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NEGOTIATING DISHONOUR OF CHEQUE: MEDIATION STRATEGIES FOR CHEQUE DISPUTES

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ABSTRACT

To mitigate the shortcomings of this system, Alternative Dispute Resolution (ADR) was introduced as a method for resolving conflicts. ADR includes a range of methods, including conciliation, arbitration, negotiation, and court settlement. Because of its relative simplicity and procedural flexibility, mediation has become one of the most widely used and quickly expanding ADR technique. Parties in dispute may develop mutual trust and understanding in the cooperative atmosphere that mediation offers. With the help of a mediator, which is a neutral third party in the dispute, it turns an adversarial environment into a cooperative one where both parties strive towards a shared objective of settling their dispute without relinquishing goodwill or dignity. Parties are able to look at different possible outcomes during mediation, which helps them determine their core values and areas of interest.

1. INTRODUCTION

"Going to court is like losing a cow for the sake of a cat", this quotation by Mark Twain captures the very essence of the adversarial process used in our court system. The adversarial system is characterized by rigid litigation procedures, which often intensify hostility between parties, adopt a win-lose mindset, and allow for multiple appeals. These aspects raise questions about its effectiveness as a means of resolving civil disputes. The adversarial approach can lead to lengthy delays, significant financial costs, and a loss of valuable time, which breeds resentment among those involved. Consequently, the adversarial system can create fear and hesitation among individuals seeking to assert their legal rights. To mitigate the shortcomings of this system, Alternative Dispute Resolution (ADR) was introduced as a method for resolving conflicts. ADR includes a range of methods, including conciliation, arbitration, negotiation, and court settlement. Because of its relative simplicity and procedural flexibility, mediation has become one of the most widely used and quickly expanding ADR technique. Parties in dispute may develop mutual trust and understanding in the cooperative atmosphere that mediation offers. With the help of a mediator, which is a neutral third party in the dispute, it turns an adversarial environment into a cooperative one where both parties strive towards a shared objective of settling their dispute without relinquishing goodwill or dignity. Parties are able to look at different possible outcomes during mediation, which helps them determine their core values and areas of interest.

2. WHAT DOES MEDIATION INVOLVE?

An impartial third party, known as the mediator, assists the disputing parties in reaching a mutually acceptable solution during the mediation process. One critical component of mediation is that the parties involved maintain the authority to make decisions regarding the dispute; the mediator is prohibited from imposing his or her decisions on any of the disputing parties. Although the mediator oversees the proceedings, it is the parties who ultimately decide how things will turn out and finally determine an acceptable outcome for themselves.

The settlements made during mediation are legally enforceable and binding. Usually, the mediator starts the process by helping the parties communicate, gathering information, and directing the parties' conversational flow. The mediator guides the parties toward practical solutions, facilitates communication of offers and counteroffers, provides reality checks about their circumstances, and helps them reach mutually beneficial settlement terms.

The mediator shall avoid giving solutions or negotiate arrangements on behalf of the parties because their primary function is to provide support. Finding a middle ground to terminate a dispute under the supervision of an impartial, legally recognised body is the fundamental goal of mediation. As a result, in a mediation, the mediator acts as a catalyst.

3. SECTION 138, NEGOTIABLE INSTRUMENTS ACT, 1881

The Section reads as: "Dishonour of cheque for insufficiency, etc., of funds in the account. [Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, debt of other liability means a legally enforceable debt or other liability."

The following circumstances must be met in order for it to constitute an offence under the Act:

1. A individual who received a cheque from a bank account to satisfy a legally binding debt obligation.
2. The cheque was delivered to the bank that received the drawee application no later than three months after it was issued, whichever came first.
3. The drawee bank returned the cheque unpaid.
4. Within 30 days of receiving notification of the cheque's dishonour, the payee must have submitted a written demand to the drawer for the payment of the amount due under the cheque.
5. The drawer must have failed to make the payment within 15 days of receiving the notice.
6. Section 142 stipulates that a written complaint must be submitted to a court of equal or higher authority than that of a metropolitan or judicial magistrate within one month from the date the cause of action arose.

