

Mediation in Cheque Dishonour Cases : Legality and Binding effect.

..... Bharat Chugh (Civil Judge - Delhi)

This article is an attempt to highlight a very important question of law facing magisterial courts today. The question is 'the legal permissibility of referring a complaint case u/s 138 of the NI Act for amicable settlement through Mediation, and the legal implications of breach of a mediation settlement agreement'.

The question becomes extremely important, having regard to the increased reliance on Mediation as an ADR (Alternative Dispute Resolution) mechanism for speedy and qualitative disposal of cases.

Beginning at the beginnings, the first question relates to the legality of the very first order of mediation referral in a case u/s 138 of the NI Act.

At the very outset, it may be flagged that criminal compoundable cases can be referred to Lok Adalats under the Legal Services Authorities Act, 1987 and a Lok Adalat award is executable as a decree per se. This position is also clarified by the Hon'ble Supreme Court in **K.N.Govindan Kutty Menon V. C.D.Shaji**¹, wherein it was held by the Hon'ble Supreme Court that if a case u/s 138 of the NI Act is referred to Lok Adalat by a criminal court and if the matter is settled in the Lok Adalat, then by virtue of the deeming provision u/s Section 21 of the Act, an award passed by the Adalat based on the compromise has to be treated as a decree (by way of a legal fiction) capable of execution by a civil court.

There is no quarrel as far as this is concerned. However, what needs to be flagged is that the Legal Services Authority Act, 1987 applies only with respect to a Lok-Adalat and does not provide for mediation, as a form of ADR.

In Civil cases, Section 89 of Code of Civil Procedure provides mediation as one of the ADR mechanisms, for settling the issues between the parties

¹ (2012) 2 SCC 51

in an efficacious and expeditious manner. In what can be termed the *locus classicus* on the subject - **Afcons Infrastructure Limited and another V Cherian Varkey Constructions Company Private Limited²**, the Hon'ble Supreme Court has laid down an illustrative category of cases where mediation is normally not permissible and those where the same is permissible as a form of dispute resolution :-

27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration. (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

(vi) Cases involving prosecution for criminal offences.

“28. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

- (i) All cases relating to trade, commerce and contracts, including
- disputes arising out of contracts (including all money claims);
 - disputes relating to specific performance; • disputes

between suppliers and customers;

- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/coparceners/co- owners; and
- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/apartment owners' associations;

(iv) All cases relating to tortious liability, including

- claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes, including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of “suitable” and “unsuitable” categorisation of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

Therefore, on a bare reading of the above, it appears that recourse to mediation in criminal cases is generally disfavoured. However, the above embargo on mediation in criminal cases, it appears, was not meant to be an absolute one. The categorisation of cases by the court is merely illustrative

and not a rigid or inflexible rule. The last paragraph of the decision is suggestive of the fact. Furthermore, since the question of legal validity mediation in a criminal compoundable case never arose directly in *Afcons* (supra), the observations of the court do not seem to be binding in their nature and do not constitute its *ratio*. Furthermore, the possibility of carving out an exception in a certain category of criminal cases is not completely ruled out. Infact, the examples are not far to seek. Courts have been increasingly referring criminal cases u/s 406/498A IPC to mediation and such a practise also bears the imprimatur of the Hon'ble Supreme Court of India.

An analogy, therefore, can be drawn to cases u/s 138 of the NI Act, especially in light of the fact that the Hon'ble Supreme Court has also observed that cases u/s 138 of the NI Act are quasi-criminal in nature.

In practise, courts are increasingly referring such matters for mediation, albeit without a legal basis, as this articles endeavours to demonstrate. In no case, the first principles or legality of such a referral have been examined till date.

Since the Legal Services Authorities Act and Section 89 of the CPC do not cover the situation of mediation in a compoundable criminal case, the legal sanctity of mediation has to be looked elsewhere.

In Delhi, Mediation is governed by the 'Mediation and Conciliation Rules, 2004'³

The Hon'ble High Court of Delhi has made certain modifications in Rule-1 to the following effect⁴:

"The Rules will apply to all mediation and conciliation **connected with any suit or other proceeding** pending in the High Court of Delhi or in any court subordinate to the High Court of Delhi. The mediation in respect of any suit or proceeding pending before the High Court of Delhi or any other Court or Tribunal may be referred to the Delhi High Court Mediation & Conciliation Centre or any other Mediation Centre set up by Legal Services Authorities.

3 In force vide notification No-171/Rules/DHC dated 11.08.2005.

4 Vide notification No.-158/Rules/DHC dated 06.07.2006

Upon such a reference being made to Delhi High Court Mediation & Conciliation Centre, the same will be governed by the Charter of the Delhi High Court Mediation & Conciliation Centre and to those mediation proceedings, the present Rules will apply *mutatis mutandis*."

The use of Expression "**other proceeding**" is normally invoked to justify and legalise referral of a criminal compoundable case to mediation. However, this appears to be an erroneous assumption as what is lost sight of is : that the 'Mediation and Conciliation Rules, 2004' have been made in exercise & pursuance of powers under the Code of Civil Procedure, 1908. The preamble to the Mediation and Conciliation Rules, 2004 makes this amply clear in the following words :-

"In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following Rules..."

