

● A CRITICAL ANALYSIS OF PROVISIONS OF THE MEDIATION ACT, 2023



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Abstract

Mediation is a procedure in which a neutral third person helps and negotiates with the parties to a dispute to reach at an amicable settlement. Recently, the Parliament has passed the Mediation Act, 2013. This paper gives an overview of the various provisions of this Act. Further, it also makes critical analyses of the provisions of this Act.

Key words

Alternative Dispute Resolution Mechanism, Mediation, Evolution of Mediation, Need for Mediation, the Mediation Act, 2023, Critical Analysis

"At first people refuse to believe that a strange new thing can be done, then they begin to hope that it can be done- then it is done and all the world wonders why it was not done centuries ago."

-France Burnett, The Secret Garden

I. INTRODUCTION

India is a colossal country having huge population. There has been high growth in socio-economic activities of its citizens in the last some decades. Citizen's grievances and disputes in the society are also growing while dealing with various social, economic, and routine affairs leading to huge litigation. There has been huge burden on the Judiciary because of pendency of cases in the courts. It is rightly said that 'justice delayed is justice denied.' This distressing situation has resulted in the growth of various Alternative Dispute Resolution (ADR) mechanisms like Lok Adalats, mediation, arbitration and conciliation to resolve these problems and disputes.

Mediation is one of the most frequently adopted Alternative Dispute Resolution Mechanism¹. It is a non-binding process in which a neutral third person, the mediator or conciliator, helps the parties to a dispute in reaching a mutually agreed and acceptable settlement of dispute. The Mediator acts as impartial third person who facilitates and makes use of various techniques, procedures and skills to assist the parties in resolving their disputes by negotiating agreements without adjudication. He has no authority to

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¹AVTAR SINGH, LAW OF ARBITRATION AND CONCILIATION AND ALTERNATIVE DISPUTE RESOLUTION SYSTEMS 583 (Eastern Book Company, Lucknow, 11th edn., 2018).

make any binding decision². He has no power to adjudicate a dispute or to pass and enforce an award. The mediation procedure is followed on a private basis and without detriment to the lawful rights and remedies of the parties. The mediation processes may involve many stages like preparation, joint sessions, private meetings and final result³.

The mediators apply their own methods and techniques. Their steps and strategies may be different. Everything rests on the nature of the dispute. Whenever a dispute is highly complicated, than it may require more private meetings with the parties. The technique of evaluative or facilitative approach may be adopted by a mediator. A mediator will try to shun judgments or opinions. Rather, they encourage and felicitate parties to start their interactions and uncover their priorities and interests. In mediation procedure, the Mediator will make efforts to identify the main issue of differences or disputes and try to assist the parties to bridge the gaps among them⁴.

The term "mediation" is very well used and recognized in international law. "It is the technical term in International Law which signifies the interposition by a neutral and friendly state between two states at war or on the eve of war with each other, of its good offices to restore or to preserve peace. The term is sometimes as a synonym for intervention, but mediation differs from it in being purely a friendly act⁵."

II. EVOLUTION OF MEDIATION IN INDIA

The idea of mediation is not novel for justice delivery system in India. Mediation has always been practiced in India in the shape of the Panchayati system for centuries. In Panchayat system, esteemed elders of the rural community used to work as mediators between the village parties and facilitated to resolve their disputes. This type of traditional mediation is still taken in to use in rural areas even today⁶. Moreover, in pre-British era in India, mediation was admired and practiced amongst the businessman. The members of business associations used to resolve their disputes through some respected and impartial businessmen called as Mahajans and by making use of informal procedure which combined arbitration and mediation⁷. Afterwards, the Britishers set up an alternative dispute resolution (ADR) system to resolve disputes in India between government agencies and undertakings, intra-governmental entities, in public utility service disputes and in labour disputes⁸. In contemporary India, mediation is acknowledged but slightest practiced technique of alternative disputes resolution because of lack of awareness⁹.

Before the enactment of the Mediation Act in the year 2023, there was no specific and dedicated legislation on mediation in India. There were only three methods to commence mediation procedures in India. The first one was to provide a clause in the

²id. at 582.

³id. at 583.

⁴ibid.

⁵P. RAMANATHA AIYAR (ED.), ENCYCLOPEDIA OF LAWS OF ENGLAND (Law Lexicon, 1997).

⁶See, the Mediation Bill, 2021, evolution of Mediation.

⁷Consumer handbook on Mediation (FAQ), Ministry of Consumer Affairs, Government of India, New Delhi, 2021.

⁸Supra note 6.

⁹Supra note 7.



contract for resolving disputes between the parties. This process is called as 'private mediation.' Second method is by 'reference through courts under Section 89 of the Code of Civil Procedure 1908', which is called as 'court-referred mediation.' And third and last method is to lay down provisions under various laws for mediation as a technique for resolution of disputes¹⁰.

Section 89 under the Code of Civil Procedure, 1908 presents provision for the resolution of clash outside the courts¹¹. The constitutionality of this provision was contested before the Supreme Court in the case of *Salem Advocate Bar Association v. Union*¹² of India. The Supreme Court upheld the constitutionality of section 89 and set up a committee to prepare rules for the smooth implementation of section 89. The Committee submitted its report to the Supreme Court in the year 2005. The Supreme Court accepted this report and directed all the High Courts to apply the rules created by the Committee¹³. In the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*¹⁴, the Supreme Court pointed out certain drafting errors and vagueness under Section 89. The Court observed that there has been lack of clarity on the use of phrases like 'mediation' and 'judicial settlement.' It does not offer for the suitable stage for referring the case to mediation. Further, there has been lack of uniform rules of procedure regulating mediation; consequently, proceedings take place as per the rules approved by each High Court. All these issues have caused hurdles in reaping its full benefits¹⁵.

