Status Of Pre-Suit Mediation In Eliminating Conflicting Legal Principles In Indian Commercial Disputes

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Abstract

Pre-litigation is an alternative to going to court that allows parties to settle their differences in an informal setting with the help of a neutral third party. The parties' preferred outcome is typically reached in pre-litigation negotiations.

Pre-suit mediation can be useful for a number of reasons. First, certain contracts mandate mediation before arbitration or litigation is filed; second, the reliability of arbitration tribunals, judges, and juries is questionable at best.

Furthermore, litigation can be extremely taxing on plaintiffs' emotional resources, particularly in highly charged instances. The parties' relationship may also worsen during the course of the dispute. Furthermore, when litigation continues and conflicts grow, the case may get more complex. The high cost of protracted litigation is a powerful argument in favour of early mediation.

Commercial dispute mediation is now mandated by law according to the Commercial Courts Act of 2015. The Act states that parties may engage in pre-litigation measures when an immediate need for interim relief is not anticipated. The method for such pre-litigation mediations is laid forth in the Commercial Courts (pre - institution mediation and settlement) Rules, 2018. The provision's required nature has been upheld by the courts;therefore, it may encourage parties to a possible adversarial action to settle their disagreement amicably.The courts' interpretations of whether Section 12-A is required or merely advisory diverged after its implementation.

The purpose of this article is to prove that Section 12A of the Commercial Courts Act, 2015 is useful despite the many legal and constitutional flaws that have been pointed out about it.

Keywords:pre-suit mediation, commercial dispute, interim relief, win-win situation, law commission report, overburdened judiciary.

DOINumber:10.48047/nq.2022.20.22.NQ10344 **NeuroQuantology2022;20(22):3449-3454**

INTRODUCTION

Once Mahatma Gandhi stated-

“I had learnt the practice of law. I had learnt to find out the better side of human nature, and to enter men’s hearts. I realized that the true function of a lawyer was to unite parties driven a sunder. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul.”

The overcrowded nature of the legal system makes it an ideal time for the use ofalternative "mediation" is a quick and necessary treatment. The power of mediation lies in the fact that it creates a new, dynamic foundation for future dialogue. Mediation has many positive effects, including: putting the parties in charge of the situation so they can come up with their own unique solutions to the problems at hand; providing an environment free from conflict and adversarial atmosphere; reducing conflict; resolving conflicts more quickly and peacefully; and providing an environment free from conflict and adversarial atmosphere.

The success of any system for resolving conflicts depends on two things: a body of legislation that

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Relevant conflicts of interest/financial disclosures: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

is unambiguous and consistent, and a judicial system that operates according to well-established norms and protocols. As delivering justice to the people is the essence of good administration, the preamble of the constitution emphasized the importance of delivering political, social, and economic justice to the people.

Article 39-A of the Indian Constitution appears to encourage justice based on equal opportunity, ensuring that no citizen is denied access to justice due to a financial hardship or other impairment.

International investment poured in when the judicial economy was liberalised. India began its economic liberalisation and reform programme in the early 1990s. As international business and commerce grew, so did the significance of GATT and, later, the WTO, leading to a rise in the exchange of goods, services, investments, and intellectual property. There were many kinds of disputes between the trading parties, and they were all complicated and costly. Such matters required prompt and amicable settlement because the parties could not tolerate the lengthy legal process in Courts, appeal, review, and revision.

PRE-SUIT MEDIATION HAS EMERGED AS A TREND IN INDIA

As parties become increasingly dissatisfied with the traditional litigation process, pre-litigation strategies are gaining ground. When little disagreements are taken to court, they can cause lengthy delays and unfavourable rulings that force an appeal. This is quite distressing for the individuals whose time and energy are being wasted on frivolous litigation, and it may even have an adverse effect on their psychological well-being. On the other hand, pre-litigation allows the parties to settle their dispute in a manner that best suits them in terms of time, money, and method. The best possible outcome is usually a mutually agreeable settlement. Therefore, the court's decisions and orders can be accepted without question. Since pre-litigation processes vary among jurisdictions and there is no universally defined structure that must be adhered to, they have a high success rate in generating conclusions that are satisfactory to both sides.

Ancient rulers from small to huge kingdoms sometimes played the role of mediator when disputes arose between their followers. In many families, the eldest person is expected to mediate arguments between family members. Community mediation services provided by panchayats have also been documented. This exemplifies the historical significance of mediation in Indian culture. Thus, it would appear that settling social disagreements outside of the legal system is both the oldest and most successful technique.

