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An Analyses of the New Mediation Act

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ABSTRACT

The article titled "An Analyses of the new mediation act" focuses on to carry out a comprehensive study of the new statute. Article starts with a study of the Preamble of the act followed by a study of few of the key provisions of the act. It is to be noted that the article is completely based upon my understanding of the act and no secondary materials were used.

The article identifies few key provisions which may create a pit fall in the application of the act. Not only the pitfalls are marked out a substantial reasoning is also provided for the same in order to substantiate my point.

***Keywords**: Mediation ,3rd June circular , ADR , online mediation.*

I. INTRODUCTION

The New Mediation Act provides for a paradigm shift in the process of dispute resolution from arbitration to mediation as the best alternative. The objective behind the introduction of the New Mediation Act, 2023 is to ensure that the shortcomings of the Arbitration Act are addressed and that mediation emerges as the best alternative.

The preamble of the Act states:

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

The preamble reflects the need for an institutional setup to resolve disputes, with a major focus on commercial disputes. It aims to ensure that current realities are integrated by encouraging online mediation processes and including community mediation. The Act is business and economic-centric, as evident from the "Statements of Objects and Reasons" given in the preamble. The statement of objects and reasons states that the rapidly changing society and progress in various areas, not limited to economic, industrial, or financial sectors, demand commensurate expeditious settlement of disputes between parties, which at present is time-

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consuming. Thus, there is a need to further promote Alternative Dispute Resolution (ADR), inter alia by institutional mediation. The ADR mechanism of mediation, though mentioned in various existing laws, currently lacks a comprehensive law governing its various aspects. The New Mediation Act deals in detail with the questions under consideration. The act seeks to promote mediation as a preferred mode of ADR, inter alia, providing for:

1. Subsuming the conciliation part under Part III of the Arbitration and Conciliation Act, 1996, into mediation as per the international practice of using the terms conciliation and mediation interchangeably.

2. Compulsory pre-litigation mediation in matters of civil or commercial dispute, before parties approach a court or tribunal.

3. An indicative list of matters that are not fit for mediation under the first schedule.

4. A period of one hundred and eighty days for completing the mediation process, which is further extendable to a maximum period of one hundred and eighty days with the mutual consent of parties.

5. The agreement will be final and binding on all parties.

The Mediation Act appears to be the need of the hour, evident from the fact that the Circular from the Ministry of Finance dated 3rd June 2024[2] aptly points out the shortcomings of the Arbitration Act of 1996 and how mediation as a process will help to overcome them. The focus of this article is to analyze the Act and its key provisions in light of making mediation an alternative to arbitration.

II. KEY SECTIONS OF THE ACT AND AN ANALYSIS OF THE SAME

Section 2 deals with the applicability of the Act and provides for its application to both domestic and international disputes. It gives a wide definition to the state when it comes to commercial disputes where one of the parties is the state. It is interesting to note that as per Section 2(iv), the wide definition given to the state is only with respect to commercial disputes. With respect to other disputes, as per Section 2(v), the state holds discretion to take up the matter for mediation or not. It is noteworthy that such discretion runs against the principle of mediation, where the parties have a right to choose a mode for the settlement of the dispute.

Section 4 provides a wide definition of the agreement of mediation. The definition is similar to

[2] - Guidelines for Arbitration and Mediation in Contracts of Domestic PublicProcurement – reg, https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf

that of the Arbitration Act, which is not only broad but friendly enough for the parties to interpret. Section 4 further provides a remedy in the absence of an agreement by stating that in the absence of a written agreement, the same can be arrived at post the conflict arises.

Section 5 provides for pre-litigation mediation. It states that irrespective of any agreement, a commercial matter is bound to be referred to mediation. This is a step in the direction of solving commercial disputes amicably, and such disputes shall be taken in accordance with the principles of Section 12A of the Commercial Courts Act of 2015. For the purposes of this Act, the mediator will be one registered with the council, empanelled by a court-annexed mediation centre, or empanelled by an authority constituted under the Legal Services Authorities Act 1987.

Section 6 deals with matters that are not fit for mediation. Sub-section 1 states that mediation under this Act shall not be conducted for the resolution of any dispute or matter contained in the indicative list under the first schedule. The section further provides that if a court of law is of the view that a dispute relating to compoundable offenses, including matrimonial disputes, can be referred to mediation. However, the same shall not be considered a judgment or decree under Section 27(2). Thus, Section 6 is an exception to Section 27. It is to be noted that this will create a conflict with the concept of mediation if the award is not enforceable, as it will bring one back to ground zero.

Section 7 provides power to a court or tribunal to refer a matter for mediation after it has taken over the case for judicial proceedings. It has the power to pass interim orders to safeguard interests at stake. However, parties are not obligated to come to a settlement in the mediation. This provision has its own issues, as initially it was provided that pre-litigation mediation is necessary before court proceedings begin. It can be used as a delay tactic to deny the party under scrutiny timely benefit or relief.

