

JUDICIAL INTERVENTION IN MEDIATION SETTLEMENTS

SATYAM SINGLA*

With the increasing number of litigations, the scope for Alternative Dispute Resolution has also increased manifold, for several reasons including less time and substantial difference in the monetary burden. Of the several ADR mechanisms, one is Mediation, which, in the simplest terms, refers to the exploring of alternatives by the parties themselves. The present piece of work elucidates the concept of mediation and its reception in the Indian Legal System. The focal point of the paper would be detailing the scope and instances of judicial intervention in the process of mediation and settlements arrived thereof. Given its private nature, Courts across the country have taken a back seat when it comes to mediation settlement.. However, they have not acted as a mere spectator whenever a settlement has violated and encroached upon public interest or any other settled principle of law. Waiving of any statutory right in a mediation settlement has also been deprecated by the Courts when the rights could not have been waived and the author has tried to serve the entire legal position in respect of mediation vide the present work. Enforcement of a mediation settlement is a matter of constant debate owing to divergent views of courts across the country which has made the situation more cumbersome. Parties often resort to contempt jurisdiction of the court to enforce the settlements but the same has to be deprecated for being inappropriate. Few suggestions of the author with respect to the codified law for mediation and enforcement of settlement arrived thereof have also been inculcated to fill the existing gaps.

* Satyam Singla is a fifth-year student pursuing BBA LLB from Symbiosis Law School, Noida and can be contacted at satyamsingla2000@gmail.com.

Keywords: Mediation, Decree, Contempt, Judicial Intervention, Waiving of Rights, Enforcement

I. INTRODUCTION

The Law Commission in its 245th Report has observed that timely justice is essential to strengthen the rule of law and to enforce the right of access to justice which has been enshrined in Part III of the Constitution of India, 1950.¹ Justice Markandey Katju had expressed his concerns over the arrears of cases in Indian judiciary including the Supreme Court.² The former Chief Justice of India (or 'CJI'), Justice S.A. Bobde had also emphasized on the importance of compulsory pre-litigation mediation which prevents not only the wastage of precious judicial time but also saves the time of litigating parties. He appreciated how the Commercial Courts Act, 2015³ requires compulsory pre-litigation mediation and how other institutions should also follow the same.⁴ Apprehending their contribution in this backlog, people generally hesitate to approach the courts of law. A case, once filed, is likely to go on for a long time, sometimes owing to the delaying tactics adopted by either party. In this situation, Alternative Dispute Resolution (hereinafter referred to as 'ADR') mechanism has come a long way as a blessing in disguise. Despite having statutory recognition, ADR has not become a common practice and has been looked down by many. Multiple reasons could be associated with the same which range from lack of knowledge of the parties to lack of experience of the advocates, from disinterest of the parties to a lack of security and trust amongst the parties. The Judiciary has acknowledged the same and has worked a lot upon the efficient enforcement of this mechanism in order to combat the problems faced by parties in litigation. Litigation

¹ LAW COMMISSION OF INDIA, REPORT NO. 245: REPORT ON ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER, 6 (2014) (hereinafter 'Report').

² MARKANDEY KATJU, WHITHER INDIAN JUDICIARY 204 (Bloomsbury Publ'g 2018).

³ Commercial Courts Act, 2015, § 12 (A), No. 4, Acts of Parliament, 2016 (India).

⁴ *CJI Bobde Bats for Law Containing Compulsory 'Pre-litigation Mediation'*, THE WEEK (Feb. 8, 2020), <https://www.theweek.in/news/india/2020/02/08/cji-bobde-bats-for-law-containing-compulsory-pre-litigation-mediation.html> (hereinafter 'Pre-litigation mediation').

puts a burden on the pocket of the parties, often takes a long time and causes mental agony as a result. Parties might cease to have a cordial relation with each other. On the other hand, in ADR mechanism, owing to confidentiality and the absence of a rigid process, parties can avoid the disadvantages and limitations that they would otherwise face with litigation. Through judicial pronouncements, we have a set of settled principles which govern such processes and therefore, assist the parties in reaching a settlement amicably. Needless to say, active judicial intervention in such processes has encouraged the parties to approach the courts in some cases, but the fact that these mechanisms help to reduce arrears of cases cannot be ignored. The backlog of cases can also be reduced by allowing judicial intervention only after a matter has undergone any ADR process. The recommendations of the Report,⁵ therefore, contained one recommendation relating to improvement in enforcement of such alternative dispute resolution mechanisms. These mechanisms include mediation, conciliation, arbitration, and judicial settlements. The present paper talks about mediation as a mechanism of alternative dispute resolution. Instead of pondering upon mediation, the paper focuses on the judicial intervention in mediation settlements. The courts have, at times, taken an active role in modifying the settlement arrived at between parties on the ground of it being contrary to law or public policy. The various areas where the court would ordinarily interfere with mediation settlements shall be discussed in the following section. Next, the issue of enforcement of the mediation agreement has been discussed in detail. The provision of contempt in respect of the enforcement of such settlement/agreement has also been elucidated.

II. MEDIATION

The term 'ADR' has been coined to represent an aggregate of the methods that seek to resolve conflict by reaching consensual agreement amongst the parties, with less formality and technicality as compared to other legal processes.⁶ Mediation as one of the mechanisms of ADR has gained a lot of momentum especially in recent years. Credit has

⁵ REPORT, *supra* note 1.

⁶ SRIRAM PANCHU, *MEDIATION PRACTICE AND LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION*, 9 (LexisNexis, 2012) (hereinafter 'Panchu').

to be given to the role of the judiciary which, through various judicial pronouncements, mandated mediation and other ADR processes before certain matters are taken up by the Court. Mediation has not been defined either by the Code of Civil Procedure, 1908⁷ (or 'CPC') or any other law. This issue was examined at length by various reports of the Law Commission of India⁸ and the Supreme Court of India, which in the year 2005 has formally defined it.⁹

A. Characteristics of Mediation

Mediation is a non-binding procedure. The mediator is not a decision maker and he is there only to assist the parties in reaching their own decisions.¹⁰ Mediation is a process of assisted negotiation guided by a trained, independent professional.¹¹ It gives the parties in dispute and their representatives an opportunity to agree jointly to the details of any settlement after an examination of their respective needs and of the options and possibilities for resolution.¹² The parties are at liberty to arrive at any settlement according to their mutual desire and to resolve the dispute amicably. Both the parties are in a position to negotiate with the other party according to their needs. The Mediator has the responsibility to act fairly and to ensure that the settlement arrived at between the parties is a result of their own will and neither party has dominated the mediation proceedings. The fact that mediation has the potential to provide an expeditious, economical and private resolution of the problems cannot be ignored.¹³

⁷ Code of Civil Procedure, 1908, No. 5, Acts of Parliament of 1908 (India).

⁸ LAW COMMISSION OF INDIA, REPORT NO. 222: NEED FOR JUSTICE-DISPENSATION THROUGH ADR ETC.31 (2009); LAW COMMISSION OF INDIA, REPORT NO. 238: AMENDMENTS ON SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908 AND ALLIED PROVISIONS 18 (2011).