The judicial system is already stretched thin; thus, pre-litigation agreements are essential. Former Chief Justice of India (CJI) Justice Arvind Bobde recently spoke at a global conference titled "Arbitration in the Era of Globalisation," where he remarked that being a judge is "a difficult job" since judges must make choices that most people will not. When one side is unhappy with the outcome, the other can file an appeal, which starts a domino effect of appeals. He continued by saying that an agreement reached through mediation cannot be enforced, even though it ensures efficiency and reduces waiting times for all parties, including the courts. In a Public Interest Litigation (PIL) submitted to the Supreme Court of India last year, the Youth Bar Association of India argued for the establishment of nationwide mandatory pre-litigation mediation. The Centre has been asked by the Supreme Court to comment on whether legislation in this area is now being considered. A court hearing should not be held in an unreasonable amount of time. Both "Justice delayed is justice denied" and "Justice rushed is justice buried" are accurate maxims. Our judicial system is designed to evaluate each case individually, which often requires multiple sessions. These hearings can take years due to the backlog of cases currently pending in the judicial system.

The mediation procedure in Indian courts has the potential to alter the current state of Indian law. That is why the idea of ‘mediation before institution’ is like the icing on the cake. Mediation before formal litigation begins is a form of Alternative Dispute Resolution in which the parties, with the help of an impartial third party, work out their differences without resorting to formal channels like a court or government agency. In mediation, the parties themselves select the mediator to function as the "adjuster," as opposed to appointing a judge in a lawsuit.

A NUMBER OF STATUTES THAT MANDATE EARLY SETTLEMENT CONFERENCES

The 129th Law Commission (Justice Malimath Committee) Report, based on Urban Litigation and Mediation as Alternative to Adjudication study published its findings in 1988. Considering the backlog of Indian court cases, the Justice Malimath Committee Report recommended that the parties be encouraged to send their disputes to alternative dispute settlement methods. These guidelines made it possible for Section 89 of the CPC to be revised in 1999. The CPC originally went into effect in 1908. After recording admission and rejection of the documents, the court is required by Order X Rule 1A of Section 89 of the CPC to advise the parties to settle the matter through arbitration, conciliation, judicial settlement, settlement by the Lok Adalat, or mediation.

If a dispute arises between two parties, the court must submit the matter to Lok Adalat under Section 20(1) of the Legal Services Authority Act, 1987. Any other provisions of that Act that are relevant to the dispute will also apply. According to Section 21 of the Act, an agreement reached in a Lok Adalat has the same force and effect as a court ruling.

When evaluating whether to grant a request under Section 14 for permission to file for divorce, the court must take into account the fair probability of a reconciliation between the spouses before the passing of a year from the date of marriage, as required by Section 14(2) of the Hindu Marriage Act of 1955. Parliamentarians would also like the court to make an initial attempt at mediating the dispute.

THE DEVELOPMENT OF MANDATORY MEDIATION PRIOR TO LITIGATION ININDIA.

The courts in India are famously backlogged, with many cases taking years to reach a conclusion. Due to India's ineffective legal framework, it is more difficult for both foreign and native investors to protect their capital in the country. Excessive delays in the legal procedure might be regarded a violation of India's commitments under investment treaties, as demonstrated by the well-known case White Industries Australia Ltd. against Union of India. To ensure the speedy enforcement of contracts, the straightforward recovery of monetary claims, and the award of reasonable compensation for damages suffered, a dependable and effective dispute resolution mechanism has long been needed.

After more than a decade of extended deliberations and a new impetus from the current Government's mission to improve India's image as an investment destination, the Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Ordinance, 2015 ("Ordinance") was approved by the Cabinet and received Presidential assent on October 23, 2015. conducted an in-depth study of Commercial Courts in the United Kingdom, the United States of America, Singapore, France, etc. to ensure that the Ordinance was consistent with international trends, and the results were published in the Commission's 188th report and 253rd report.

Changes Brought by the 2018 Rule

On May 3, 2018, a new ordinance amended the Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Act, 2015 (the "Act"). There will be a dramatic shift in the nature of business litigation in India as a result of this legislation, which takes effect immediately and applies to all procedures begun after its inception.

The primary distinctions are:

The State Government can now apply the Act to any transaction that exceeds Three Lakhs in Indian Rupees, when before it only applied to those exceeding One Crore.

Even in nations where the High Court is the court of first instance, state governments may now establish lower-level commercial courts.

Except for litigation or applications for urgent interim relief, all cases must now go through mediation before they can be officially instituted. Government officials are obligated to notify the authorised authority of their intention to mediate. The mediation process must be completed by the appointed authority within three months. A binding arbitration award would be equivalent to the mediated agreement. Suits that do not require any immediate interim relief shall not be brought unless the plaintiff exhausts a remedy for pre-institutional mediation in accordance with norms specified by the Central Government. This requirement was added as Chapter IIIA to the Commercial Courts Act of 2015 in a 2018 amendment.

