

MEDIATION – INCOMPLETE ASPECTS

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1. Mediation has become a well known alternative dispute resolution machinery in the judicial administration in India. The cases pending before the courts are referred to mediation for settlement. The parties will appear before the Mediator who will be a neutral 3rd party and will assist, help and guide the parties to arrive at an agreement which will be known as “Settlement Agreement” which contains the terms of settlement between the parties. It is popularly explained that the Mediator will help the parties to explore the remedy which are already with the parties. The parties, their advocates if represented by and the Mediator himself will sign the settlement Agreement. The Mediator thereafter send his report known as Mediation report to the court concerned along with the settlement agreement. The court on receipt of the agreement between the parties and the letter of the Mediator, after due intimation to the parties, record the settlement, if it is not collusive.

2. There is very vast difference between the Lok Adalat Award and a Mediation agreement. Nowadays there are lot of national level Lok Adalats are being conducted under the able guidance and directions of the Supreme Court of India. Generally the litigants are not aware of the legal consequences of a Mediation agreement and they are usually considering the mediation agreement equivalent to an award passed by Lok Adalat. A Lok Adalat award, is itself a decree and having enforceability as a decree of a civil court for all purposes. A lok

Aladat award needs no approval, endorsement or seal of the court which referred the case to Lok Adalat. The court which referred the case to Lok Adalat, if received the award, then it is sufficient and lawful for the court to just note down that the case settled at lok adalat and dispose the case. Whereas the Mediation Settlement Agreement is only an agreement between the parties to the case and the same has to be sent to the court concerned for passing necessary order or decree pursuant to the settlement agreement. In such cases mostly advocates and parties are representing before the courts that their case is settled at mediation and the case need not be proceeded further. They consider that the case disputes ends with the due execution of the Mediation Settlement Agreement. But the parties to the mediation settlement agreement shall necessarily appear before the court concerned and shall request the court to pass a decree accepting and as per the terms of the mediation settlement agreements. Only after passing of such decree the Mediation settlement agreement gets legal sanctity and culminates as a decree. The reasons for non follow up by the parties of the mediation settlement agreement before the courts are, in certain mediation settlement agreements the entire obligations of the parties got fulfilled during the course of mediation itself. For example in a money claim if the debtor undertakes to pay the entire amount in 8 monthly installments, the mediation will be stretched for 8 months and the entire amount will be repaid during the mediation itself. In such cases the parties tend to think that their case is entirely settled in mediation and they fail to follow up the case before the court and to ensure that the mediation agreement also gets endorsed in the case in the court and case is closed by way of an order or decree. Thus, the litigants shall be properly educated to know that mediation settlement agreement is incomplete until it gets endorsed by the court which referred the case for mediation. The courts also shall ensure that the cases settled in mediation shall not be treated as cases settled at Lok Adalat and give a proper disposal of the case as per the mediation agreement by an order or decree.

3. The supreme court of India gives much importance to ensure that adequate number of pending cases are being referred for mediation. Nevertheless, there is no comprehensive law passed either by the Central Government or by the State government on this subject. The Mediation and Conciliation Project Committee of the Supreme court of India had published a Mediation Training Manual of India which describes the process of mediation, roles of mediators, roles of lawyers, roles of referring court and related aspects, but the same can be used in mediation training programs and also as a guide. We are not totally helpless, thanks to the Madras High Court which passed the 'Tamilnadu Mediation Rules, 2010' published in Tamilnadu Government Gazette on 23.09.2010. In the above rules Rule 25 speaks about Settlement Agreement.

25. Settlement Agreement – (1) Where an agreement is reached between the parties in regard to all the issues in the suit or part of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holders. If counsels have represented the parties, they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the court in which the suit is pending

(3) where no agreement is arrived between the parties, before the time limit specified in rule 19 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said court in writing”

Rule 26 of the above Rules clearly stipulates the duties of the court on receipt of the mediation settlement agreement.