⁹ Salem Advocate Bar Assn. v. Union of India, (2005) 6 SCC 344; Civil Procedure ADR and Mediation Rules, 2003, Rule 4 (India).

¹⁰ WIPO, MEDIATION: FREQUENTLY ASKED QUESTIONS, <https://www.wipo.int/amc/en/mediation/guide>.

¹¹ ROGER FISHER & WILLIAM URY, GETTING TO YES, 109 (Bruce Patton ed., 3rd ed., Random House UK 2012).

¹² VARDIA BONDY & MARGARET DOYLE, MEDIATION IN JUDICIAL REVIEW: A PRACTICAL HANDBOOK FOR LAWYERS, 19 (The Pub. L. Project 2011).

¹³ Dhananjaya Y. Chandrachud, *Mediation – Realizing the Potential and Designing Implementation Strategies*, LAW COMMISSION OF INDIA, http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.

In the absence of any dedicated legislation qua the procedure of mediation, every High Court has been given the liberty to adopt the Model Rules, 2003¹⁴ or to frame new rules for its subordinate courts.¹⁵ Various High Courts have placed their own rules in practice which now govern the entire procedure of mediation;¹⁶ however all of them have chosen, and rightly so, to retain the basic idea behind mediation. Mediation with a view to settle the dispute would not *ipso facto* take the case outside the judicial system.

As such, all cases cannot be referred to mediation. Cases of criminal nature involving serious offences cannot be settled outside the court. Notably, in order to further the objective of mediation, civil cases involving the State as either respondent or petitioner can be settled in a mediation.¹⁷

B. Schools of Mediation

There are two prominent schools of mediation— Facilitative and Evaluative. The former school recognizes a very limited role of the mediator and states that the mediator is there only to facilitate communication between the parties and the latter states that the mediator shall provide a non-binding assessment and therefore has a more active role in mediation. It, therefore, considers mediation at par with conciliation.¹⁸ In India, facilitative school has been well recognized and the role of mediator thus has always remained limited.

III. STATUTORY RECOGNITION

Mediation as an ADR mechanism was introduced in the CPC in the year 1999.¹⁹ However, it is not the first time that any Indian

¹⁴ LAW COMMISSION OF INDIA, CIVIL PROCEDURE ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION RULES, (2003).

¹⁵ Code of Civil Procedure, 1908, § 89 (2)(d), No. 5, Acts of Parliament of 1908 (India).

¹⁶ Mediation and Conciliation Rules, 2004, 171 DHC Rules; see also: Tamil Nadu Mediation Rules, 2010, Roc. No. 194-A/2010/F1; see also: Uttar Pradesh Civil Procedure Mediation Rules, 1253/7-Nyaya-2-2009-319-08(2009); see also: Civil Procedure Mediation (Gujarat) Draft Rules (2007).

¹⁷ REPORT, *supra* note 1 at 193.

¹⁸ PANCHU, *supra* note 6 at 297.

¹⁹ Code of Civil Procedure (Amendment) Act, 1999, § 7, No. 46, Acts of Parliament, 1999 (India).

Law has recognized mediation as Acts enacted prior to it have also recognized mediation and other ADR mechanisms.²⁰ However, with the 1999 amendment of the CPC, it can be said that mediation evolved significantly. The validity of the amendment act was upheld in *Salem Advocate Bar Assn. v. Union of India*²¹ wherein the Supreme Court did not overlook the fact that the Arbitration and Conciliation Act, 1996²² was already in force and observed that the purpose of amendment was to further the objective of the legislation to get the cases settled out of court more efficiently.²³ Another reason for the amendment, as observed by the court, was the delay in disposal and lack of sufficient judges in the Indian Judiciary. The issue regarding the enforcement of ADR through CPC was then considered by the Court²⁴ after taking into account the report submitted by the Jagannadh Rao Committee.²⁵ It was laid down that a matter once sent to Mediation will have to be listed back to the original court for the purpose of passage of a decree, in cases where a settlement is arrived at or otherwise, for trial. Therefore, the jurisdiction of the court doesn't go with the reference of the case of mediation.

It is clear that suits under CPC can be referred to mediation.²⁶ However, the issue arises with respect to whether criminal cases can be referred to mediation and therefore, whether the Code of Criminal Procedure, 1973²⁷ (hereinafter referred to as 'Cr.P.C.') recognizes the application of mediation. Owing to the objective of criminal law, the nature of penalty prescribed and the complexity involved in the trial and

²⁰ Legal Services Authority Act, 1987, § 19, No. 39, Acts of Parliament, 1987 (India); Arbitration and Conciliation Act, 1996, § 30, No. 26, Acts of Parliament, 1996 (India); Hindu Marriage Act, 1955, § 23, No. 25, Acts of Parliament, 1955 (India); Family Courts Act, 1984, § 9, No. 66, Acts of Parliament, 1984 (India); Industrial Disputes Act, 1947, § 10, No. 14, Acts of Parliament, 1947 (India).

²¹ *Salem Advocate Bar Assn. v. Union of India*, (2003) 1 SCC 49.

²² Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

²³ *Afcons infrastructure Ltd. v. Chierian Verkay Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

²⁴ *Salem Advocate Bar Assn. v. Union of India*, (2005) 6 SCC 344.

²⁵ *Salem Advocate Bar Assn. v. Union of India*, (2003) 1 SCC 49 (appointing S. Jagannadh Rao Committee).

²⁶ Code of Civil Procedure, 1908, § 89, No. 5, Acts of Parliament of 1908 (India).

²⁷ Code of Criminal Procedure, 1973, No. 2, 1973, Acts of Parliament, 1973 (India).

its direct nexus with 'liberty' under Article 21 of the Constitution, the answer to this question, *prima facie* appears to be in the negative.²⁸

It is argued here that the issue before the Supreme Court²⁹ was not related to the nature of matters or disputes which can referred to mediation or other ADR processes. Therefore, the observation of the court was not an authority and was merely an obiter.³⁰ Obiter are not authoritative, unlike *ratio decidendi*.³¹ This contention of the author also finds its support from a subsequent judicial pronouncement.³²

The provisions of the Cr.P.C. cannot be overlooked as the same lays down the procedure for trial in criminal cases. The objective of mediation and the provisions of the Act are to be read harmoniously. It is admitted that there is no express provision enabling the trial court established under Cr.P.C. to refer any case before it, to mediation. However, it must be noticed that there exists no provision stating otherwise. Therefore, it cannot be said that the statute bars the reference of cases to mediation or any other ADR mechanism. Cr.P.C, on the other hand, recognizes the compounding of criminal cases³³ and therefore, quashing of criminal proceedings in cases as prescribed under the Code is permissible. The provision of compounding inherently envisages the element of settlement of the issue(s). As stated above, settlement can obviously be only by a voluntary process *inter se* the parties. However, the parties may, if they want, take services of a third party such as mediator or conciliator and therefore, it can be said that the criminal courts also have the power to refer the cases to mediation. This aspect would be dealt in greater detail in the following sections.

IV. JUDICIAL INTERVENTION IN MEDIATION

Though the debate about separation of powers *vis-à-vis* judicial activism is never ending, there exists no doctrine of separation of power

²⁸ Afcons Infrastructure Ltd. v. Cherian Verkey Construction Co. (P) Ltd., (2010) 8 SCC 24.