¹⁰Ibid.

¹¹The Code of Civil Procedure, 1908, s. 89. It reads:- "Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:-

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation;

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

¹²(2005) 6 SCC 344.

¹³Sonali Negi and Arpita Chauhan, "Need for Mediation Laws in India" Vol. 5 Issue- 2 INTERNATIONAL JOURNAL OF LAW, MANAGEMENT AND HUMANITIES 397 (2022).

¹⁴(2010) 8 SCC 24.

¹⁵Supra note 6.

Further, before the passing of the Mediation Act, 2023, there had been a small number of specific sectors and laws including the Industrial Disputes Act, 1947, the Companies Mediation Rules, 2016 and Pre- Institution Mediation Rules under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, the Consumer Protection Act, 2019 which included provisions on mediation within the Act providing it is as one of the modes of amicable resolution of disputes¹⁶.

III. THE MEDIATION ACT, 2023: SALIENT FEATURES

The urgent need for a separate legislation on mediation had been widely felt by all stakeholders including the Supreme Court in order to give sanctity to the mediation method and to eradicate the discrepancies in various prevailing laws such as the Industrial Disputes Act 1947; the Code of Civil Procedure 1908; the Commercial Courts Act 2015, etc. Moreover, it was necessary to pass a legislation to address the issues of international and domestic mediation and to implement the Singapore Convention on Mediation¹⁷.

Since there was no specific legislation in India on mediation, therefore, the Supreme Court constituted a committee in January, 2020 to be chaired by Shri Niranjan Bhat to make the draft of law on Mediation. Later, the Supreme Court recommended to the Central Government to pass a law on mediation. Relying on the recommendations from the Supreme Court, the Central Government prepared the draft of the Mediation Bill on November 5, 2021 on their website for receiving responses from public on it. After considering public opinions and suggestions on the draft Bill, 'the Mediation Bill, 2021' was presented in the Rajya Sabha by the Central Government on December 20, 2021. This Bill was sent to the Standing Committee of Parliament for examination on December 22, 2021 which submitted its report on July 21, 2022 to the Parliament¹⁸. Finally in the year 2023, this Bill was passed in Lok Sabha and Rajya Sabha on August 7, 2023 and August 1, 2023 respectively. The Mediation Act, 2023 (hereinafter to be called as the Act) received the approval of the President of India and notified in the Gazette of India on September 14, 2023¹⁹.

The Act consists of 11 chapters comprising 65 sections and 10 schedules. It comprehensively covers several areas of mediation. This Act recognizes dispute settlement through mediation process and gives it the same validity as of decree of the Court of law. It provides for resolution of disputes through mediation by the mediation service providers, institutional mediation or otherwise like community mediation. It provides for setting up of Mediation Council of India for promotion and facilitation of International and domestic mediation, conduct of mediation proceedings, registration or renewal, lay down standards of professional and ethical conduct of mediators etc. It also provides provisions on how mediation settlement agreement can be enforced. Further, it also gives recognition to community mediation and online mediation and

¹⁶Nisith Desai, "Mediation: The Go-TO Dispute Resolution Mechanism in India" (December 2020). (3 August 2023) <https://www.nishitdesai.com>

¹⁷Supra note 6.

¹⁸Ibid.

¹⁹The Mediation Act, 2023.



makes consequential amendments in various laws to give effect to mediation processes²⁰. The salient features of the Act may be discussed as under:

III.I OBJECTIVES, POLICY AND APPLICABILITY OF THE ACT

The Act has been passed to accept mediation process as an effective alternative to dispute resolution mechanism. The policy of the Act is:

"to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process and for matters connected therewith or incidental thereto.²¹

Therefore, the objectives and policy of the Act is to recognize institutional mediation for settlement of commercial or other disputes, promotion and facilitation of mediation, enforcement of mediated settlement agreements, to recognize and facilitate community mediation and online mediation, establishment of a body for registration of mediators and to make consequential amendments in existing laws to give effect to the policy of the Act.

Chapter I deals with the short title, extent and commencement of the Act. This Act has been made applicable to the whole of Indian territories²². The provisions of the Act will be made implemented by the Central Government from such date as may be deemed fit. Nevertheless, different dates may also be fixed for the applicability of diverse provisions of the Act²³.

Chapter II provides for application and definitions under the Act. Section 2 provides that the Act will be applicable whenever a provision has been provided in mediation agreement or both the party to a dispute resides in India or personally works for gain or where one of the parties to a clash is government or its instrumentality or in international mediation. Further, a dispute may also be referred for mediation by the Central or state government²⁴.

²⁰Ibid.

²¹The Mediation Act, 2023, the Preamble.

²²Id., s. 1(2).

²³Id., s. 1(3).

²⁴Id., s. 2. It reads: - "Applicability- This Act shall apply where mediation is conducted in India, and-

- (i) all or both parties habitually reside in or are incorporated in or have their place of business in India; or
- (ii) the mediation agreement provides that any dispute shall be resolved in accordance with the provisions of this Act; or
- (iii) there is an international mediation; or
- (iv) wherein one of the parties to the dispute is the Central Government or a State Government or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government and where the matter pertains to a commercial dispute; or
- (v) to any other kind of dispute if deemed appropriate and notified by the Central Government or a State Government from time to time, for resolution through mediation under this Act, wherein such Governments, or agencies, public bodies, corporations and local bodies including entities controlled or owned by them, is a party."