4. MEDIATION IN COMPOUNDABLE OFFENCES

Mediation is not something that is not known or a novel method of settling disputes between conflicting parties, but it is only with the addition of Section 89 to the Code of Civil Procedure, 1908 (CPC), that it was given official legal recognition. This amendment paved the way for Alternative Dispute Resolution (ADR), allowing courts to refer backlogged cases to ADR for more efficient and effective resolution, thus alleviating the courts' workload. Nonetheless, Section 89 specifically addresses civil disputes and does not extend to criminal matters.

The case of "Gian Singh v. State of Punjab & Anr", decided by the Supreme Court, marked a significant turning point in legal precedent. The decision clarified that High Courts have the inherent power under Section 482 of Criminal Procedure

Code, 1973 (CrPC) to dismiss criminal cases or complaints related to non-compoundable offences which primarily have a civil nature arising from civil, mercantile, commercial, financial, partnership, or similar transactions, so long as the parties involved must have resolved their differences amicably. In "Yashpal Chaudharani v. State (Govt. of NCT Delhi)", the Honourable Delhi High Court recently established standards that courts and mediation centres must abide by when submitting criminal cases to mediation. These guidelines can be modified for various forms of alternative dispute resolution. They are as follow:

(i) Prior to determining whether the components of a settlement are present in a criminal case, the court must first undertake a preliminary examination to evaluate the legality of terminating the criminal action. This entails considering the general guidelines for the exercise of jurisdiction under Section 482 of the CrPC to ascertain whether the offence is compoundable or whether the High Court would be ready to quash it.

(ii) The mediator must undertake a preliminary review of the circumstances of the criminal case to ensure that they can effectively facilitate the mediation before beginning the process. In order to guarantee consistency and uniformity in their technique, mediation institutions should implement an institutional mechanism.

(iii) An institutionalized vetting process must be implemented at the conclusion of the mediation process to verify that the criminal charge is either compoundable or that the High Court has no reservations regarding its inherent power under Section 482 of the CrPC, in accordance with pertinent legal principles, prior to the formal execution of any settlement in a criminal case by the parties.

5. LEGALITY OF REFERRING CRIMINAL CASES TO MEDIATION

Various court decisions have brought attention to the current trend of using mediation to resolve criminal offences. In contrast to the earlier belief that mediation was only appropriate for civil disputes, the Honourable Delhi High Court acknowledged the legal permissibility of raising a complaint under Section 138 of the NI Act for agreeable resolution through mediation in "Dayawati v. Yogesh Kumar Gosain". This ruling provides more details on the process and rules that must be adhered to in these types of criminal prosecutions.

The Negotiable Instruments Act's Section 138 is seen as having quasi-criminal characteristics. It deals with cheque dishonour and lays down fines and penalties that can be as high as double the amount of the cheque or a year in jail. In "Kaushalya Devi Massand v. Roopkishore Khore", it was determined that Section 138 offences are distinct from those included in the Indian Penal Code or other criminal offences. Additionally, a violation of this clause is fundamentally a civil wrong that has been endowed with a criminal nature.

The SC underlined the original aim and purpose behind the adoption of Sections 138–142 of the NI Act, in "Modi Cements Ltd. v. Kuchil Kumar Nandi". According to the Court, these clauses were intended to promote cheque usage and raise the legitimacy of these types of payments. It also made it clear that the legislators' primary goal was to re-establish public confidence in the effectiveness of banking operations and the use of negotiable instruments in commercial transactions. In particular, the criminal measures are meant to deter people from not making their scheduled cheque payments.

6. DAYAWATI V YOGESH KUMAR GOSAIN: AN OVERVIEW

In recent years, mediation has become more popular as a means to settle civil disputes. However, a common question that arises is whether criminal cases may be sent to mediation or not, and if so, which types of criminal cases are suitable for this approach. The Honourable Supreme Court addressed this issue in Gian Singh. In the matter of "Dayawati v. Yogesh Kumar Gosain" , the Honourable Delhi High Court clarified issues with dishonoured checks, which comprise a substantial amount of cases that are still ongoing. The court decided that ADR procedures including mediation could potentially be used in cases involving dishonoured checks to effectively to lighten the burden of cases on courts. It further stated that although the CrPC does not specifically restrict how these processes may be carried out, it does allow and recognise settlements, even where there is no expressed statutory provision permitting criminal courts to refer complainants and accused parties to ADR mechanisms.