²⁹ *Id.*

³⁰ Directors of Settlements v. M.R. Apparao, (2002) 4 SCC 638.

³¹ MCD v. Gurnam Kaur, (1989) 1 SCC 101 : AIR 1989 SC 38.

³² Dayawati v. Yogesh Kumar Gosain, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

³³ Code of Criminal Procedure, 1973, § 320, No. 2, 1973, Acts of Parliament, 1973 (India).

in a stricter sense.³⁴ The Judiciary has also intervened in the matter of Mediation on several instances in order to promote social welfare and meet the ends of justice. In the absence of any dedicated legislation, courts throughout the nation have taken the opportunity to delve into this issue and its ancillary matters. The following section of the paper shall discuss such instances. The first section will talk about how the judiciary, without any express legislative policy, paved the way for cases which are suitable for mediation and the enforcement of mediation agreement. Secondly, it will discuss how the judiciary has altered terms and conditions of the settlement arrived at between the parties by respecting the privity of contract. Thirdly, the discussion will focus on how statutory rights have been entertained in mediation, followed by the concept of enforcement of mediation agreement and the repercussions of non-compliance.

V. REFERENCE OF CASES TO MEDIATION

There are two ways through which a mediation center takes up cases. One is the court-annexed or court-referred mediation and the other is pre-litigation mediation which is a voluntary exercise by the parties to a dispute. The law on reference to mediation has undergone a substantial change especially after the *Afcon* case.³⁵

Prima facie, if one keeps the cases of civil nature aside, it seems that only those cases which are compoundable³⁶ under the criminal law can be referred to mediation for settlement.³⁷ One may argue that the offences, on the basis of severity and the impact on society, have been classified as compoundable or non-compoundable. This distinction between compoundable and non-compoundable offences has been respected earlier while applying the principles of ADR as the cases belonging to the latter class were not referred to mediation or any other kind of ADR for settlement.³⁸ There have been judicial pronouncements

³⁴ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

³⁵ *Afcons Infrastructure Ltd. v. Cherian Verkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

³⁶ Code of Criminal Procedure, 1973, § 320, No. 2, 1973, Acts of Parliament, 1973 (India).

³⁷ *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

³⁸ Code of Criminal Procedure, 1973, § 320(9), No. 2, 1973, Acts of Parliament, 1973(India).

supporting this hypothesis and thus, furthering the statutory provisions and intent.³⁹ However, the inherent powers of the superior court⁴⁰ can always be exercised to quash prosecution for non-compoundable offences on the limited ground that it would be impossible to record conviction of the accused person in light of the peculiar facts of the case.⁴¹ However, the situation now stands amended. No doubt the bar of Section 320(9) Cr.P.C.⁴² still exists, but non-compoundable offences can also now be settled by way of compromise between the accused and victim.⁴³ Grave offences like murder, rape⁴⁴ etc. cannot be settled at any cost and therefore, prosecution cannot be quashed even if the accused and victim arrived at a settlement for the reason that these offences are offences against the human body and are not private in nature, involving mental depravity and a serious impact upon society.⁴⁵

Therefore, the position today is that prosecution under non-compoundable offences may be quashed if the court thinks it fit in the interest of justice, especially when the parties i.e., the victim and the accused have entered into a settlement. The compounding of an offence is materially different from quashing an offence or prosecution. Compounding of the offence is governed by the statutory provision, while in quashing, the court has to apply its discretion and is guided by the material on record as to whether the ends of justice would justify such exercise of power. However, the same is subjected to the condition that the offence must not be one which has a social impact and not private to the parties as elucidated in the *Gian Singh*⁴⁶ case. One thing that quashing and compounding share is the end result which may be acquittal or dismissal of indictment.⁴⁷

³⁹ Ram Lal v. State of J&K, (1999) 2 SCC 213; Ishwar Singh v. State of M.P., (2008) 15 SCC 667.

⁴⁰ Code of Criminal Procedure, 1973, § 320, No. 2, 1973, Acts of Parliament, 1973 (India).

⁴¹ Shiji v. Radhika, (2011) 10 SCC 705; Jayrajsinh Digvijaysinh Rana v. State of Gujarat, (2012) 12 SCC 401 : (2012) 6 SCR 534.

⁴² Code of Criminal Procedure, 1973, § 320(9), No. 2, 1973, Acts of Parliament, 1973 (“No offence shall be compounded except as provided by this section.”).

⁴³ Gian Singh v. State of Punjab, (2012) 10 SCC 303.

⁴⁴ State of M.P. v. Madanlal, (2015) 7 SCC 681.

⁴⁵ Parbatbhai Aahir v. State of Gujarat, (2017) 9 SCC 641.

⁴⁶ Gian Singh v. State of Punjab, (2012) 10 SCC 303.

⁴⁷ *Id.*

When it comes to the reference of cases to mediation, the settled law is that for offences which can result in a compromise between the offender and the victim, or the prosecution in which cases can be quashed, meditation may be used for settlement of dispute.

A combined reading of the *Afcon* case⁴⁸ and the *Dayawati* case⁴⁹ shows that civil cases will be referred u/s 89 of the CPC⁵⁰ and will be settled as per the Legal Services Act, 1987 and cognizable offences will also be settled in a Lok Adalat.⁵¹ It is to be respected that it is the parties who are referred to mediation and not the *lis* that exists between the parties. The Court before referring the matter has to consider whether there are sufficient grounds to expect that a settlement will be arrived at. However, merely on this ground the jurisdiction of court to try the suit afterwards, if no settlement is arrived at between the parties, is not ousted.⁵²

The courts have classified cases of certain nature which have to undergo the ADR mechanism first. The court will not hesitate in referring the cases to mediation where the parties are familiar to each other, and confidentiality is required to maintain the dignity and integrity of the parties. One such offence is the offence of cruelty for dowry.⁵³ Though the offence is non-compoundable, the courts have been directed to refer all the cases involving family disputes to mediation.⁵⁴ Duty of court has been recognized by the judiciary to encourage genuine settlements of matrimonial disputes and as such, bar of section 320 has become inoperative for such disputes.⁵⁵

While quashing the criminal proceedings in case of any non-compoundable offence, the court is not bound by the settlement arrived at between the parties. The court is required to consider other factors such as the antecedents of the accused, the conduct of the accused, how

⁴⁸ *Afcons Infrastructure Ltd. v. Cherian Verkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

⁴⁹ *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

⁵⁰ Code of Civil Procedure, 1908, or. 10 (1)(a), No. 5, Acts of Parliament of 1908 (India).

⁵¹ Legal Services Authority Act, 1987, § 19(5), No. 39, Acts of Parliament, 1987 (India).

⁵² *Salem Advocate Bar Assn. v. Union of India*, (2005) 6 SCC 344.

⁵³ Indian Penal Code, 1860, § 498-A, No. 45, Acts of Parliament, 1860 (India).

⁵⁴ *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226 : AIR 2013 SC 2176.