The Act provides an inclusive and vast definition of mediation. The word 'mediation' means and includes a procedure under which a neutral third person helps the parties to reach an amicable settlement of a dispute. It also includes online mediation, pre-litigation mediation or conciliation²⁵. A 'mediator' may be appointed by the parties to a dispute or by a mediation service provider²⁶.

III.II MEDIATION AGREEMENT AND PRE-LITIGATION MEDIATION

Chapter- III deals with mediation, mediation agreement and pre litigation mediation. A mediation agreement must be between two parties or their representatives which shall be reduced in to writing agreeing to submit all or any disputes to mediation. The mediation agreement can be created through inserting a clause in a contract or by making separate agreement. It may arise by exchange of communications like letters, emails etc. or by signed documents by parties or a suit in which mediation agreement is claimed by one party and not denied by the other party²⁷.

The most important feature of the Act is that it provides for pre- litigation mediation. It provides that both the parties to any civil or commercial nature of dispute before filing a suit can make appropriate steps for settlement of their disputes through mediation with mutual consent and voluntarily even if there is no mediation agreement between them²⁸. The law regarding pre litigation mediation will be applicable on various tribunals established by the Central Government or State Government. A mediator in all such cases may be either a mediator enrolled with the Mediation Council or empaneled by the Court Mediation Centre or any Legal Services Authority or empaneled under this Act.

²⁵Id., s. 3(h). It reads: -"Mediation includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute."

²⁶Id., s. 3(i). It reads: -"Mediator means a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council."

²⁷Id., s. 4. (1) It reads: - "Mediation Agreement- A mediation agreement shall be in writing, by or between parties and anyone claiming through them, to submit to mediation all or certain disputes which have arisen or which may arise between the parties;

(2) A mediation agreement may be in the form of a mediation clause in a contract or in the form of a separate agreement;

(3) A mediation agreement is in writing, if it is contained in or recorded as-

(a) any document signed by the parties;

(b) an exchange of communications or letters including through electronic form as provided under the Information Technology Act, 2000;

(c) any pleadings in a suit or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other;

(4) A reference in any agreement containing a mediation clause shall constitute a mediation agreement if the agreement is in writing and the reference is such as to make the mediation clause as part of the agreement;

(5) The parties may agree to submit to mediation any dispute arising between them under an agreement, whether entered prior to arising of the dispute or subsequent thereto;

(6) A mediation agreement in case of international mediation shall refer to an agreement for resolution in matters of commercial disputes referred to in clause (a) of section 3."

²⁸Id., s. 5.



However, both parties may agree for any other mediator for settlement of their dispute. An application can be made by any party of a dispute to an authorized person for pre litigation mediation services. The mediation centers at different High Courts and Legal Services Authorities established under the Legal Services Authorities Act, 1987 will prepare and preserve a panel of mediators for pre litigation mediation. In case of non-settlement of compensation under the Motor Vehicles Act, 1988, the Claims Tribunal shall refer all such cases for mediation. The Claims tribunal will adjudicate motor accident compensation cases in consideration of settlement agreement if it is agreed by both the parties to a dispute. If there can be no settlement of dispute through mediation than the mediator will prepare and submit a report to the Claims Tribunal for non-settlement of dispute²⁹. This Act lays down a suggestive list under First Schedule of matters or disputes which cannot be referred to mediation apart from a few matrimonial crimes or compoundable crimes linked with or arising out of civil proceedings which can be referred to mediation by Court, if deemed fit. However, the outcome of such mediation will not have effect of decree or judgment of Court. The Central Government may alter this list by notification³⁰. Although, a dispute could not be settled through pre litigation mediation due to lack of agreement, the court or tribunal can refer at any stage of proceedings any dispute for mediation. While referring a matter for mediation, it may also make interim orders to safeguard any party from damages or harm. Both the parties in such a mediation process shall be free to reach to any settlement³¹.

III.III MEDIATORS: WHO MAY BE APPOINTED AS MEDIATOR

Chapter- IV of the Act deals with mediators and who may become mediator in a dispute. The Act unambiguously and categorically says that a citizen of any country can be appointed as a mediator³². However, a mediator who is of foreign nationality must have essential qualifications, experience and accreditation from recognized authority. Both the parties to a dispute can decide the name of mediator and method of their appointment voluntarily. In case no consensus is made out than the party who wish to avail mediation services will have to file a written request to a mediation service provider

²⁹Ibid.

³⁰Id., s. 6.

³¹Id., s. 7.

³²Id., s. 8(1) It reads- "Unless otherwise agreed upon by the parties, a person of any nationality may be appointed as a mediator: Provided that mediator of any foreign nationality shall possess such qualification, experience and accreditation as may be specified.

(2) The parties shall be free to agree upon the name of mediator and the procedure for their appointment.

(3) If the parties do not reach any agreement on a matter referred to in sub-section (2), then the party seeking initiation of mediation shall make an application to a mediation service provider for the appointment of a mediator.

(4) Upon receiving an application under sub-section (3), the mediation service provider shall, within a period of seven days, appoint,-

(i) the mediator as agreed by the parties; or

(ii) in case the parties are unable to reach agreement as to the appointment of mediator or mediator agreed by them refuses to act as mediator, a mediator from the panel maintained by it, with his consent.