7. DISCUSSION

The guidelines that need to be adhered to when addressing cases relating to Section 138 of the NI Act, 1881 have been elucidated by the Delhi High Court in the above mentioned case. The Court addressed a number of important issues, including:

Question 1. Is it permissible to send a criminal case that qualifies for compounding, as one covered by Section 138 of the NI Act, to mediation?

Answer: The Court answered in affirmative.

Question 2. Can criminal proceedings be subject to CPC-established Mediation and Conciliation Rules, 2004? If not, how might this legal vacuum be filled? Is it necessary to have distinct regulations, possibly in accordance with Section 477 of CrPC?

Answer: The Honourable Court responded to this inquiry by stating that mediation in civil and criminal cases is governed by the "Delhi Mediation and Conciliation Rules, 2004," which were developed in accordance with the rule-making authority of Part X, Section 89 (ii) (d), and other enabling powers granted to the Delhi High Court.

Question 3. What procedures should be followed once a dispute has been referred to mediation?

Answer: The Court deliberated over whether to resolve the case by treating the mediated settlement agreement as proof of compounding the case, which would allow the case to be dismissed, or whether to keep the case pending until compliance is obtained (such as when payments are spread out over a long time, which is common in these kinds of settlements).

In matters arising under Section 138 of the NI Act, the Court developed specific guidelines for assessing the referral of parties to mediation, which include:

1. Upon the respondent's initial appearance in a complaint under Section 138 of the NI Act, the Magistrate may first document the admission and denial of documents in accordance with Section 294 of the CrPC. Anytime prior to the hearing of the complaint, if the Magistrate determines that there are elements of a potential settlement, they should inquire if the parties are willing to explore the possibility of amicably resolving their disputes.
2. If the parties express interest in mediation, the court should inform them of the various available mechanisms for achieving a settlement. Possible alternatives to litigation include out-of-court settlements, referrals to Lok Adalat under the Legal Services Authorities Act, 1987, referrals to court-annexed mediation centres, and conciliation under the Arbitration and Conciliation Act, 1996.
3. After the parties have decided on a dispute resolution mechanism, the court should direct them to that forum, giving them a deadline of six weeks to negotiate and a next hearing date for when the case will be brought back before the court to discuss the results.
4. The court shall set a hearing before the designated mediation facility or mediator on an appointed day, ensuring that the parties or their authorised representatives appear, in case the parties have opted to pursue mediation.
5. The parties should be encouraged to resolve all of their disagreements, not just those pertaining to the particular case or the dishonour of a particular cheque, when a matter is submitted to mediation by the courts and the same should encouraged by mediators on matter being referred to mediation.
6. The parties should be encouraged to discuss their unique solutions and offers with one another so that there may be as many interactions as needed to reach a successful resolution within the period set by the court. It is essential for them to show up promptly before the mediator, following the schedule set by the court.
7. In the interest of justice, the magistrate may grant an extension beyond the first six- week limitation period, when requested by the parties, after assessing the mediation's progress. While keeping the mediation process secret, the magistrate may ask the mediator for an interim report in order to consider such an extension. If the magistrate is satisfied that the parties are making genuine and earnest efforts to reach a settlement, they may set a reasonable new timeline for the parties to meet with the mediator and schedule the next hearing date to review the mediation progress. The length of this new period will depend on the specific circumstances and is best determined at the magistrate’s discretion, considering interests of both sides in mind.

8. CONTENTS OF THE SETTLEMENT

The terms of the agreement must be as follows if a settlement is reached through mediation:

a. A precise declaration outlining the sum that each party will be required to pay.
b. An easy-to-use payment system that specifies the way and means of payment.
c. Promises made by each party to abide by the settlement’s conditions, guaranteeing that the provisions will be followed.

d. A precise description of the repercussions of breaking the settlement as well as any agreed- upon fines for non-compliance with the requirements.
e. A clear declaration confirming that each party signed the contract fully aware of its contents and the consequences of any violation.
f. A clause validating the settlement's voluntariness, which states that the parties are entering into the agreement voluntarily and free from pressure, undue influence, or coercion.
g. On the date specified for the parties or their authorized representatives to appear before the court, the mediator shall submit a meticulously prepared settlement agreement, attested by both sides, together with their report.