⁵⁵ *Jitendra Raghuvanshi v. Babita Raghuvanshi*, (2013) 4 SCC 58.

he had managed to enter into a compromise with the complainant⁵⁶ and the possible lack of *bona fides*.⁵⁷ The same seems to be justified as the court must honor the legislative intent behind classifying certain offences as non-compoundable offences and every aspect of 'consent'. In order to serve justice and to ensure that the interests of society are not hampered with, the court must adhere to the factors elucidated by the Apex Court from time to time considering the changing societal dimensions.

Criminal proceedings in cases which have been classified as criminal but have a predominantly civil character like cases of cheque bounce⁵⁸ and like cases arising out of commercial transactions, may be quashed if the court deems the conditions of settlement fit and fair.⁵⁹ Cases involving commercial transactions are primarily civil in nature which have been masqueraded as criminal cases by the parties just to pressurize the other party to ensure timely payment of the amount involved. No purpose would be served in continuing the criminal proceedings if the party or the accused is ready to pay the entire amount to the complainant in mediation settlement or settlement arrived through any other ADR mechanism.

VI. TERMS AND CONDITIONS OF MEDIATION SETTLEMENT

The next facet of judicial intervention in the mediation proceeding is intervention in the terms and conditions of the settlement arrived at between the parties. Though, *prima facie*, it is a purely private settlement and therefore, courts generally respect the privity of the contract, there are instances where the courts have refused to certify/decree the settlement because of the presence of a condition or conditions and have referred the matter back to mediation. Though the scope of settlement cannot be narrowed down,⁶⁰ the courts have done so, in order to protect the larger interest. The general principles governing this are the same as that of a contract. This means that a

⁵⁶ State of M.P. v. Laxmi Narayan, (2019) 5 SCC 688 : AIR 2019 SC 1296.

⁵⁷ Yashpal Chaudhrani v. State (Govt. of NCT of Delhi), 2019 SCC OnLine Del 8179.

⁵⁸ Negotiable Instrument Act, 1881, § 138, No. 26, Acts of Parliament, 1881 (India).

⁵⁹ Yashpal Chaudhrani v. State (Govt. of NCT of Delhi), 2019 SCC OnLine Del 8179.

⁶⁰ M.C. Subramaniam v. Sakthi Finance Ltd., (2020) 3 CTC 807.

condition which is not in public interest,⁶¹ or frustrates the purpose of mediation, or is barred by the law of the land⁶² or any other condition as the court may deem as uncalled for or inappropriate⁶³ has to be removed or reworked. Now this contention of the author finds its force from recent judicial pronouncements of different Courts apart from the statutory provisions.

The rights of a minor,⁶⁴ in case of a mediation agreement resulting between the parents of the child, cannot be compromised in any manner. This is in concurrence with the provisions of Hindu Minority and Guardianship Act, 1956.⁶⁵ The parents i.e., the natural guardians are bound to perform the acts which are beneficial for the minor and not detrimental for him/her. This also draws its authority from the settled position of law.⁶⁶ In a recent order,⁶⁷ the Apex Court has re-affirmed the position and has held that the rights of child cannot be compromised by the guardian and the court exercised its power under Article 142 of the Constitution of India, 1950 to set aside the relevant condition from the settlement. The subordinate courts⁶⁸ took no time to enforce the same and had also asked the parties before it to re-work the settlement conditions wherein the parties had compromised the rights of their minor child. It is basically a principle of prudence to avoid any future litigation as the minor has the right to get the agreement set-aside.⁶⁹

In a case where the settlement condition has given birth to a fresh cause of action, the court⁷⁰ has reprimanded the mediation cell and has directed that a mediation settlement should not give birth to any other cause of action with the parties. The objective of mediation is to check the arrear of the cases by limiting the number of suits filed and

⁶¹ Sukna Mahato v. Sadhana Debnath, 2017 SCC OnLine Cal 18565 : (2018) 2 ICC 286.

⁶² Code of Civil Procedure, 1908, or. 23(3), No. 5, Acts of Parliament of 1908 (India) (“[B]y any lawful agreement or compromise”).

⁶³ Commercial Courts Act, 2015, § 12, No. 4, Acts of Parliament, 2016 (India).

⁶⁴ Hindu Minority and Guardianship Act, 1956, § 4 (a), No. 32, Acts of Parliament, 1956 (India).

⁶⁵ Hindu Minority and Guardianship Act, 1956, § 8, No. 32, Acts of Parliament, 1956 (India).

⁶⁶ Imambandi v. Mutsaddi, 1918 SCC OnLine PC 12 : AIR 1918 PC 11.

⁶⁷ Ganesh v. Sudhirkumar Shrivastava, 2019 SCC OnLine SC 1107.

⁶⁸ Rakesh Jain v. State, Crl. MC No. 2935 of 2019, decided on 6-9-2019 (Del).

⁶⁹ Hindu Minority and Guardianship Act, 1956, § 8 (2), No. 32, Acts of Parliament, 1956 (India).

⁷⁰ Karuna Bhalla v. Rajeev Bansal, 2017 SCC OnLine Del 8288.

therefore, such a condition would infact frustrate the purpose and objective of the mediation.

The court will not ordinarily set-aside or interfere with the mediation settlement merely on a bald allegation of fraud or undue influence as there is a presumption of genuineness attached with the settlement. It will frustrate the purpose of the mediation and therefore, the party has to prove that any kind of fraud has been played on it for arriving at a settlement.⁷¹

It is true that the court's concern has always been whether the parties had entered into the agreement on their own will after acknowledging and understanding each and every clause of the agreement, and without the presence of any kind of duress, undue influence, misrepresentation, fraud, coercion or unequal bargaining positions.⁷² If the court finds its answer in the affirmative, the court will not hesitate in passing a decree. The way to determine or answer the same is to look at whether the agreement concluded after extensive negotiations is closest to an acceptable, just and equitable resolution.⁷³

The private mediation settlement agreements also follow the principles laid down under contract law,⁷⁴ as explained above. Therefore, the courts are under an obligation to ensure that the terms of the settlement are not in contravention with any principle or provision of contract law.⁷⁵

Where one party is under an obligation to do certain acts, the same cannot form the part of consideration for any settlement. It will go against the settled position of law i.e., doctrine of pre-existing duty⁷⁶ and therefore, such a condition in a settlement is not a valid condition.⁷⁷ The law doesn't classify it as a valid consideration as the party is otherwise also, duty bound to do so. In any event, it cannot avoid its liability and thus, it will render the mediation agreement for one party, of no benefit.

⁷¹ Bhai Sarabjit Singh v. Indu Sabharwal, 2014 SCC OnLine Del 2575 : (2014) 211 DLT 171.

⁷² Dayawati v. Yogesh Kumar Gosain, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

⁷³ Debbie Ong Siew Ling, *When Spouses Agree*, 18 SING. ACAD. OF L. J. 96, (2006).

⁷⁴ SUP. CT. OF INDIA, MEDIATION AND TRAINING MANUAL OF INDIA, (2018) (hereinafter 'Manual').

⁷⁵ Sukna Mahato v. Sadhana Debnath, 2017 SCC OnLine Cal 18565 : (2018) 2 ICC 286.