(5) The person appointed under clause (i) of sub-section (4) shall communicate his willingness or otherwise within a period of seven days from the date of receipt of communication of such appointment."

for the purpose of nomination of a mediator. The mediation service provider will have to assign a mediator within time limit of seven days from the date of receipt of application. Such mediator will be appointed either as per the agreement of both parties to a dispute or where no such agreement can be reached or refusal of mediator to serve as mediator than from a panel of mediators maintained by mediation service provider with his consent. The newly appointed mediator must convey his acceptance to serve as mediator within a period of seven days to the concerned persons³³. The considerations of preference of the parties and suitability of mediator shall be kept in mind whenever a mediator has to be appointed by the mediation service provider from the panel of mediators maintained by them³⁴.

The Act also provides process to be observed by the mediator which must be just and fair procedure. A person who is appointed as mediator must disclose to both the parties to a dispute before or after the conduct of mediation proceedings any conflict of interest raising doubts of his impartiality or independence due to his professional, personal, financial or other circumstances. After such disclosure, any party to a dispute may either waive any objection in writing or may request to change the mediator and termination of his assignment as mediator from such dispute³⁵. The mediation service provider upon receipt of such written objection can terminate services of a mediator after affording him reasonable opportunity of being heard³⁶. The mediation service provider has to appoint a new mediator within 07 days from end of services of earlier mediator³⁷.

III.IV PROCEDURE OF MEDIATION PROCEEDINGS

Chapter- V provides the procedure for mediation proceedings. The settlement of disputes through mediation will be done within the territorial jurisdiction of the court or tribunal having jurisdiction to resolve such dispute. Nevertheless, the parties to a dispute may mutually agree that mediation may be conducted at any place outside the jurisdiction of court or tribunal. The mediation may be conducted in online mode also. When mediation is conducted online or outside the jurisdiction of the court or tribunal with the consent of both parties to a dispute, then it will be considered to be done within the territorial jurisdiction³⁸. Where there has been an existing agreement among the parties to a dispute and one of party sends notice for settlement of dispute through mediation than the mediation process will be considered to have started from the date of receiving of notice by the another party. However, where there is no such agreement and both parties agree on settlement of their dispute through mediation than the mediation process will start from the date of receipt of consent of mediator. Further, if a party to dispute seeks services of mediation through mediation service provider than the mediation process will start from the date of appointment of mediator by such mediation service provider³⁹. The procedure of mediation proceedings has to be just and fair and it will not be obliged to follow provisions of the Code of Civil Procedure, 1908 or the Indian

³³Ibid.

³⁴Id., s. 9.

³⁵Id., s. 10.

³⁶Id., s. 11.

³⁷Id., s. 12.

³⁸Id., s. 13.

³⁹Id., s. 14.



Evidence Act, 1872. The rules of procedure may be laid down in this regard. The parties to a dispute will be assisted by a mediator in an impartial, independent and neutral manner to reach to amicable resolution of their disputes. Every mediator has to observe and follow the standards of professional and ethical conduct and principles of fairness and objectivity. He must protect confidentiality, voluntariness and self-determination of the parties. A mediator may apply several techniques of mediation like meetings with both the parties separately or jointly as per requirements and circumstances of a case. The language of mediation proceedings can be decided as per the choices of both the parties to a dispute by the mediator⁴⁰.

The role and function of mediator is to help the parties to a dispute in resolution of their disputes through exchange of communication of view or opinion of both parties, identification of main issues of disputes, to clear priorities and making better understanding and discovering areas of settlement. The mediators will emphasize that both the parties to a dispute should reach to a resolution by putting claims. The mediator must inform both the parties expressly that it is the choice of parties to arrive at a settlement mutually and he will not give any guarantee that the mediation may lead in a settlement or he will force any settlement⁴¹. The mediator shall be debarred to perform as a representative or counsel of a party or act as an arbitrator in any arbitration or judicial proceeding in reverence of a clash which is the subject matter of the mediation process. He will also not to be represented by the parties as a witness in any judicial or arbitral proceeding⁴². Every mediation proceeding must be concluded within a period of 120 days from the first date of hearing before the mediator. This period may be extended with the consent of both parties to a dispute to a maximum period of sixty days⁴³.

The parties to a dispute may enter in to writing to a mediated settlement agreement on all or any of the issues in a dispute. Such mediated settlement agreement must confirm to essential requirements of a valid contract and may cover issues which are outside of original disputes of the parties. The mediated settlement agreement has to be in writing and duly signed by both parties to a dispute and countersigned by the mediator⁴⁴. The mediated settlement agreement may be registered with an authority duly notified by the Central Government for the purpose of record within a period of one hundred and eighty

⁴⁰Id., s. 15.

⁴¹Id., s. 16.

⁴²Id., s. 17.

⁴³Id., s. 18.

⁴⁴Id., s. 19(1) It reads:- "A mediated settlement agreement includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator: Provided that the terms of the mediated settlement agreement may extend beyond the disputes referred to mediation.

Explanation.-A mediated settlement agreement which is void under the Indian Contract Act, 1872, shall not be deemed to be lawful settlement agreement within the meaning of mediated settlement agreement.

(2) Where a mediated settlement agreement is reached between the parties with regard to all or some of the disputes, the same shall be reduced in to writing and signed by the parties.

(3) Subject to the provisions of section 26, the mediated settlement agreement signed,-

(i) in case of institutional mediation, shall be submitted to the mediator, who shall, after authenticating the same, forward it with a covering letter signed by him, to the mediation service provider and also provide a copy to the parties;

days from the date of receiving of true copy of mediated settlement agreement⁴⁵. Where parties to a dispute cannot reach to an amicable settlement of their dispute than the mediator shall prepare and submit a duly signed non-settlement report to the mediation service provider or to all the parties to such dispute. The mediator does not require providing any reasons for non-settlement⁴⁶.