26. Court to order or decree – (1) On receipt of the agreement between the parties and the letter of the mediator's the court shall, after due intimation to the parties, record the settlement, if it is not collusive.

(2) The court shall then pass an order or decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the legal proceeding.

(3) If the settlement disposes of certain issues arising in the legal proceeding, the court shall record the settlement and -

a. If certain issues are severable from other issues and if an order or decree is possible to be passed to the extent of the settlement covered by those issues, the court may pass an order or decree in accordance with the settlement on those issues without waiting for a decision of the court on the other issues which are not settled

b. If the issues are not severable, the court shall wait for a decision of the court on the other issues, which are not settled.

4. Thus, the only aspect that the referring court shall consider is that the settlement agreement is not collusive. Rule 26 also empowers a court to approve partial settlement of issues. In such cases if it is possible to pass a decree with respect to settled issues then a decree shall be passed and the case is to be proceeded with respect to the remaining issues. If the settled issues are not severable then the court has to wait for the final disposal of the case and to pass a comprehensive decree deciding all the issues. While passing an order or decree pursuant to the settlement mediation agreement, for example, it is sufficient for the court to pass a decree treating the settlement agreement as a compromise under Order 23 Rule 3 C.P.C. and can pass a decree stating that the settlement agreement forms part of the decree. But under Order 23 Rule 3 C.P.C. it is expressly provided that the compromise between the parties shall be proved to the satisfaction of the court. The Rule 26 of 'Tamilnadu Mediation Rules, 2010' does not contain an equivalent term, even then it is obligatory on the part of the court to satisfy itself two things before recording the settlement agreement, that the settlement agreement is voluntary and not collusive.

5. Finally, I want to conclude with an analysis of a hypothetical situation, which may certainly arise in some case. Assuming that after the mediation settlement agreement reaches the court, the parties appeared before the court and anyone of party or both not accepted the terms of agreement terming it is not voluntary or for any other reason like coercion, undue influence, fraud or mistake, then what will be its legal consequences. Admittedly if the parties disputed the settlement agreement before the court, the court cannot mechanically pass a decree without addressing the denial of the party. Can a beneficiary of such disputed settlement agreement claim that he will enforce the mediation settlement agreement in a separate action as it contained a valid agreement. The answer will be no, if we consider Rule 21 of the 'Tamilnadu Mediation Rules, 2010' which states that there shall be confidentiality, disclosure and inadmissibility of Information.

21. Confidentiality, disclosure and inadmissibility of information:

(1) Where a party gives information to the mediator subject to a specific condition that it shall be kept confidential, the mediator shall not disclose that information to the other party.

(2) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge the information regarding the documents or the oral information or as to what transpired during the mediation.

(3) Parties shall maintain confidentiality in respect of events that have transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to -

(a) Views expressed by a party in the court of the mediation proceedings -

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) proposals made or views expressed by the mediator;

(d) admission made by a party in the course of mediation proceedings;

(e) the fact that a party had or had not indicated willingness to accept a proposal;

(4) There shall be no stenographic or audio or video recording of the mediation proceedings.

6. The above Rule 21 states that the parties shall not rely on or introduce the said information in any other proceeding including the fact that a party had or had not indicated willingness to accept a proposal. When the parties are precluded from relying upon what transpired before the mediation in any proceedings then they are also indirectly prevented from relying upon the disputed mediation agreement, which is the outcome of the process, if the same is not fulfilled by getting endorsement from the court concerned. Thus, an incomplete mediation settlement agreement, that is to say not approved by a court cannot be the subject matter of another litigation and cannot be enforced indirectly. If such enforceability is attached to settlement mediation agreement as a common law remedy, then the parties will be indifferent in properly submitting their settlement agreement before the concerned court and hence such independent remedy cannot be attached to mediation settlement agreement. In such case of disputed mediation agreement, the court can ignore the mediation settlement agreement treating the case as not settled at mediation and can decide the case on merits.

Ensure that the Mediation settlement agreements are endorsed by courts by passing necessary orders or decrees.