⁷⁶ FREDERICK POLLOCK ET AL., THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT, 101 (13th ed. 2007).

⁷⁷ Anuradha Samir Vennangot v. Mohandas Samir Vennangot, (2015) 16 SCC 596.

Had he not entered into the agreement, the other party would still have a duty to perform the act, which has now been colored as consideration.

Consent given under duress is not a valid consent. The party might have had to compromise his/her claim not out of his/her own will but owing to facts and especially the duress under which the said agreement has been arrived at between those concerned parties. The law cannot allow one party to take the benefit of the duress of another party. The court had set-aside the settlement for dissolution of marriage as the same was consented by one party just to save her life.⁷⁸ The court had discussed the provisions of Hindu law⁷⁹ and Contract Law and therefore had hinted that the settlements arrived must satisfy the principle of free consent.⁸⁰

The sanctity of the court has to be respected and the personal agreements cannot govern the procedure of working of any court. The parties to the settlement cannot decide the manner in which the suit or the proceeding has to be conducted or concluded. That is the job of the court to decide, and the parties are incompetent to decide upon the same. The court will not take into account such conditions while passing a decree recording settlement between the parties.⁸¹

The court will also not honor any condition in any settlement where the rights of a person, not a party to the mediation are affected unless and until the parties have a separable right in respect of the dispute and the rights of such a person has not been affected and any condition of the settlement has not caused any kind of prejudice to that person.⁸² It is based on the principle of *Audi Alterm Partem* i.e., hear the other side. One cannot decide the rights of any other person especially to the prejudice of that concerned person without giving a reasonable opportunity to him. The Courts are duty bound to make ensure that the principles of natural justice are not violated and any such agreement which tends to prejudice the rights of a party whose interest has not

⁷⁸ *Id.*

⁷⁹ Hindu Marriage Act, 1955, § 23 (1) (bb), No. 25, Acts of Parliament, 1955 (India).

⁸⁰ Rashika Narain & Abhinav Sankaranarayanan, *Formulating a Model Legislative Framework for Mediation in India*, 11 NUJS L. REV. 2, 75 (2018).

⁸¹ Mohanan P.K. v. Sudakshina Ramakrishnan, 2017 SCC OnLine Ker 4735 : (2017) 3 KHC 155.

⁸² Sukna Mahato v. Sadhana Debnath, 2017 SCC OnLine Cal 18565 : (2018) 2 ICC 286.

been represented properly shall be subjected to strict scrutiny of the court.

If the statute bars the waiving of any right conferred by it, then any condition contrary to the same would go against the public policy.⁸³ The same seems to be justified when read with the Lockean theory of social contract. Action of one person should not go against the right of any other person and therefore, larger societal interest supersedes the individual interest. The judiciary has always stepped in the picture when the need of the same was felt by it, in order to save the larger public interest. Therefore, any compromise or settlement arrived at between the parties, if contains any condition which is against the public policy,⁸⁴ would to that extent be set-aside by the court.⁸⁵

VII. SETTLEMENT VIS-À-VIS STATUTORY RIGHT

‘Right’, a nomenclature which has been used to describe what all actions are permissible in the eyes of law, has been pondered upon extensively.⁸⁶ It represents what set of actions can be done by an individual and therefore, also explains what cannot be done. Statutory rights are the rights which have been conferred upon an individual by a statute, in furtherance of the objective of that statute or to meet societal needs. In any kind of *lis*, the party approaching the Court for a suitable remedy, does so by alleging that his/her legal right has been infringed upon by the act of another party.

One cannot waive his/her fundamental rights as enshrined in Part III of the Constitution.⁸⁷ That being a settled law, the issue of whether any mediation settlement can have any condition contrary to the statutory rights of any party to it, needs to be addressed. The basic premise of this issue is that statutory rights vis-à-vis claims can be a subject matter

⁸³ Rajat Gupta v. Rupali Gupta, 2018 SCC OnLine Del 9005 : (2018) 249 DLT 289; Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619.

⁸⁴ Indian Contract Act, 1872, § 25, No. 9, Acts of Parliament of 1872 (India).

⁸⁵ Nagendrappa Natikar v. Neelamma, (2014) 14 SCC 452.

⁸⁶ Leif Wenar, *Rights*, THE STAN. ENCYCLOPEDIA OF PHIL. (Apr. 23, 2020, 4:15 PM), <https://plato.stanford.edu/archives/spr2020/entries/rights> (“Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states.”).

⁸⁷ Basheshar Nath v. CIT, AIR 1959 SC 149.

of Mediation. The correctness of the premise or the hypothesis will be examined first and then the issue will be answered.

To illustrate, a victim has a right to get the First Information Report (hereinafter referred as 'FIR') registered under section 154 of Cr.P.C against a perpetrator by virtue of *Lalita Kumari*⁸⁸ and to get the same investigated. If a settlement is arrived at between the parties and they approach the High Court for quashing of the said FIR under section 482 of Cr.P.C, on the basis of such settlement, the court upon its satisfaction⁸⁹ may quash such criminal proceedings. Now what has conspired is that the victim has exercised his/her right in the beginning but has waived the same in the future..From this example, it can clearly be ascertained that the statutory rights can be waived of through the settlement.

Having established that the statutory rights and corresponding claims are subject to mediation proceedings, the next issue is whether any term or condition in the settlement arrived between the parties through mediation, can go against the same. Can a party to the settlement waive any of its statutory rights? Whether any agreement can be made in contravention of any statutory right? Whether the parties to an agreement, when they have decided to waive any of their statutory rights, claim their right afterwards and if yes, would it not amount to contempt of court as the parties had already submitted this waiver to the Court?

The general principle is that a person has the right to waive the benefit he could have availed through any law or rule. The law or rule might have been framed for the benefit of the said individual only, but the law confers upon him the power to waive the same till the time any public right⁹⁰ is not infringed due to such action and the same must not

⁸⁸ *Lalita Kumari v. State of U.P.*, (2012) 4 SCC 1 : AIR 2012 SC 1515.

⁸⁹ *Gian Singh v. State of Punjab*, (2012) 10 SCC 303; *Afcons Infrastructure Ltd. v. Cherian Verkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24; Code of Criminal Procedure, 1973, No. 2, 1973, Acts of Parliament, 1973 (India).

⁹⁰ *Indira Bai v. Nand Kishore*, (1990) 4 SCC 668 (determining the nature of the right waived i.e., whether private or public, it is to be seen that whether the right was of the party alone or of the public also in the sense that the general welfare of the society is involved).

be against public policy.⁹¹ The law regarding waiver has been discussed by the Apex Court many times. Waiver⁹² is nothing but an agreement not to assert a right or to release a right.⁹³ A right can be waived by a party in whose favor the law vests the right. A waiver is a question of fact and must be an intentional act evident by act or conduct of the parties.⁹⁴ Waiver can be, therefore, only constituted by voluntary and intentional relinquishment of a right.⁹⁵ Waiver puts an estoppel⁹⁶ and it is settled that where there is no estoppel, there is no waiver.⁹⁷ However, both estoppel and waiver are different.⁹⁸

A statutory right can be waived through a contract. It is a settled position of law that if a statute bars the waiver of any right conferred thereunder, the parties cannot, in any circumstance, waive the right.⁹⁹ It is because of the fact that the legislature while conferring the right upon an individual vide a statute, keeps in mind the objective of the statute. There is a reason why such restriction has been imposed upon waiver of any right, which could be the social nature of the legislation. The same position has been followed by the courts in mediation settlements. As stated earlier, the settlements in mediation are governed by the principles of Contract Law.¹⁰⁰ It being a private matter i.e., between two individual parties, the parties are at liberty to waive any of their statutory rights. However, in certain situations, the courts will not be inclined to pass a decree for any settlement where any public right has been compromised by the parties, for the reason that it is against public policy¹⁰¹ and the welfare of the society depends upon it.¹⁰²

⁹¹ Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619.