The mediator, all parties to a dispute and participants are required to maintain privacy and confidentiality to the mediation proceedings like suggestions, opinions, acknowledgements, promises, apologies, admissions and proposals made during the mediation; willingness to or acceptance of proposals made or exchanged in the mediation; papers prepared solely to carry out of mediation. Further, video or audio recording of mediation proceedings are also not permissible, and all such documents are not admissible as evidence before any court or tribunal⁴⁷. However, such privilege from disclosure will not be applicable in cases of child abuse, domestic violence, imminent threat to public health and safety etc⁴⁸.

The mediation proceedings shall be terminated on the date of award of mediated settlement agreement or on the expiry of time limit of mediation process or written declaration by the mediator to put an end to mediation proceedings or where any party

(ii) in all other cases, shall be submitted to the mediator who shall, after authenticating the mediated settlement agreement, provide a copy to all the parties.

(4) The parties, may, at any time during the mediation process, make an agreement with respect to any of the disputes which is the subject matter of mediation.

(5) Any mediated settlement agreement under this section includes a settlement agreement resulting from online mediation."

⁴⁵Id., s. 20(1). It reads:- "For the purposes of record, mediated settlement agreement arrived at between the parties, other than those arrived in a court or tribunal referred mediation or award of Lok Adalat or final award of the Permanent Lok Adalat under section 21 or section 22E of the Legal Services Authorities Act, 1987, may, at the option of parties, be registered with an Authority constituted under the said Act, or any other body as may be notified by the Central Government, in such manner as may be specified and such Authority or body shall issue a unique registration number to such settlement agreements: Provided that the mediated settlement agreement under this section may be registered with such Authority or the body situated within the territorial jurisdiction of the court or tribunal of competent jurisdiction to decide the subject matter of dispute.

Explanation.-For the removal of doubts, it is clarified that nothing contained in this sub-section shall affect the rights of parties to enforce the mediated settlement agreement under section 27 or challenge the same under section 28.

(2) The registration referred to in sub-section (1) may be made by the parties or mediation service provider within a period of one hundred and eighty days from the date of receipt of authenticated copy of mediated settlement agreement: Provided that mediated settlement agreement may be allowed to be registered after the expiry of period of one hundred and eighty days on payment of such fee as may be specified in consultation with the Authority or any other body referred to in sub-section (1)."

⁴⁶Id., s. 21.

⁴⁷Id., ss. 22, 23.

⁴⁸Ibid.



opts out from mediation proceedings⁴⁹. The overall cost of mediation process shall be borne by both the parties equally⁵⁰.

III.V ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENT AND ONLINE MEDIATION

Chapter- VI & VII lays down the provisions relating to enforcement of mediated settlement agreement and online mediation. A mediated settlement agreement which has been duly signed and authenticated and verified by the mediator shall be binding on all the parties or their representatives to a dispute and it will be imposed in the similar manner as if it is a decree or order of the court as per the provisions of the Code of Civil Procedure, 1908. Both the parties can make use of such mediated settlement agreement in their defense, set-off or other legal proceedings⁵¹. Where a party is not satisfied with the mediated settlement agreement and is willing to challenge it than such party can file an application in this regard to the Court or Tribunal of capable jurisdiction. A mediated settlement agreement can be challenged within a period of 90 days from the date of receipt of an authenticated copy of such settlement on the grounds of corruption, fraud, impersonation or lack of jurisdiction. However, the Court or Tribunal can relax the limitation period of ninety days if the applicant is able to prove sufficient cause for non-filing of application within the limitation period⁵².

Chapter- VII provides for online mediation which can be conducted at any stage of mediation proceedings under the Act. Online mediation can also be conducted in pre

⁴⁹Id., s. 24. It reads:- "The mediation proceedings under this Act shall be deemed to terminate-

- (a) on the date of signing and authentication of the mediated settlement agreement; or
- (b) on the date of the written declaration of the mediator, after consultation with the parties or otherwise, to the effect that further efforts at mediation are no longer justified; or
- (c) on the date of the communication by a party or parties in writing, addressed to the mediator and the other parties to the effect that the party wishes to opt out of mediation;
- (d) on the expiry of time limit under section 18."

⁵⁰Id., s. 25.

⁵¹Id., s. 27.

⁵²Id., s. 28.(1). It reads:- "Notwithstanding anything contained in any other law for the time being in force, in any case in which the mediated settlement agreement is arrived at between the parties and is sought to be challenged by either of the parties, such party may file an application before the court or tribunal of competent jurisdiction.

(2) A mediated settlement agreement may be challenged only on all or any of the following grounds, namely:-

- (i) fraud;
- (ii) corruption;
- (iii) impersonation;
- (iv) where the mediation was conducted in disputes or matters not fit for mediation under section 6.

(3) An application for challenging the mediated settlement agreement shall not be made after ninety days have elapsed from the date on which the party making that application has received the copy of mediated settlement agreement under sub-section (3) of section 19: Provided that if the court or tribunal, as the case may be, is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of ninety days, it may entertain the application within a further period of ninety days." ninety days, it may entertain the application within a further period of ninety days.

litigation mediation. However, online mediation can be done only with the prior consent of both parties to a dispute and necessary elements of confidentiality and integrity of proceedings has to be maintained⁵³.

