Mandatory Mediation in India

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Alternative Dispute Resolution (ADR) Mechanism plays a pivotal role in access to justice to all irrespective of any economic or other disabilities within a reasonable time. The consensual nature of the process of mediation provides party autonomy and gives them the choice of selection of the mediator, which ensures greater confidence in the process. The direct participation of people in the administration of justice enhances the credibility and respectability of the system. The introduction of mandatory mediation in pending civil cases without the consent of the parties is a debatable issue. Referring cases without the consent of the parties may infringe their freedom to choose the method of settlement of disputes and is against party autonomy. But the court by applying the judicial mind is only considering the possibility of element of settlement of cases and the parties are insisted to see the feasibility of settlement of their case in mediation, which they otherwise not ready to opt for. Mandatory mediation is a process of coercion into mediation, but not coercion within mediation.

The author through this article is analyzing the pros and cons of mandatory mediation in India with special reference to the Mediation Rules and the development of mandatory mediation in U.K

1. Introduction

Section 89[1] of the Code of Civil Procedure (CPC) provides for ADR methods to settle the disputes pending before the courts. Under Section 89, CPC, consent of the parties is mandatory

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1. The Civil Pocedure Code, Section 89 reads, "Settlement of disputes outside the Court.- (1)Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for-
   a) arbitration;
   b) conciliation;
   c) judicial settlement including settlement through *Lok Adalat*; or

for referring a case for arbitration in the absence of an arbitration agreement and conciliation. However, for reference to judicial settlement, *Lok Adalat* or mediation, consent of the parties is not mandatory. The referral judge has the power to refer compulsorily.[2] The justification for the mandatory nature of reference is that the absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation. The referral court should apply its judicial mind objectively to ascertain the factors facilitating a successful mediation by using his judicial experience.[3] Generally, the reluctance for mediation by the parties at the initial stage of the litigation is due to the reason that they do not want to settle the dispute with his rival who dragged him to the litigation. Another reason is an apprehension that the other party might consider his readiness for mediation as a weakness of his case[4]. However, mandatory mediation provides a platform to the parties to think about an alternative option for settlement of their disputes.

2. Provisions in the Civil Procedure-Mediation Rules, 2003, and the Mediation Rules of High Courts

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d) mediation

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to *Lok Adalat*, the court shall refer the same to the *Lok Adalat* in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the *Lok Adalat;*

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a *Lok Adalat* and all the provisions of the Legal Services Authorities Act, 1987 shall apply as if the dispute were referred to a *Lok Adalat* under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

2. The Civil Procedure-Mediation Rules, 2003, contain provision for mandatory mediation under r. 5(f) (iii). As per this rule, even if the parties are not ready for reference for mediation or conciliation, the court finds that there is an element of settlement and the relationship of the parties has to be preserved may refer the case for mediation to see the chance for settlement.

3. Justice Hima Kohli, "Role of Referral Judges in Mediation", Delhi High Court Mediation and Conciliation Centre, *Samadhan: Reflections, 2006-2010*, Mediation and Conciliation Centre, p. 111.

4. Gary Soo, "Working through Unworkable Mediation", *Arbitration* 2000, 66(3), 207, p. 208.

The Civil Procedure-Mediation Rules[5] and the Mediation Rules of High Courts contain provision for mandatory mediation under certain situations. Under Rule 5[6] of the Model Mediation Rules,

5. When the constitutionality of the Civil procedure amendment Act,1999 was challenged before the Supreme Court, the court appointed a committee to draft rules dealing with the procedure to be followed under Section 89 CPC under the Chairmanship of Justice Jaganat Rao. The Committee submitted the Civil Procedure – Alternative Dispute Resolution and Mediation Rules, 2003, to the Supreme Court and the Supreme Court approved the rules and directed all the High Courts to frame rules according to the Civil Procedure-Mediation Rules.
6. The Civil Procedure-Mediation Rules, r. 5 reads; "Procedure for reference by the Court to the different modes of settlement:

   (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under Clause (b) of Rule 2 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

   (b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the *Lok Adalat* or where one of the parties applies for reference to *Lok Adalat*, the procedure envisaged under the Legal Services Act, 1987 and in particular by Section 20 of that Act, shall apply.