Furthermore, it was emphasized by the court that following procedures needs to be considered:

1. The magistrate must adhere to Order XXIII of the Civil Procedure Code, which describes a process comparable to that of a civil court.
2. The magistrate is required to take down a sworn declaration from the parties verifying the terms of the settlement, confirming to the fact that they signed the agreement willingly and with full understanding of its contents and effects. A clear commitment to adhere to the settlement terms should be recorded for added assurance
3. A statement reflecting this affirmation may be obtained through an affidavit. The magistrate must, however, additionally enter in the court files the parties' declarations confirming the affidavit and the settlement agreement.
4. The magistrate should evaluate the settlement agreement on its own to make sure it is sincere, equitable, legal, and not against public policy. It should also be voluntary and free from any legal obstacles.
5. After recording the parties' statements, the magistrate should explicitly accept their declarations and commitments, holding them accountable to the terms of the settlement. This order must clearly state that if either party defaults, the agreed-upon amount in the settlement agreement can be recovered under Section 431 in conjunction with Section 421 of the Cr.P.C.
6. When the complainant requests to be removed from prosecution as a consequence of the settlement agreement's compromise, the case has to be compounded. The request of the complaint should be granted in accordance with the provisions of Section 147 of the NI Act.
7. The trial court should either clear the accused or discharge them based on ongoing situation of the case. Even if the settlement terms call for implementation and payment over a longer time frame, this process should be followed.
8. The magistrate shall handle the complaint on its merits and according to the existing legal procedures if, after several mediation sessions, both the sides decide that an amicable settlement is not possible.
9. With regard to later-stage settlements, the judge must enforce strict respect to the norms and principles set forth by the Apex court in the matter of Damodar S. Prabhu v. Sayed Babalal

H. and as mentioned in Madhya Pradesh State Legal Services Authority v. Prateek Jain.

10. The court may also refer a criminal matter that has an underlying civil issue. The parties may be interested in discussing a solution for their civil disputes even when they are not legally able to or willing to further the criminal case through ADR. The parties may pursue mediation with respect to the underlying civil action without any legal hindrance. In the event that a settlement is reached, those civil conflicts will also be resolved in accordance with the guidelines that have been presented. In the event that a settlement is made during mediation and the criminal case pertains only to an underlying civil issue, the referring court may direct the mediator to submit the settlement in the civil case, which would subsequently continue in accordance with the established protocols.

Question 4. Fourthly, can the settlement agreement be enforced as a decree or is the court required to have a trial based only on the merits of the case if the settlement achieved during mediation is not followed?

Answer: The subsequent procedure should be implemented in cases where the court accepted the mediation settlement but it is not complied:

(i) In the event that the accused fails to comply with the settlement agreement, the magistrate will issue an order under Section 431 in combination with Section 421 of the CrPC to recover the agreed-upon amount: this order will be regarded in a manner similar to the recovery of a fine.
(ii) Furthermore, the court will take appropriate legal action to ensure adherence to the undertaking and its associated orders in the event that the magistrate or court receives a breach of the undertaking. This may include procedures according to Section 2(b) of the Contempt of Courts Act, 1971 for any violations.

Question 5. Lastly, how should the Mediated Settlement Agreement be carried out if it is thought of as being similar to a decree? Does the complainant have to go via a civil court to file an application for execution? If so, what directives concerning the criminal complaint ought to be given? What effect does a mediation like this have on the complaint case??

Answer: The court made it quite clear that a settlement obtained through criminal mediation is not the same as a civil court order and cannot be enforced there. On the other hand, if the correct processes under Order XXIII of the CPC are followed, a mediation settlement that results from a civil matter referred by a civil court can produce a decree. Nevertheless, settlements reached through mediation resulting from criminal proceedings does not come under this.