III.VI MEDIATION COUNCIL OF INDIA: COMPOSITION, TERMS AND CONDITIONS, POWERS AND FUNCTIONS

The Act under Chapter- VIII lays down for the establishment and incorporation, terms and conditions, powers and functions of Mediation Council of India. The Central Government shall through notification set up a Council by the name of the Mediation Council of India to perform functions and duties under the Act. The Council is a legal person or body corporate having head office at New Delhi⁵⁴. The Council consist a Chairperson, two members, three *ex-officio* members and one part time member who are to be appointed by the Central Government⁵⁵. The Chairperson must be a person of capacity, integrity and standing who have sufficient knowledge and professional experience or who have shown capability in tackling with problems relating to law, mediation or alternative dispute resolution, public affairs or administration. One member has to be appointed by the Central Government who have knowledge and experience in mediation law or alternative dispute resolution mechanisms. Another member must have experience in teaching and research in alternative dispute resolution mechanisms or mediation law. The *ex officio* members must be one member from Department of Legal Affairs, Ministry of Law and Justice and one member from

⁵³Id., s. 30(1). It reads:-"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 but not limited to an encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both.

(2) The process of online mediation shall be in such manner as may be specified.

(3) The conduct of online mediation shall be in the circumstances, which ensure that the essential elements of integrity of proceedings and confidentiality are maintained at all times and the mediator may take such appropriate steps in this regard as he deems fit.

(4) Subject to the other provisions of this Act, the mediation communications in the case of online mediation shall, ensure confidentiality of mediation."

⁵⁴Id., s. 31. (1). It reads:-"The Central Government shall, by notification, establish for the purposes of this Act, a Council to be known as the Mediation Council of India to perform the duties and discharge the functions under this Act.

(2) The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract, and shall, by the said name, sue or be sued.

(3) The head office of the Council shall be at Delhi or at such other place as may be notified by the Central Government.

(4) The Council may, in consultation with the Central Government, establish offices at other places in India and abroad."

⁵⁵Id., s. 32(1). It reads:-"The Council shall consist of the following members, namely:-

(a) a person of ability, integrity and standing having adequate knowledge and professional experience or shown capacity in dealing with problems relating to law, alternative dispute resolution preferably mediation, public affairs or administration to be appointed by the Central Government-Chairperson;

(b) a person having knowledge and experience in law related to mediation or alternative dispute resolution mechanisms, to be appointed by the Central Government-Member;



Department of Expenditure, Ministry of Finance and one member Secretary who will be the Chief Executive Officer. There will be one part time member who will represent a body belonging to commerce and industry⁵⁶. The tenure of the Chairperson will be four years from the date of joining the office or seventy years whichever is earlier. The other member will hold office for four years or sixty seven years whichever will be earlier and they are eligible for reappointment. The member's terms and conditions of service, salaries and allowances will be such as may be decided by the Central Government. The members will be getting travelling and other allowances⁵⁷. The proceedings of the Council will not become invalid merely due to any vacancy or any defect in the composition of the Council or any irregularity in the procedure not affecting merits of the case⁵⁸.

A member of Council may tender his resignation from office addressed to the Central Government. However, he will not be relinquished from his office until three months from notice or a new member joins in⁵⁹. Any member can be removed by the Central government from his office if he has become physically or medically unfit in performance of his duties or undischarged insolvent or engaged in paid employment or convicted for offence of moral turpitude or acquired pecuniary or other interest likely to affect prejudicially his functions as member or abused his position detrimental to public interest. However, where a member has to be removed from his office on any of these grounds than, he shall be notified about his charges and given reasonable opportunity of being heard before his removal⁶⁰. The Council can constitute expert committees to smoothly discharge its functions⁶¹. The office of the Council will comprise a Chief Executive Officer and Secretariat. The Secretariat will consist of such number of officers

(c) an eminent person having experience in research or teaching in the field of mediation and alternative dispute resolution laws, to be appointed by the Central Government-Member;

(d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary- Member, *ex officio*;

(e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary- Member, *ex officio*;

(f) Chief Executive Officer-Member-Secretary, *ex officio*; and

(g) one representative of a recognised body of commerce and industry, chosen by the Central Government-Part-Time Member.

(2) The Members of the Council, other than *ex officio* members, shall hold office as such, for a term of four years from the date on which they enter upon their office and shall be eligible for re-appointment: Provided that no Member other than *ex officio* Member shall hold office after he has attained the age of seventy years, in the case of Chairperson, and sixty-seven years, in the case of other Members: Provided further that if the Chairperson is appointed on Part-Time basis, then, at least one of the Members appointed under clauses (b) or (c) shall be a Full-Time Member.

(3) The salaries, allowances and other terms and conditions of Members other than *ex officio* Members shall be such as may be prescribed.

(4) The Member shall be entitled to such travelling and other allowances as may be prescribed."

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸Id., s. 33.

⁵⁹Id., s. 34.

⁶⁰Id., s. 35.

⁶¹Id., s. 36.

and employees as required. The qualifications, appointment and other terms and conditions of service may be laid down by the rules⁶².

The Council has to perform various the duties and functions⁶³. These functions include promotion and development of international and domestic mediation and create a set up for it, to lay down rules and guidelines for the conduct of mediation, continuous education, grant of certificate and assessment of mediators, registration, renew, suspend or cancel registration, to lay down standards of conduct and etiquettes, to organize conference or workshops on mediation, to recognize mediation institutions and mediation service providers etc⁶⁴. The Council has to prepare and present annual report on enforcement of the provisions of the Act to the Central Government⁶⁵.

III.VII MEDIATION SERVICE PROVIDERS, MEDIATION INSTITUTES AND COMMUNITY MEDIATION

Chapter- IX deals with mediation service providers and mediation institutes. Mediation service provider means an organization or a body that assists for the conduct of mediation. This body or organization may be recognized by the Council or it may be an authority which has been established under the Legal Services Authorities Act, 1987 or

⁶²Id., s. 37.