Therefore, there is a clear vacuum insofar as rules governing mediation in criminal compoundable cases are concerned. The Mediation and Conciliation Rules, 2004, it is clear, have been made with respect to civil proceedings. On account of these rules, the legal position is relatively clear in civil cases as the broad rules for mediation, role of the mediator, procedure on receipt of case from mediation, consequences of, and the enforcement of settlement agreement have been laid down elaborately, in ample details.

According to the rules, in order for the settlement agreement to have finality, it has to bear the imprimatur of the court. Rule 25 of the Mediation and Conciliation Rules, 2004 lays down the procedure for adoption of the mediation settlement agreement in the form of an executable decree :-

"Rule 25 : **Court to fix a date for recording settlement and passing decree.**-(a) On receipt of any settlement, the court shall fix a date of hearing normally within seven days but in any case not beyond a period of fourteen days. On such date of hearing, if the court is satisfied that the parties have settled their dispute(s), **it shall pass a decree in accordance with terms thereof.** (b) If the settlement dispose of only

certain issues arising in the suit or proceeding, on the basis of which any decree is passed as stated in Clause (a), the court shall proceed further to decide remaining issues."

It is therefore clear that on receipt of the settlement agreement and after being satisfied as to the voluntariness of the agreement, the civil court has to pass a consent decree within terms of Or. XXIII R 3A of the CPC. The decree, needless to state, is executable.

However, the above rule is incompatible with a mediation settlement agreement in criminal cases, as a criminal court cannot pass a decree, much less execute the same.

This raises questions as to the very legality of referral to mediation and also the enforceability of mediation settlement, in case of a default, which, unfortunately, is extremely common-place.

As far as judicial precedent on this point is concerned, there are divergent views : the Hon'ble High Court of Kerala in **Sreelal v. Murali Menon & Anr, Crl. MC. No. 1864/2014⁵** has held that in such a case, the court has no option but to proceed for a trial on merits. The Court held that in absence of compounding of the case by the parties, the matter has to be decided on merits, after a full-blown trial and the question of guilt or innocence of the accused has to be adjudicated, eschewing the factum of settlement totally from consideration as the same cannot be used as a piece of evidence. A meaningful reading of the case reveals that the court was of the opinion that, though criminal compoundable cases could be referred to Lok Adalat under the Legal Services Authority Act, 1987, they could not be referred to mediation in absence of a specific legal authority to that effect. The Hon'ble Court was of the opinion that in case where mediation is employed, it has to be seen in its limited role as a facilitator of compounding of an offence. If the offence is compounded, then, the proceedings end and the accused is to be acquitted of the offence. However, in case of default in compliance of settlement/terms of compounding, no legal sanctity can be attached to the mediation settlement and the matter has to proceed for a trial on merits.

As opposed to this, the Hon'ble High Court of Delhi in **Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd.**⁶ and **M/s. Arun International**⁷, has held that settlement in Mediation Centre in a case u/s 138 of the NI Act is binding and is to be treated as an executable decree. In Arun International (supra) the Hon'ble High Court held the mediation settlement agreement to be binding and directed the Magistrate to pass appropriate judgment on the basis of the mediation settlement.

Issues

In view of this divergence of judicial opinion, and legal vacuum highlighted above, the following questions arise :-

1. What is the legality of referral of a criminal compoundable case (such as one u/s 138 of the NI Act) to mediation ?
2. Can the Mediation and Conciliation Rules, 2004 (as applicable to Delhi) formulated in exercise of powers under the CPC, be imported and applied in criminal cases ? If not, how to fill the legal vacuum? Is there a need for separate rules framed in this regard (possibly u/s 477 of the CrPC) ?
3. In cases where the dispute has already been referred to mediation - What is the procedure to be followed thereafter ? Is the matter to be disposed-of taking the very mediated settlement agreement to be evidence of compounding of the case, or the same is to be kept pending, awaiting compliance thereof (for example, when the payments are spread over a long period of time, as is usually the case in such settlement agreements)?
4. If the settlement in Mediation is not complied with, is the court required to proceed with the case for a trial on merits, or hold such a settlement agreement to be executable as a decree ?
5. If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed ? Is the complainant to be relegated to file an application for execution in a civil court ? and if yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What

6 2015 SCC OnLine Del 7309

7 2015 SCC OnLine Del 9334

would be the effect of such a mediated settlement vis-a-vis the criminal complaint case?

There is a serious need for guidelines laying down the legal basis of referral of criminal compoundable cases to mediation, the procedure to be adopted by the mediators/mediation institution, and also laying down the aftermath of mediation proceedings, its enforceability and procedure to be adopted by a criminal court on receipt of a mediation settlement agreement and consequences of breach thereof.

Fortunately, the Hon'ble High Court of Delhi has recently accepted and is currently hearing submissions on the above questions, in a Criminal Reference Petition⁸(under Section 395 of the CrPC) made by the author of this article. An authoritative decision by the court will provide much needed legal clarity and shall go a long way in streamlining and preserving the sanctity of mediation as a form of ADR in criminal compoundable cases.

⁸ Crl. Reference No. 1 of 2016, titled : Dayawati v. Yogesh Kumar Gosain.