   (c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under Clause (b) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a *Lok Adalat* and thereafter the provisions of the Legal Services Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to *Lok Adalat* under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act;

   (d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or *Lok Adalat*, or to judicial settlement, within thirty days of the direction of the Court under Clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

   (e)(i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under Clause (b) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act;

   (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under Clause (b) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

   (f) Where under Clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under Clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and

   (i) in case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act, shall apply.

   (ii) in case all the parties agree for mediation, the Court shall refer the matter to mediation in accordance with the Civil Procedure - Mediation Rules, 2003 in Part II shall apply.

   (iii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after

the parties in a suit can opt for different types of ADR processes ie. arbitration, judicial settlement and *Lok Adalat*. If all the parties on application opt for settlement under any of these ADR methods, the court can refer the matter for such method under the respective law. When none of the parties agreeing for the above ADR methods, and all of them agree for conciliation or mediation, they can apply for reference for settlement through conciliation or mediation and the court may refer the case for conciliation or mediation. If there is no unanimous agreement for reference for conciliation and mediation, one of the parties can apply for reference for conciliation or mediation and on issuance of notice, if all the parties agree, the court can refer the matter for conciliation or mediation. The situation of mandatory reference arises as per Rule 5(f)(iii) of the Model Mediation Rules. As per this Rule, when one party applies to the court for mediation or conciliation, the court after hearing all the parties, can refer the matter for mediation without the consent of the parties. However this reference can be made only when the court satisfy that there is a relationship between the parties which has to be preserved and there is an element of settlement exists which may be acceptable to the parties. It is profitable to quote Rule 5(f)(iii) of the Model Mediation Rules:

> "5 (f) (iii):- In case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to

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the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply.

(g)(i) Where none of the parties apply for reference either to arbitration, or *Lok Adalat*, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under Clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(ii) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure -Mediation Rules, 2003, shall apply.

mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply".

From a plain reading of Rule 5, it is clear that in some instances, the rule makes mediation compulsory, though the parties are not agreeing for the same, to preserve the relationship between the parties. The court is called upon to find out the possibility of any settlement as per the facts of the case by applying the judicial mind, so that the relationship between the parties can be maintained. The rule is drafted in such a way that it is intended to remind the court its duty to preserve the ethics and morals of the society for protecting its basic unit, i.e., the family. The court is not asked to reach a settlement or to form an opinion of possible settlement but to satisfy that there are elements of settlement exits that too; might be acceptable to the parties. Therefore, for the mandatory reference, under this rule, the referral court's opinion of existence of an element of settlement is crucial, which cannot be mechanical but must be gathered by a proper application of judicial mind. The primary concern of the court while making such reference is to see whether there is a relationship between the parties, which has to be preserved for which the facts of the case reveals elements of settlement. If the reference is without such application of mind, in the absence of consent of the parties, there is a higher chance of possibility of non appearance of parties in the mediation process. In that situation, the court may not be able to take action against the parties for non appearance before the mediator if the party raises an objection that they are not interested in mediation.[7]

There is criticism against mandatory mediation from lawyers by stressing that the voluntariness of the parties loses sight if there is compulsion from the side of the judges. The parties can think that compulsory mediation is inconsistent and hostile to the consensual nature of the process. The lawyers' disagreement towards mandatory mediation might be due to their apprehension of

7. The Civil Procedure-Mediation Rules, r. 13 reads: "Non-attendance of parties at sessions or meetings on due dates (a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs. (c) The parties not resident in India may be represented by their counsel or power of attorney holders at the sessions or meetings".

reduction of inflow of cases to them. But, by using compulsory mediation, the parties are not compelled for a settlement which is against their consent. The purpose of compulsory mediation is to bring the parties to mediation process. It is the process of coercion into mediation, but not coercion within mediation, which is against the voluntary nature of the process.[8] If it were, coercion into mediation the ultimate result would be an unfavorable outcome, which is not envisaged in this process.[9] Once they are into the process, they will understand the effectiveness of the process and participate in mediation. In case of unreasonable objection, the court can exercise its discretion to refer the matter for mediation to examine the chances of a settlement. The party's ignorance about mediation may be one reason for their reluctance to prefer mediation. Since mediation is of recent origin, awareness programmes shall be spread to create an opinion among the litigants about the advantages of mediation thereby the lawyers resistance against compulsory mediation can be avoided.