⁶³Id., s. 38. It reads:- "The Council shall-

- (a) endeavour to promote domestic and international mediation in India through appropriate guidelines;
- (b) endeavour to develop India to be a robust centre for domestic and international mediation;
- (c) lay down the guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes;
- (d) provide for the manner of conduct of mediation proceedings, under sub-section (1) of section 15;
- (e) provide for manner of registration of mediators and renew, withdraw, suspend or cancel registration on the basis of conditions as may be specified;
- (f) lay down standards for professional and ethical conduct of mediators under sub-section (3) of section 15;
- (g) hold trainings, workshops and courses in the area of mediation in collaboration with mediation service providers, law firms and universities and other stakeholders, both Indian and international, and any other mediation institutes;
- (h) enter into memoranda of understanding or agreements with domestic and international bodies or organisations or institutions;
- (i) recognise mediation institutes and mediation service providers and renew, withdraw, suspend or cancel such recognition;
- (j) specify the criteria for recognition of mediation institutes and mediation service providers;
- (k) call for any information or record of mediation institutes and mediation service providers;
- (l) lay down standards for professional and ethical conduct of the mediation institutes and mediation service providers;
- (m) publish such information, data, research studies and such other information as may be required;
- (n) maintain an electronic depository of the mediated settlement agreements made in India and for such other records related thereto in such manner as may be specified; and
- (o) perform any other function as may be assigned to it by the Central Government."

⁶⁴Ibid.

⁶⁵Id., s. 39.



it may be a court- annexed mediation Centre or such body may be recognized by the Central Government⁶⁶. The mediation service providers will perform several functions namely certification of mediators and maintenance of penal of mediators, to provide services of mediators to parties to a dispute, to give infrastructural, logistic and other assistance in the smooth conduct of mediation, promotion of professional and ethical conduct among mediators and to help in registration of mediated settlement agreement etc⁶⁷. The Council will give recognition to mediation institutes to perform such functions and carry out such duties and as may be identified⁶⁸.

Chapter- X provides provisions for community mediation. This is a very important and novel concept for settlement of disputes at community level. A dispute at community level which may disturb mutual harmony, peace and tranquility of a locality or area can be amicably settled by community mediation. However, the permission of all the parties to a dispute should be taken before going for community mediation. Community mediation can be availed by any of the parties to a dispute at community level by making an application before the District Magistrate or Sub-Divisional Magistrate or any competent authority. The concerned authority or District Magistrate after receiving such an application for settlement of dispute through mediation will set up a panel of three community mediators. The District Magistrate or Sub-Divisional Magistrate will establish a permanent panel of community mediators which can be changed from time to time keeping in mind representation of women or class or group of persons. The permanent panel of mediators may be set up from amongst the persons who are of standing, honesty and integrity or a local person who has significantly contributed to society or representative of a place or resident welfare association or any person who have experience in mediation etc⁶⁹. A panel of three mediators will conduct community mediation and formulate appropriate procedure for resolution of dispute. The mediators will try to settle disputes amicably with the consent of all disputing parties.

⁶⁶Id., s. 40.(1). "It reads: -"mediation service provider" includes-

- (a) a body or an organisation that provides for the conduct of mediation under this Act and the rules and regulations made thereunder and is recognised by the Council; or
 - (b) an Authority constituted under the Legal Services Authorities Act, 1987; or
 - (c) a court-annexed mediation centre; or
 - (d) any other body as may be notified by the Central Government: Provided that the bodies referred to in clauses (b), (c) and (d) shall be deemed to be mediation service providers recognised by the Council;
- (2) The mediation service provider shall be recognised by the Council in the manner as may be specified."

⁶⁷Id., s. 41. It reads:- "The mediation service providers shall perform the following functions, namely:-

- (a) accredit mediators and maintain panel of mediators;
- (b) provide the services of mediator for conduct of mediation;
- (c) provide all facilities, secretarial assistance and infrastructure for the efficient conduct of mediation;
- (d) promote professional and ethical conduct amongst mediators;
- (e) facilitate registration of mediated settlement agreements in accordance with the provisions of section 20; and
- (f) such other functions as may be specified."

⁶⁸Id., s. 42.

⁶⁹Id., s. 43(1). "It reads:- Any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute;

Where a community dispute is settled through community mediation then the settlement has to be made in to writing which must be signed by all parties to dispute and countersigned by the community mediators. A copy of such a settlement must be served to all parties to dispute. Where the parties could not reach to settlement than a non- settlement report will be presented by the mediators to the District Magistrate or Sub- Divisional Magistrate or the concerned authority and to the parties⁷⁰.

III.VIII OTHER MISCELLENEOUS PROVISIONS

Lastly, Chapter- XI lays down other necessary miscellaneous provisions under the Act. A 'Mediation Fund' must be established to promote, facilitate and encourage mediation in India. All monies received from the Central Government, fees and charges, donations, grants, contributions etc. will be credited into the Mediation Fund. This fund will be utilized to incur the expenses towards salaries and other allowances of Chairperson, members, officers and employees and expenses of the Council⁷¹. The Council will prepare and maintain account books and records yearly which have to be audited by the

(2) For the purposes of sub-section (1), any of the parties shall make an application before the concerned Authority constituted under the Legal Services Authorities Act, 1987 or District Magistrate or Sub-Divisional Magistrate in areas where no such Authority has been constituted, for referring the dispute to mediation;

(3) In order to facilitate settlement of a dispute for which an application has been received under sub-section (2), the concerned Authority constituted under the Legal Services Authorities Act, 1987 or the District Magistrate or Sub-Divisional Magistrate, as the case may be, shall constitute panel of three community mediators;

(4) For the purposes of this section, the Authority or District Magistrate or the Sub-Divisional Magistrate, as the case may be, shall notify a permanent panel of community mediators, which may be revised from time to time;

(5) The following persons may be included in the panel referred to in sub-section (4)-

- (a) person of standing and integrity who are respectable in the community;
- (b) any local person whose contribution to the society has been recognised;
- (c) representative of area or resident welfare associations;
- (d) person having experience in the field of mediation; and
- (e) any other person deemed appropriate.

