nature and could be resolved undoubtedly through mediation and conciliation, still end up in courts due to wrong advice and guidance tendered by lawyers solely with an axe to grind.

Though some statutes like the Industrial Disputes Act, 1947, Companies Act, 2013, Legal Services Authority Act, 1987, Commercial Courts Act, 2015, Consumer Protection Act, 2019, etc., gives the liberty to the parties to choose mediation and conciliation as a mode of dispute resolution, there is scant regard for procedural guidance.[19]

Further, it is to be noted that not all disputes could be resolved through mediation and conciliation and some disputes are strictly referred to the special public forums that are created to adjudicate that particular type of dispute. While there's no clear-cut stratification as to which dispute could be mediated, it is best advised to place reliance on the decision of the Hon'ble Supreme Court in ***Booz Allen v. SBI Home Finance Limited***[20], wherein the court observed

[18]*Supra* Note 15.
[19] L&L Partners, *Mediation: Current Jurisprudence and the path ahead*, Mondaq, 24th June 2020, (last visited May 28th 2022 at 12.45 PM), https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead.
[20]*Booz Allen v. SBI Home Finance Limited,* (2011) 5 SCC 532.

"that rights *in personam* would be amenable to arbitration, whereas those relating to rights *in rem* would be adjudicated by courts and public tribunals. The Court further observed that certain categories of disputes could only be resolved through adjudication by public forums". Inference can be drawn from this ruling as to what disputes could be mediated. Thus, the quintessence of this ruling has undoubtedly dispelled the cobweb of ambiguity that existed earlier.

Many Organizations prefer to have in house mediation but there is a reasonable apprehension of fear in the minds of the employees that the mediation arranged could be biased. Hence, there is always a proclivity for the Courts and Tribunals for dispute settlement in these circumstances.

Another challenge that mediation and conciliation face is the non-binding nature of the agreement arrived at the end of mediation as the same lack legal sanctity and the disputes once again end up in courts and Tribunals either for the enforceability of the agreement or for fresh adjudication of the dispute in some cases.[21] In a labour and employment setup, where time plays a crucial factor in resolving disputes, if the outcome of mediation is not binding on the parties, the entire process of mediation and conciliation would yield no fruitful results and the dispute would end up in the court, wasting a considerable amount of time and money.[22]

Another unfortunate predicament of the mediation and conciliation prevalent in India is the low competence and capability of the mediators and the poor infrastructure of mediation centers[23]. The Mediators do not undergo any quality training and enter into mediation under the presumption that they have to adjudicate the dispute instead of acting as a facilitator to facilitate the parties to settle their disputes amicably[24].

Future of the dispute resolution:

In view of the ubiquitous problem of Covid 19 and its consequent impact on the workforce, there's a surge in labour and employment disputes all around the world. With travel restrictions

[21] WIPO, *Alternative Dispute Resolution, Mediation*, WIPO, (last visited May 28th 2022 at 12.45 PM), https://www.wipo.int/amc/en/mediation/what-mediation.html.
[22] CJI SA Bobde, *Devise Law To Make Mediation Agreements Binding*, Sage Mediation, 10th February 2021, (last visited May 28th 2022 at 02.30 PM), https://sagemediation.sg/news/devise-law-to-make-mediation-agreements-binding-cji-sa-bobde/.
[23] ODR The Future of Dispute Resolution India, VIDHI Centre for Legal Policy, July 2020, (last visited May 30th 2022 at 07.40 AM) https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/.
[24] Dr. Justice Dhananjaya Y. Chandrachud, *Mediation-Realizing the potential and designing implementation strategies*, Law commission of India, (last visited May 30th 2022 at 06.00 PM) https://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.

in some parts of the countries and the widely adopted work from home setup, it becomes an absolute necessity for the organizations or the establishments to adopt innovative methods with the help of technology to resolve disputes. The pandemic situation stirred a need for Online Dispute Resolution mechanism and the same has now been adopted by the Corporations and many other industries where the parties to the dispute and the Arbitrator/Mediator/Conciliator are connected through video-conferencing applications and other similar applications. The concept of ODR is still in a nascent stage and requires many legislative and executive reforms for establishing a uniform framework for mediation and conciliation.[25] In fact, the Mediation Bill also provides for mediation to be conducted even through online platforms if the parties mutually agree.

Conclusion and Suggestions:

From the aforementioned discussions, it can be concluded that the role of mediation and conciliation in resolving labour and employment dispute would be an effective alternative to adversarial litigation if it's used extensively. It is understood that mediation is particularly effective in resolving individual specific and sensitive disputes where factors such as confidentiality, time and costs are vital to the parties. It is suggested that there has to be a significant shift in the perception that mediation and conciliation is a proven method for resolving labour and employment disputes effectively and not just an alternative to adversarial litigation. However, it is pertinent to note that there is a dire need for the improvement of mediation and conciliation techniques to suit the current requirements in order to reap the full benefits. In addition to that, the mediators and conciliators must be given the appropriate training and knowledge in order to conduct mediation proceedings effectively. Mediation and Conciliation should be made the mandatory local remedy and without exhausting this local remedy, a party should be precluded from approaching the Courts or Tribunals. Mediation, as it stands today, requires a lot of awareness in the legal fraternity and should be encouraged in the labour and employment setup as the primary dispute resolution mechanism. Further, a separate comprehensive statute exclusively for the purpose of mediation and conciliation is a desideratum.

[25] *Supra* Note 23.