Therefore, pre-litigation mediation must take place between the parties before a lawsuit can be filed.

Authorizations provided for in Section12-A of the Commercial Courts Act,2015

Years of deliberation between the Indian government, the judiciary, the Law Commission of India, and a wide range of interested parties led to the passage of the Commercial Courts Act in 2015. The concept was first proposed in December 2003 by the Law Commission of India (the Commission) in its 188th Report of the Law Commission of India titled "Proposal for constitution of Hi-tech fast track Commercial Divisions in High Courts" (the Report), which was inspired by the system of speedy adjudication of commercial disputes in countries like the United Kingdom and the United States. The investigation was initiated by the Commission, which recognised a critical and overdue need for the speedy resolution of commercial disputes. It has been obvious that this will be India's long-term growth plan since the age of privatisation, globalisation, and, most significantly, inflow of foreign capital into the Indian economy began with the country's economic liberalisation in 1991.

As a result of the Commission's Report, the "Conference of Chief Ministers of States & Chief Justices of the High Courts" convened in August 2009 decided to create Commercial Divisions within the High Courts of India as soon as legislation was passed by the Indian parliament. A short time thereafter, the Commercial Division of High Courts Bill, 2009 (the Bill) was introduced and quickly passed by Lok Sabha. The Bill was referred to a Select Committee after a contentious debate broke out in the Rajya Sabha after its introduction in December 2009. The Bill was changed after receiving feedback from a Select Committee, but the Rajya Sabha, nonetheless decided to vote against it. After a period of stagnation in 2013, when the Ministry of Law and Justice referred the revised Bill to the Commission for input, work of the Act resumed. The Commission has revised their recommendations in their 253rd Report, titled "Commercial Division and Commercial Appellate Division of High Courts Bill, 2015." The Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Act, 2015 was brought back to parliament, passed by both chambers, and signed into law by the president. The goal was reached in 2015, allowing for faster resolutions to commercial conflicts.

COMMERCIAL DISPUTES AND SECTION 12A OF THE CCA, 2015.

The legislative branch has made efforts in recent years to promote alternative dispute resolution techniques like mediation. Section 12A ("12A") of the Commercial Courts Act, 2015 ("Act"), which was added in 2018's-chapter IIIA, requires parties to a commercial suit of a certain value to mediate before the suit is formally instituted, but does not allow for an application for urgent interim relief. Whether or not this provision is mandatory or merely advisory in nature has been the subject of discussionSpecifically, in Deepak Raheja v. Ganga Taro Vazirani, a Bombay High Court Division Bench (Nitin Jamdar and C.V. Bhadang, JJ.) ruled that Section 12A of the Act is mandatory in case of a commercial suit of specified value, which does not contain any application for urgent interim relief, because the plaintiff cannot initiate such a proceeding before pre-institution mediation has been exhausted. The Bombay High Court's Learned Single Judge's decision in Ganga Taro Vazirani v. Deepak Raheja was overturned by the Division Bench because it was found to be inconsistent with the present case.

The Madras High Court has come to a different result from the other High Courts when interpreting 12A, although it is important to note that the other High Courts have come to similar judgements.

In a Commercial Summary Suit ("CSS") brought under Order XXXVII of the Code of Civil Procedure, 1908 ("CPC"), plaintiff Ganga Taro Vazirani seeks to have defendant Deepak Raheja found liable for damages of Rs. 5,54,00,000/-. (About $5,540,000 at today's exchange rate). It's worth noting that the plaintiff here wasn't looking for immediate help. Since the provisions of Section 12A are procedural in character, the Learned Single Judge of the Bombay High Court concluded that they should be interpreted in light of the notion of substantial compliance. Many people were surprised before the judgement was issued when the Learned Single Judge noted that the provision that "compulsorily" requires disputing parties to attempt an amicable

settlement through mediation is procedural and that there is no absolute prohibition to file a suit prior to attempting mediation. The defendant then filed Commercial Appeal (L) No. 11950 of 2021 (supra) to challenge the judgement of the Learned Single Judge in Ganga Taro Vazirani.