⁹² Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd., (1971) AC 850 (defining 'waiver').

⁹³ Supt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766.

⁹⁴ Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229.

⁹⁵ All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487 ("Waiver must be spelled out with crystal clarity i.e., with a clear intention to give up a right known to the person").

⁹⁶ Supt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766.

⁹⁷ Municipal Corpn of Greater Bombay v. Hakimwadi Tenants Assn., 1988 Supp SCC 55.

⁹⁸ Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, 1935 SCC OnLine PC 8 : AIR 1935 PC 79.

⁹⁹ Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619.

¹⁰⁰ Sukna Mahato v. Sadhana Debnath, 2017 SCC OnLine Cal 18565 : (2018) 2 ICC 286; MANUAL, *supra* note 77at 16.

¹⁰¹ Nagendrappa Natikar v. Neelamma, (2014) 14 SCC 452.

¹⁰² Indira Bai v. Nand Kishore, (1990) 4 SCC 668.

When one party has taken the advantage and benefit accrued to it under the settlement, though it was argued that the act required to be performed by the party in lieu of it, is against her statutory right, the court held that the party cannot walk out of the said agreement and undertaking given to the court without the consequences flowing from the Contempt of Courts Act.¹⁰³ Contempt of court vis-à-vis mediation settlement has been discussed in the following section, in depth.

The parties are at liberty to waive the cooling off period, if agreed and directly approach the court for a decree of mutual divorce.¹⁰⁴ Where one party has compromised its right to claim any further amount in form of maintenance, the agreement will not be enforceable in the eyes of law as the provisions of maintenance have been introduced in various legislations in order to promote welfare, and the enforceability of the agreement would puncture the object of those legislations.¹⁰⁵

The court will not enforce the agreement when it contains a condition which prevents any party from claiming damages which are otherwise payable in law.¹⁰⁶ The party claiming the waiver of right must show that the agreement waiving the right came into being as a consideration for any other compromise.¹⁰⁷ This follows that where the mediation agreement is not, *prima facie*, unreasonable, the court would warrant the party claiming that the consent has been obtained on the basis of some fraud or alike nature of act, to show and prove the same. This, therefore, means that a presumption of good faith has been annexed with the mediation agreement, especially in the cases of court-annexed mediation as the mediator who is a third and neutral party has presided over the meetings and has drawn the settlement agreement.

Therefore, a statutory right can be compromised in a mediation settlement only and only if the same is in the nature of a private right and not a public right. The party cannot unilaterally withdraw from an agreement especially after availing the benefit from the same.

¹⁰³ Avneesh Sood v. Tithi Sood, 2012 SCC OnLine Del 2445.

¹⁰⁴ Rajat Gupta v. Rupali Gupta, 2018 SCC OnLine Del 9005 : (2018) 249 DLT 289.

¹⁰⁵ Nagendrappa Natikar v. Neelamma, (2014) 14 SCC 452.

¹⁰⁶ G. Ramachandra Reddy v. Union of India, (2009) 6 SCC 414.

¹⁰⁷ Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229.

VIII. ENFORCEMENT AND EFFECTS OF BREACHING MEDIATION SETTLEMENT

The fact of the matter is that the settlement arrived by the parties in mediation in India are unenforceable. India, as stated above, has no dedicated legislation for the enforcement of mediation settlement which results in opening up of cases again in the court very often. It is merely an agreement which is not enforceable under any law and therefore, unless made vide a decree of the court, cannot bind the parties.

The area concerning the enforceability of mediation settlements has always remained grey. Former CJI S. A. Bobde has also called for a statute in relation to the enforceability of mediation agreement or settlement.¹⁰⁸

India has a different mechanism for the enforcement of settlements arrived between the parties on the basis of whether they were a result of pre-litigation or court referred mediation proceedings. For the latter one, the settlements are enforceable only if they are placed before the court for recording the settlement and disposal.¹⁰⁹ For the cases referred to mediation under section 89 of CPC, the mediation institution will be deemed as Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 will be applicable¹¹⁰ and therefore the award shall be final and will be deemed to be a decree of civil court.¹¹¹ The mediation settlement is drawn into a decree by virtue of Order XXIII¹¹² and therefore, binds the parties to discharge their obligations. It is based on the well settled law that agreement or compromise, in whole or part is to be recorded¹¹³ and the decree is to be passed.¹¹⁴

¹⁰⁸ PRE-LITIGATION MEDIATION, *supra* note 4.

¹⁰⁹ *Afcons Infrastructure Ltd. v. Cherian Verkay Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

¹¹⁰ *Id.*

¹¹¹ Legal Services Authority Act, 1987, § 21, No. 39, Acts of Parliament, 1987 (India).

¹¹² Code of Civil Procedure, 1908, No. 5, Acts of Parliament of 1908 (India).

¹¹³ *Mohanan P.K. v. Sudakshina Ramakrishnan*, 2017 SCC OnLine Ker 4735 : (2017) 3 KHC 155.

¹¹⁴ *Hemanta Kumari Debi v. Midnapur Zamindari Co.*, 1919 SCC OnLine PC 41: AIR 1919 PC 79 (Buckmaster, J.).

For pre-litigation mediation, the parties can file a suit and make an application to the court of competent jurisdiction to pass a decree. They can also get it enforced by virtue of the principles of contract law.¹¹⁵

It is worth noting that even though the Supreme Court has held¹¹⁶ that conciliation and mediation are synonyms, it is still unclear as to whether settlements arrived through mediation will be enforceable in the same manner as that arrived through conciliation are. However, the answer to this question as of now seems to be in negative. The reasons are two-fold. The conciliation settlements are enforceable by the virtue of section 74 of the Arbitration and Conciliation Act. The act doesn't talk about mediation at all and therefore, stretching the same and subjecting it to the provisions of the Arbitration and Conciliation Act based upon the judicial precedent would amount to an uncalled purposive interpretation. Also, if mediation settlements are deemed to be covered by the act, the Mediation Model Rules, 2003 would become infructuous. The other reason is the recent judicial trend. The courts on various occasions have questioned the genesis of the settlement in question. The courts have denied relief to litigants on account of the settlement in question being a result of mediation and not conciliation¹¹⁷ and therefore, denied enforcing the settlement as per the Arbitration and Conciliation Act.¹¹⁸

A. Criminal Cases

The issue of enforcement of mediation settlement in criminal cases has been discussed by the Kerala High Court in *Sreelal v. Murali Menon*.¹¹⁹ Here, the court held that the criminal court cannot pass any civil decree to effectuate the settlement and it can only record that the offence is compounded and that compounding would be equivalent to acquittal.¹²⁰ A decree therefore, cannot be passed in any circumstances

¹¹⁵ MANUAL, *supra* note 77at 16.