9. RATIO DECIDENDI

The Delhi High Court came to the conclusion that the CrPC does recognise and permit settlements without specifying or limiting how these settlements can be achieved, even though the Legislature has not expressly provided a statutory provision allowing criminal courts to refer complainants and accused individuals to ADR mechanisms. As a result, there is no restriction on the use of ADR procedures to settle disagreements pertaining to crimes covered by Section 320 of the CrPC., such as arbitration, mediation, and conciliation (as permitted by Section 89 of the CPC). The Court addressed a number of issues and provided comprehensive guidelines for courts to abide by in similar situations while coming to its decision.

10. EMPIRICAL DATA ON MEDIATION SUCCESS RATES: IMPLICATIONS FOR CHEQUE DISHONOUR DISPUTES

Empirical evidence from Pre-Institution Mediation and Settlement (PIMS) initiatives in Maharashtra, spanning from July 2018 to February 2021, reveals significant insights into the effectiveness of mediation as a mechanism for resolving disputes, including those related to cheque dishonour. The data indicates that out of a total of 8,052 applications received across various mediation centers, 3,672 cases were successfully settled, resulting in an overall settlement rate of approximately 45.6%.

Notably, Mumbai, a key area for mediation activities, accounted for 7,460 applications, with 3,587 settlements, showcasing a high settlement rate of 48.1%. This data underscores the efficacy of mediation in reaching amicable resolutions and alleviating the pressures on the judicial system.

The analysis of cases also reveals the prevalence of non-starter cases, where mediation did not commence due to various factors. Out of the total applications, 4,283 cases (approximately 53.2%) were classified as non-starters, highlighting the need for improved outreach and engagement strategies to ensure parties are adequately informed about mediation processes. In contrast, the number of cases where mediation did not result in a settlement stood at 64 (about 0.8%), further demonstrating that once parties engage in mediation, there is a substantial likelihood of reaching an agreement. These statistics illustrate that mediation not only serves as a practical alternative to litigation but also reflects a high degree of success in resolving disputes, a principle that can be applied to cheque dishonour cases. Cheque disputes often entail financial implications and reputational risks for the parties involved. By utilizing mediation strategies that prioritize fairness, transparency, and negotiation, stakeholders can work towards agreements that uphold their financial interests while maintaining critical relationships.

The empirical data thus supports the argument that mediation can effectively address cheque dishonour disputes, ensuring fair outcomes for all parties involved and reinforcing the judicial system's efficiency. This approach aligns with the broader legal principles of access to justice and dispute resolution, highlighting mediation and its significance as a tool for achieving equitable and timely resolutions in financial disputes.

11. CONCLUSION

Courts have a responsibility to explore various settlement options to alleviate the burdens faced by overloaded judicial systems. However, this exploration must respect the distinct boundaries between civil and criminal law, as each domain has its own limitations that should not be crossed.

It is often said that "change is the law of nature, and every change is necessary," yet this principle is not being followed by lawmakers. To date, there have been no rules or statutes established to support the practice of referring compoundable criminal cases to mediation for dispute resolution. Given the current evolving landscape, it is essential for the Legislature to amend the CrPC to include a specific provision similar to Section 89 of the Code of CPC to address these critical issues effectively.

The lack of a formal framework for mediating compoundable criminal cases hinders the effective resolution of disputes and places unnecessary strain on the judicial system. By failing to create appropriate legislation, the opportunity for timely and amicable settlements remains untapped, leading to prolonged legal battles and increased court congestion.

Incorporating mediation into the criminal justice process, particularly for cases under Section 138 of the NI Act and similar offenses, could foster a culture of resolution that benefits all parties involved. It is imperative that lawmakers recognize the potential of ADR mechanisms to promote justice and efficiency, paving the way for legislative reforms that align criminal procedures with contemporary practices.

Establishing clear guidelines and provisions for mediation in criminal cases would not only enhance access to justice but also empower courts to manage their dockets more effectively. Ultimately, embracing this shift would reflect a progressive approach to legal practices, promoting harmonious resolutions while preserving the integrity of the criminal justice system.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

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