In Deepak Raheja (supra), the Division Bench of the Bombay High Court stated as follows:

The Division Bench of the Bombay High Court observed in Deepak Raheja (supra) that a liberal interpretation of the Act's provisions should be avoided in order tofacilitate in the swift resolution of commercial issues. For the purposes of Section 12A, the Division Bench divided commercial disputes into two categories: those in which urgent relief was requested and those in which it was not. If rapid interim relief is not needed, pre-institution mediation must be used as a last resort. If a party need immediate interim relief, they may apply directly to the court. The Court stated that the initial separation is the legal mechanism designed to hasten the settlement of business disputes.

The post-CSS filing conversations between the parties constituted "substantial compliance" with the clause, according to one argument that was rejected by the Division Bench. The parties are free to mediate their disagreement on their own, with the aid of an unbiased third party, or through statutory mechanisms, the court ruled. The resolution reached after the authority has mediated the dispute in accordance with Section 12A is legally binding and enforceable, much as an arbitration ruling. Considering the intent and purpose of Section 12A, it was decided that neither party could waive the obligation of pre-institution mediation.

Calcutta High Court upheld the constitutionality of Section 12A:

The Learned Single Judge of the Calcutta High Court noted, among other things, that a plaintiff does not have an unconditional right to have a matter involving a "commercial dispute" as defined by the Act of 2015 decided by such Court without following the provisions of Section 12A of the Act of 2015. This was in the case of Laxmi Polyfab v. Eden Realty. In the case Dredging and Desiltation Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium, the same bench of the Calcutta High Court noted, among other things, that the purpose of the Act of 2015 is to speed up the resolution of a commercial dispute. Pre-institution mandated mediation meets this purpose. A commercial dispute can be resolved within the mandatory pre-institution mediation time frame, preventing the case from having to be heard and decided by a court.

As a result, it was determined that both Laxmi Polyfab and Dredging and Desiltation Company Pvt. Ltd. must adhere to Section 12A of the Act. In the matter of Awasthi Motors v. Managing Director M/s. Energy Electricals Vehicle and Another, the Allahabad High Court concurred with this evaluation.

Madras High Court's viewpoint on Section 12A of CCA,2015

In contrast to the aforementioned rulings, the Madras High Court stated that one has right to access justice, which is a constitutional right, cannot be denied or deprived for not resorting to mediation in Shahi Exports Private Limited v. Goldstar Line Limited &Others. The fact that Rule 3(1) of the Commercial Courts, (Pre-Institution Mediation and Settlement) Rule, 2019 (the "Commercial Courts Rules") utilizes the phrase "shall," indicating that the Court is not a replacement for alternative conflict resolution procedures, was also taken into consideration.

By taking into account a consistent reading of Section 12A of the Act and Rule 3 (1) of the Commercial Courts Rules, the Court concluded that Section 12A of the Commercial Courts Act was not a mandatory provision. A party seeking justice should not be discouraged from going straight to court without first considering other dispute resolution options like mediation.

There are some situations where a pre-litigation or early mediation is not feasible. However, in some cases, the benefits to all parties involved may make pre-litigation mediation the optimal course of action. There are a number of advantages to pursuing mediation before going to court. In the beginning, litigation may cause plaintiffs to experience significant emotional stress, particularly those involved in contentious cases.

CONCLUSION

"... Pre-litigation mediation is the need of the hour to avoid delaying justice and for early disposal of pending cases, which are mounting. I think the time is ripe to devise a comprehensive legislation, which contains compulsory pre- litigation mediation..."

Mr. S A. Bobde, Former Chief Justice of India

The Covid-19 delay has added years to a system that was already overworked in a nation that is working to eliminate the backlog of more than 4.5 crore cases. The adversarial method of dispute resolution in India has resulted in a massive backlog that has all but shut down the court system. India's then-former Chief Justice, Justice T.S. Thakur, stated in April 2016 that a lack of judges was the main cause of the backlog of cases. But merely increasing the size of the legal system won't make the problem go away. The first instance court is not open to new cases. To try to fill this gap, legislation mandating mediation of commercial conflicts prior to litigation as well as alternative dispute resolution procedures like arbitration have been implemented. However, arbitration has not always been as successful as it was supposed to be in the past due to judicial interference at various points.

In India, the use of mediation as a recognised method of resolving legal disputes has skyrocketed in recent years. Both court-annexed and private mediations carried out by several mediation facilities spread around the nation have shown notable success.

Because both parties find the real litigation procedure to be frustrating, pre-litigation is becoming more and more popular. It can take a long time, cost a lot of money, and result in an unfavourable judgement that can be challenged numerous times when a minor dispute is brought to court. As a result of the stress, they are under, it is logical that persons whose lives are occupied by spurious lawsuits may experience some mental health concerns. Contrarily, pre-litigation allows the parties a chance to settle their disagreements in a way that fits their needs in terms of schedule, expense, and procedure.

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