¹¹⁶ Afcons Infrastructure Ltd. v. Cherian Verkay Construction Co. (P) Ltd., (2010) 8 SCC 24.

¹¹⁷ Angle Infrastructure (P) Ltd. v. Ashok Manchanda, 2016 SCC OnLine Del 1534 : (2016) 228 DLT 624 (DB).

¹¹⁸ Ravi Aggarwal v. Anil Jagota, 2009 SCC OnLine Del 1475.

¹¹⁹ Sreelal v. Murali Menon, 2014 SCC OnLine Ker 28501 : (2014) 3 KLT 536.

¹²⁰ Code of Criminal Procedure, 1973, § 320 (8), No. 2, 1973, Acts of Parliament, 1973 (India).

in case of settlement of a criminal case.¹²¹ It should also be observed¹²² that a mediation agreement, unless accepted by the court and a decree is passed under CPC,¹²³ will have no effect. The other way to validate the same is to get it converted into a conciliation agreement which would, therefore, be enforceable u/s 74 of the Arbitration and Conciliation Act once an award thereupon is passed. However, it is bewildering how the Punjab and Haryana High Court Mediation and Conciliation Centre has failed¹²⁴ to understand the basic difference between the enforceability of settlements arrived at after mediation and conciliation in as much as their “pre-litigation mediation” has been made enforceable under Arbitration and Conciliation Act. As described above, conciliation settlements are enforceable by virtue of Section 74 of the Arbitration and Conciliation Act whereas mediation settlements are enforceable by virtue of the decrees *impliciter*. It is submitted that the settled law of the land¹²⁵ is contrary to the view of the Punjab and Haryana High Court Mediation Center which is neither substantiated by any authority nor by any statutory provision. However, the settled law of the land is contrary to the view otherwise.

The next issue is whether the settlement arrived at between parties would be tantamount to a decree passed by the court and if yes, how it can be enforceable. The issue was answered in the affirmative¹²⁶ and therefore a settlement, though not ordinarily, can be tantamount to a decree if it complies with the procedure of Order XXII¹²⁷ and thereafter, the execution proceedings would be what they are in case of a decree passed by court.

B. Non-compliance with Mediation Agreement

Where one party undertakes to comply with certain directions or conditions in pursuance of mediation agreement and he does not do so

¹²¹ Dayawati v. Yogesh Kumar Gosain, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

¹²² Sreelal v. Murali Menon, 2014 SCC OnLine Ker 28501 : (2014) 3 KLT 536.

¹²³ Code of Civil Procedure, 1908, § 89, No. 5, Acts of Parliament of 1908 (India); See also Code of Civil Procedure, 1908, Order 23 (3), No. 5, Acts of Parliament of 1908 (India).

¹²⁴ MEDIATION CTR. HIGH CT. OF PUNJAB & HARYANA, CONDITIONS FOR PRE-LITIGATION MEDIATION.

¹²⁵ PRE-LITIGATION MEDIATION, *supra* note 4; Sreelal v. Murali Menon, 2014 SCC OnLine Ker 28501 : (2014) 3 KLT 536.

¹²⁶ Dayawati v. Yogesh Kumar Gosain, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

¹²⁷ Code of Civil Procedure, 1908, or. 22, No. 5, Acts of Parliament of 1908 (India).

despite having reasonable opportunity to perform the same, the relief claimed by such person in lieu of it cannot be given to him.¹²⁸

A similar view has been adopted by the Karnataka High Court¹²⁹ wherein it was held that undertakings given to the bench should be complied with in every situation, the only exceptions being fraud or statutory bar. However, the benefit of interim bail conferred already on a party giving any undertaking to the satisfaction of the court would not ordinarily be asked to be restored.¹³⁰ It was held that when the court was persuaded to accept the terms of compromise for grant of bail, it is not permissible for the parties to resile from those terms and conditions.¹³¹

Where the parties have not complied with the mediation agreement arrived between them earlier, the appropriate course of action would be to reopen the original case and the court will then decide the matter on merits.¹³²

C. Whether breach of mediation settlement amounts to Contempt

Here, it is important to note that the mediation agreement cannot become the part of a judgment or the order,¹³³ especially in criminal cases. It is because of the fact that what has conspired during meditation (sittings or hearing) is very confidential and therefore cannot be made public. Confidentiality is one of the reasons why the parties are advised to opt for mediation at the beginning. Therefore, the court would not ordinarily annex the copy of the mediation settlement with the judgment. However, the same exists with the parties and is annexed in the court records. Therefore, the provisions for contempt of court become ineffective as the judgment or the order merely records the fact of settlement and quashing, and no undertaking is given in such cases to the court but is given to the opposite party. In

¹²⁸ Deep Parikh v. State, 2017 SCC OnLine Del 7955; Shikha Bhatia v. Gaurav Bhatia, 2011 SCC OnLine Del 1014 : (2011) 178 DLT 144.

¹²⁹ S. Balasubramaniam v. P. Janakaraju, 2004 SCC OnLine Kar 226 : (2004) 5 Kant LJ 338.

¹³⁰ Biman Chatterjee v. Sanchita Chatterjee, (2004) 3 SCC 388.

¹³¹ Sajjan K. Varghese v. State of Kerala, (1989) 2 SCC 208 : 1989 SCC (Cri) 339.

¹³² Dinesh Gulati v. Ranjana Gulati, MAT APP (FC) 70 of 2016, decided on 2-8-2016 (Del).

¹³³ Sivaraajan v. Subash, 2020 SCC OnLine Ker 337 : (2020) 1 KLT 717.

this respect, therefore, the court cannot initiate contempt proceedings against any party.¹³⁴ The action for contempt of court can be initiated only in the case of breach of any undertaking given to the court, *inter alia*.¹³⁵ Any undertaking given to a court is totally different from when a counsel states that he undertakes on his client's behalf. When a person gives any undertaking to the court, it carries sanctity¹³⁶ with it and is different from an undertaking given to the other side.¹³⁷ Therefore, any willful disobedience of the undertaking given to the court attracts the action for contempt.¹³⁸ Where on the basis of any undertaking given to the other party, the court has followed one path or recourse and was persuaded to pass the order and the court ultimately finds that the party that has given the undertaking never intended to abide by the same, the action for contempt lies.¹³⁹ The enforcement in the case of consent order i.e., decree¹⁴⁰ therefore, could be made either through execution¹⁴¹ or injunction from the court of competent jurisdiction,¹⁴² which is applicable to the cases of civil nature.

However, in cases of court annexed mediation, the party can institute an action against the breaching party under the Contempt of Courts Act, 1971. Once proved that the respondent party was a party to the breached agreement or settlement, the party has willfully done some act or omission which consequently has breached the said settlement or agreement, it will become a clear cut case of civil contempt.¹⁴³ It is because the court has put its seal on the matter which means that the parties have given the undertakings before the bench and based on the same, the court has proceeded with the matter.¹⁴⁴ The other reason

¹³⁴ Contempt of Court Act, 1971, § 2, No. 70, Acts of Parliament, 1971 (India).