A judicial question that needs to be considered is what constitutes tribunals. For instance, the Apex Court has stated in various judgments that government officers cannot head tribunals related to their matters. However, we discover that this rule is not the norm; for instance, revenue tribunals are being navigated by IRS officers, which goes against the norm of natural justice. We witness a large number of cases ending in the Apex Court with respect to the formation and jurisdiction of tribunals.

Section 8 provides for the appointment of mediators. In plain terms, it provides that a person of any nationality may be appointed as a mediator, provided that person has the requisite qualifications. It is to be noted that the grounds for qualification are discretionary and not

compulsory.

Thus, it might become a serious issue if requisite qualifications become discretionary, as based on the observation of the 3rd June 2024 circular, we can notice that the focus is on having mediation as the major way of solving disputes, and if qualifications are discretionary, it will impact the efficiency of mediation as a process.

Sections 10, 11, 12, and 13 focus on the role of the mediator. These sections provide for the disclosure of the interest of a mediator in the conflict under consideration or their relationship with a party to the dispute. The focus of these four sections is to ensure that mediators are appointed and replaced as per convenience, providing them with a fair opportunity to be heard where they are being removed on some allegation. These sections are based on the principles of natural justice, fair play, and equality before the law.

One of the controversial sections in the Act is Section 22. Section 22 deals with the confidentiality of the proceedings and provides that any electronic or non-electronic data will not be shared. This includes acknowledgments, opinions, suggestions, promises, proposals, apologies, and admissions. However, Sub-section 4 conflicts with the principle of confidentiality as it states that the provisions of this section shall not prevent the mediator from compiling or disclosing general information concerning matters that have been subject to mediation for research, reporting, or training purposes.

The terms used are vague enough to cover all aspects of mediation, bringing the right of confidentiality under threat. The explanation in the statute states that nothing contained in this section shall apply to the mediated settlement agreement where its disclosure is necessary for the purpose of registration, enforcement, and challenges.

Section 23 is carved out as an exception to Section 22 of the Act, providing that no privilege or confidentiality will attach to a threat or statement of a plan to commit an offense punishable under any law for the time being in force, information related to domestic violence or child abuse, and statements made during mediation showing a significant imminent threat to public health or safety.

The issues with the aforementioned provisions are:

1. It reduces the confidence of parties.

2. No distinction is made between cognizable or non-cognizable issues and compoundable or non-compoundable issues.

3. Issues of domestic violence are placed out of context as it is barred by the first schedule.

Section 28 provides the grounds upon which the mediated settlement can be challenged, listing four grounds:

1. Fraud
2. Corruption
3. Impersonation
4. Where the mediation was conducted in disputes or matters not fit for mediation as covered under Section 6 of the Act

The issues that need to be addressed are:

1. Corruption and impersonation are species of fraud. They are the same thing
2. The notion that mediation was conducted in disputes or matters not fit for mediation under Section 6 conflicts with the first schedule of the Act.

Section 30 provides for the online mediation process. A significant move towards virtual Alternative Dispute Resolution, it provides for the use of electronic forms or computer networks, including but not limited to encrypted mail services, secure chat rooms, or conferencing by video or audio mode or both.

The issue is that Section 30 fails to cover the emergence of new technologies like blockchain. It fails to address that the mediums mentioned for online mediation require regulation. Nor is there any mention of smart contracts or virtual contracts.

To ensure an institutionalized approach to mediation, Section 31 lays the foundation stone by providing for the formation of the "Mediation Council of India." Section 38 of the Act lays out in detail the duties and functions of the council, ranging from promoting domestic and international mediation in India to guidelines regarding the education, certification, and assessment of mediators.

Section 38 is a vision document in itself as it provides for holding training, workshops, and courses in the area of mediation, and recognizing mediation institutions and service providers.

Section 43of the Act lays down the provision for community mediation. It seems a well-settled plan in the Indian context where Panchayat and sabhas have played a dynamic role in constructing social norms. However, this section is not without its problems as terms are vaguely defined within the section.

As per Section 43(4), the following persons may be included in the panel referred for mediation:

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1. A person of standing and integrity who is respectable in the community
2. Any local person whose contribution to society has been recognized
3. A representative of an area or resident welfare association
4. A person having experience in the field of mediation
5. Any other person deemed appropriate

Such a classification is very vague. While it provides great discretion and independence to parties to choose arbitrators, it also increases the risk of choosing unqualified ones. The classification can be described as subjective.

Section 44 provides for the procedure for community mediation. However, the drawback is that the decision arrived at via community mediation is not enforceable by a court of law.

In the end, the statute is provided with eight schedules, and the second schedule is the most controversial one as it provides for statutes/acts to which mediation will apply in accordance with the Mediation Act, not the special statute. The issue can be best explained by sharing a few examples:

1. The Brahmaputra Board Act focuses on negotiation, not mediation.
2. In The Industrial Dispute Act and Regulation of Workers Act, the mediators are appointed by the government.

Thus, we witness that the Act is wrapped in many shortcomings that need to be addressed over time. It is to be remembered that the Act is a positive step forward, and to make it successful, we need to identify the shortcomings and find solutions to them.

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