The experience of skilled mediators of various mediation centres shows that they had the opportunity to deal with many mandatory referred cases by the courts where the litigation has been pending for more than 20-30 years and due to effective mediation, settlement has been arrived amicably[10]. In matrimonial disputes the present mandatory reference for mediation is very effective.

3. Mandatory Mediation in Matrimonial Disputes

The Civil Procedure - Alternative Dispute Resolution and Mediation Rules, 2003 and the subsequent Rules framed by the High Courts contain provisions for mediation or conciliation in matrimonial disputes. Rule 4 of the Model Rules impose a duty on the referral court to give guidance to parties to opt ADR methods. Before the party chooses the option for ADR, the court guides the parties by drawing their attention to the relevant factors, which they have to take into account before exercising the option[11]. Clause (b) of Rule 4 treats matrimonial dispute as a

8. Marcello Marinari, "ADR and the Role of the Courts", *Arbitration*, 2006, 72(1), 49, p. 51.
9. Dorcas Quek, "Mandatory Mediation: An oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program", *11 Cardozo J. Conflict Resol*. 479, 2009-2010, p. 8.
10. Information obtained by the interaction with mediators.
11. The Civil Procedure-Mediation Rules, 2003, r. 4 reads: "Court to give guidance to parties while giving direction to opt(a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have

dispute where relationship between the parties should be preserved[12] . Therefore, when the party opts for ADR under Rule 4(b), it could be either conciliation under Section 89(b) or mediation under 89(d), CPC.

Rule 5 also prescribes the procedure for reference by the court in instances where both the parties agree for ADR, where one party agrees and where both the parties decline the option for ADR. The procedure is easy when both the parties agree for mediation. In cases where one party agrees, on his application, the court sends a notice to the other party and after hearing, if the court finds that there is element of settlement exists which is acceptable to the parties and also having regard to the fact that the relationship of the parties is to be preserved, the court compulsorily send the case for mediation. In case where none of the parties agree for reference, then the court *suo moto* directs the parties to appear before the court and whether the parties agree or not, where it appears to the Court that elements of a settlement exists, which may be acceptable to the parties and that the relationship between the parties, has to be preserved, the Court shall compulsorily refer the matter to conciliation or mediation.

The mandatory reference as per the rule is intended to preserve the relationship between the parties. The court by application of the judicial mind has to find out whether the relationship between the parties can be maintained, before making the reference. Therefore, in matrimonial or family disputes, the mandatory mediation prescribed under Rule 5 is in the larger interest of the society, i.e., to preserve the relationship between the parties. To protect such public interest, mediation can be made compulsory to the parties, when there are elements of settlement, though the parties are not agreeing for such course in the beginning. Once they are into the process, they will understand the effectiveness of the process and participate in mediation. In case of unreasonable objection, the court can exercise its discretion to refer the matter for mediation to explore the chance for settlement. The party's ignorance about mediation may be one of the reasons for their reluctance to prefer mediation.

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to take into account, before they exercise their option as to the particular mode of settlement, namely… (iii) that, where there is a relationship between the parties which requires to be preserved, it will be in the interests of parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of section 89".