¹³⁵ *Id.*

¹³⁶ C.F. Angadi v. Y.S. Hirannayya, (1972) 1 SCC 191 ("Order by consent is not a mere contract between the parties but is something more because there is super-added to it the command of a Judge").

¹³⁷ Bajranglal Gangadhar Khemka v. Kapurchand Ltd., 1950 SCC OnLine Bom 12 : AIR 1950 Bom 336.

¹³⁸ Rama Narang v. Ramesh Narang, (2006) 11 SCC 114.

¹³⁹ Ritu Markandey v. Surjit Singh Arora, (1996) 6 SCC 14.

¹⁴⁰ Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao, AIR 1967 SC 591, (defining 'decree').

¹⁴¹ Code of Civil Procedure, 1908, or. 21, No. 5, Acts of Parliament of 1908 (India).

¹⁴² Suman Chadha v. Central Bank of India, 2018 SCC OnLine Del 11536 : (2018) 254 DLT 29.

¹⁴³ Contempt of Court Act, 1971, § 2, No. 70, Acts of Parliament, 1971 (India).

¹⁴⁴ Ritu Markandey v. Surjit Singh Arora, (1996) 6 SCC 14.

for contempt action is that the parties were at liberty to negotiate and come to a conclusion thereon at that time and the present settlement has been arrived at with their consent. Because of the estoppel by prior consent and conduct, the parties cannot deny honoring the undertakings given by them at the time of mediation settlement which ensures that the settlement is not violated at any point of time. It is important here to note that the disobedience should be willful and should not be one which has arisen due to inevitable circumstances or circumstances that are not in the hands of either party. The court¹⁴⁵ has rightly concluded that in order to prevent the undermining of the majesty and the authority of the court, parties should not be allowed to resile from an undertaking given to the court without any penal consequences following the same. Otherwise, the sanctity attached to such undertakings would be completely destroyed and blown to the winds. If the courts take this action of the parties for granted, dishonesty and disrespect towards the judicial process will expand its horizon. Therefore, the position is that if the party has tendered an undertaking to abide by the terms of the agreement which stands accepted by the court; in the event of breach of the undertaking, action and consequences under the Contempt of Courts Act would follow.¹⁴⁶

D. Execution in Contempt Proceedings

The action under Contempt of Courts Act cannot be used to get the decree i.e., settlement in civil cases, executed.¹⁴⁷ The party, in order to get the settlement decree executed in addition to initiate contempt proceedings, has to seek recourse of Order 21 Rule 32 CPC.¹⁴⁸ The contempt jurisdiction is not an alternative for execution proceedings and hence, both can be initiated simultaneously and the most effective remedy is to execute the decree under CPC.¹⁴⁹ This is because of the fact that both proceedings are different in nature and the court in execution

¹⁴⁵ Avneesh Sood v. Tithi Sood, 2012 SCC OnLine Del 2445.

¹⁴⁶ Dayawati v. Yogesh Kumar Gosain, 2017 SCC OnLine Del 11032 : (2017) 243 DLT 117.

¹⁴⁷ R.N. Dey v. Bhagyabti Pramanik, (2000) 4 SCC 400.

¹⁴⁸ Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307.

¹⁴⁹ Itwar Singh v. Ganeshram, 2015 SCC OnLine Chh 12 : 2015 CriLJ 1604.

proceedings is not concerned with any willful disobedience. Once passed, it is the duty of the execution court to get the decree executed.¹⁵⁰

IX. SUGGESTIONS AND CONCLUSION

The author, by now, has discussed in depth the intervention of the judiciary in mediation settlements which are purely private settlements. It has been observed that the objective of mediation is to further the aim of reducing the arrears of cases and to avoid the disadvantages of litigation. It has also been noticed that the enforceability of mediation agreement has remained a big question for the authorities and no dedicated legislation has been provided yet. The author would like to give some suggestions in order to reduce judicial intervention in settlements which are a result of litigation after mediation and therefore, have ultimately frustrated the objective of mediation.

The legislature should come up with a dedicated legislation governing the process of mediation, the terms and conditions of mediation agreements, and the enforceability of such agreements. The parties, in such a situation, would be able to come up with more refined and accurate terms and conditions and will act on the same to avoid any kind of litigation which would have been initiated in case of breach. Pre-litigation mediation should be made compulsory for particular classes of cases and discretion should be given to the lower judiciary to refer the matter to mediation, even if slight chances exist. Appropriate amendments should be brought in the concerned acts to give legislative authority to the aforesaid decisions of the courts. Parties should be made aware of the scope of terms and conditions of the likely agreement i.e., to say that conditions not in public interest, waiving fundamental rights and alike, cannot be included in settlement. The new legislation must incorporate sufficient provisions dealing with the enforcement of mediation settlements and must provide for severe consequences, in case not followed.

The fact remains that the mediation settlement arrived at between the parties is out of their own will and no one has compelled them to agree

¹⁵⁰ Niaz Mohammad v. State of Haryana, (1994) 6 SCC 332.

to the terms and conditions. As such, the parties should not be allowed to move out or withdraw from the settlement unilaterally without there being any sort of remedy for the other party. Enforcement of settlements in criminal cases must be taken care of especially and a provision must be added which accordingly ensures that the breaching party does not benefit from the performance of the other party after failing to perform its obligations under the agreement. The case must be automatically revived and restored in the court of law, upon the complaint of any breach in the settlement and a presumption should be drawn against the breaching party, which can be extended to the merits of the case.

One way to enforce the settlement in criminal cases is to provide the court the power to pass an order in the nature of a decree, only for the purpose of mediation, which would be enforceable like a civil decree. It is because generally the terms and conditions of settlements are confined to an undertaking with respect to payment of compensation or damages, assisting in quashing of criminal proceedings by withdrawing the complaint or getting the FIR quashed. Most of the conditions are civil in nature and involve no aspect of criminal law. It is because the act of moving out or breaching the settlement has not been classified as an offence under IPC and therefore, an execution proceeding like that under CPC can fulfil the objective of the settlement. Payment of compensation and giving an undertaking to the court could also be classified as civil acts in nature and therefore, the same can be incorporated in the statute.

The need for mediation can be understood in light of the fact of arrears of cases in India. People are reluctant to spend their money and time on disputes and therefore, decide to solve the matter amongst themselves. In such a situation, one party might end up losing something very crucial. The same is absent in a court-annexed mediation and this has been recognized by various statutes. The Supreme Court, vide its judgments, has recognized the mechanism of alternative dispute resolution, and has interpreted it appropriately. Mediation benefits from being a cost and time-efficient process that additionally protects the dignity of the individuals to a dispute with the guarantee of confidentiality.

The suggestions, if implemented, may prove to be beneficial for enforcement of settlements arrived in criminal cases. A lot has been written and discussed on mediation but in order to achieve the real objective of mediation, much more has to be done. The prominent way is to come with a full-fledged act for mediation like the Arbitration and Conciliation Act is for Arbitration and Conciliation.