(6) While making panel referred to in sub-section (4) the representation of women or any other class or category of persons may be considered."

⁷⁰Id., s. 44.(1). It reads:- "Any community mediation shall be conducted by the panel of three community mediators referred to in sub-section (3) of section 43 who shall devise suitable procedure for the purpose of resolving the dispute.

(2) The community mediators shall endeavor to resolve disputes through community mediation and provide assistance to parties for resolving disputes amicably.

(3) In every case where a settlement agreement is arrived at through community mediation under this Act, the same may be reduced into writing with the signature of the parties and authenticated by the community mediators, a copy of which be provided to the parties and in cases where no settlement agreement is arrived at, a non-settlement report may be submitted by the community mediators to the Authority or the District Magistrate or the Sub-Divisional Magistrate, as the case may be, and to the parties.

(4) Any settlement agreement arrived at under this Chapter shall be for the purpose of maintaining the peace, harmony and tranquility amongst the residents or families of any area or locality but shall not be enforceable as a judgment or decree of a civil court.

(5) The provisions of section 20 shall, mutatis mutandis apply, in relation to the registration of mediated settlement agreement under this section."



Comptroller and Auditor General of India⁷². The Council will be governed by the Central Government on policy matters⁷³. The Central Government or State Government may lay down schemes or policies for the purpose of settlement of disputes through mediation where one of the parties to disputes is either Central or State Government⁷⁴.

IV. CRITICAL ANALYSIS OF THE PROVISIONS OF THE ACT

The concept of mediation is not new and there have been various laws which provide for mediation as a means of alternative dispute resolution mechanism or pre litigation resolution. However, the Mediation Act, 2023 is a welcome step towards strengthening and laying down legal and institutional framework for mediation regime in India. This Act recognizes and provides for institutionalization of mediation as an easy and cost effective dispute resolution mechanism. The Act consolidates and establishes a robust legal framework for mediation in India and provides for pre litigation mediation as an alternative to settle civil or commercial disputes before the parties go for formal adjudication of their disputes from the court of law. The Act embodies many features like the mediated settlement enforcement agreements, its conclusiveness and binding effect, its enforceability and its amenability to challenge, online mediation, mediation council of India, mediation service providers and mediation institutes, community mediation gives more credibility to the mediation. The pre litigation settlement of disputes will be helpful to Indian nationals as well as foreign investors because it alleviates the risk, delays and expenses in traditional adjudication of disputes in India⁷⁵.

There have been some lacunas in the Act. Firstly, the Act makes no provision for enforcement of mediated settlement agreements from intercontinental mediations conducted outside India. The provisions for appointment of mediators and interim relief leave too much space for interpretation. Secondly, the Act lays down provisions for challenge of a mediated settlement agreement before a court or tribunal having jurisdiction. This process may delay speedy and expeditious resolution of disputes due to the huge pendency of cases before courts and tribunals. Thirdly, India proactively agreed and signed the United Nations Convention on International Settlement Agreements, (Singapore Convention on Mediation) 2019. However, the Act does not incorporate the provisions of this convention. The Singapore Convention provides for enforcement of mediated settlement agreements in the courts of the home country of the counter party. However, the Act has no provision for implementation of mediated settlement agreements from international mediations performed abroad⁷⁶.

V. CONCLUSION

The concept of mediation involves a procedure of negotiation by which all disputing parties, together with the aid of an impartial and neutral third person tries to resolve the dispute. The mediator who is third party to a dispute makes effort by discussions with

⁷²Id., s. 46.

⁷³Id., s. 47.

⁷⁴Id., s. 48.

⁷⁵Dheeraj Nair, Vishrutiy Sahni and Ridhima Sharma, "Mediation Act, 2023: Salient Features" September, 18 (2023), (June 15, 2024)<https://www.jsalaw.com/newsletters-and-updates/mediation-act-2023-salient-features/>.

⁷⁶Ibid.

the parties to a dispute to analytically identify and isolate quarreled issues in order to develop options consider alternatives and to reach a consensual arrangement that will contain their rights and needs. The third party mediator does not have authority to decide the dispute, however, he only facilitates to make affable situation to enable the parties to determine their dispute harmoniously themselves. It has been rightly said by Christopher W. Moore⁷⁷ about the meaning, nature and scope of mediation that

"Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants."

In our country, there has been huge burden on our justice delivery system which results in high pendency of cases in courts and tribunals. An ideal justice dispensation system requires expeditious, speedy and effective settlement of disputes. The passing of the Mediation Act, 2023 is a very good and effective development for settlement of disputes between parties through mediation. It will boost the mediation process by laying down enhanced confidentiality, high standards, presenting incentives and guaranteeing enforceability. This law will significantly reshape the mediation landscape in India's justice delivery system. The Act encourages mediation as the primary tool for settlement of disputes, aiming to make more efficient legal process while nurturing a culture of cooperation and collaboration between disputing parties. This Act represents an important trend towards a more effective, efficient and harmonious approach to settlement of disputes in India.

⁷⁷CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (Jossey- Bass, 4th edn., 2014).