12. Rule 4, Expn reads: "Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved".

Due to the peculiar nature of the disputes involved in matrimonial disputes, mandatory mediation is necessary in matrimonial or family disputes, but in practice, there are many instances where the courts are not following the mandate of Rule 5[13]. Without verifying whether there are elements of settlement in a given case and there is need to preserve the relationship between the parties, the courts are mechanically referring cases to mediation centres. In such situation, the parties are reluctant to appear before the mediator and the cases where the parties appear the mediators are not able to convince the parties about possibility of settlement as the factual matrix in the case does not have the elements of possible settlement. The ultimate result is the higher number of 'no mediation cases' sent back to the court. This results in wastage of time both of the courts and the mediation centres. The delay caused due to handling of unnecessary cases affects the functioning of mediation centres also. It is necessary that in the sensitization programme necessary emphasis shall be given to the importance of mandatory reference under Rule 5. If the courts by applying the judicial mind convinced that, there are elements of settlement to preserve the relationship between the parties; mandatory reference will increase the settlement rate.

There are certain jurisdictions like United States, Canada, Belgium and Greece; there is provision for mandatory mediation. It is important to note that even without the consent of the parties the courts are sending cases for mediation mandatorily[14]. The development of mandatory mediation through legislation and judicial initiatives in UK is very relevant to understand the effectiveness of mandatory mediation.

4. Development of Mandatory Mediation in U.K

Various researches, especially in U.K., show that mandatory mediation is effective to get high rate of success in mediation.[15] Even though mediation is introduced as an effective dispute resolution mechanism, parties and their lawyers are still accustomed to treat litigation as the preferred mode of dispute resolution and the initiative of a party to approach the opposite party

13. Information gathered from the mediators.
14. Erich Suter,"The progress from void to valid for agreements to mediate", Arbitration 2009, 75(1), 28, p.31
15. Dorcas Quek, "Mandatory Mediation: An oxymoron? Examining the feasibility of implementing a Court-Mandated Mediation Program", *11 Cardozo J. Conflict Resol*. 479, p. 29..

for mediation is still treated as a sign of weakness on his side, which results in no mediation.[16] *Access to Justice Report, 1996*, the first major reform in the English and Wales civil system, submitted by Lord Woolf, the then head of the English Civil Judiciary or Master of the Rolls suggested that it is the responsibility of the lawyers to explain to their clients to think about the alternative available dispute resolution mechanism and its feasibility[17]. It is also suggested that the court shall take an initiative to suggest an alternative, when the parties may be reluctant to take initiative due to their apprehension that the other party may treat it as a sign of his weakness. Lord Woolf in his final Report recommended that the court while considering award of cost, at the end of a case, should look into the reluctance of the parties to accept a court proposal for choosing ADR during the proceedings without sufficient reasons[18]. Lord Woolf in his report proposed to cut costs, and to put the parties on an equal footing to improve access to civil justice. According to him, the role of the court is to encourage the parties to consider ADR, without suggesting any sanction if they declined to respond to such encouragement. Based on the recommendation of Woolf Committee, the then government passed the Civil Procedure Act, 1998 and in 1999, the new Civil Procedure Rules (CPR) came into force.[19]

The Court of Appeal also in several decisions has emphasized the need for encouraging the parties to recourse to ADR. *Dunnett* v. *Railtrack* [20] is the first case where the proactive role of

16. The situation of reluctance on the side of lawyers and litigants to prefer mediation is common in other jurisdictions also. See, the Lord Chancellor Dep't, Alternative Dispute Resolution: A Discussion Paper, Annex B (Nov. 1999), available at <http:// www.dca.gov.uk/consult/civ-just/adr/annexbfr.htm.>; See also, The Lord Chancellor Dep't, Emerging Findings: An Early Evaluation of Civil Justice Reforms, para. 4.12 (Mar. 2001), available at <http:// www.dca.gov.uk/civil/emerge/emerge.htm> (visited on 14.5.2014).
17. Lord Woolf, Access to Justice: *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*,1996.
18. Lord Phillips of Worth Matravers, "Alternative Dispute Resolution: An English Viewpoint", *Arbitration*, 2008, 74(4), p. 416. In view of the Woolf Report, new Civil Procedure Rules introduced in England cast a duty on the court to encourage ADR if the court feels it appropriate without looking for the parties initiative to opt ADR. See CPR, 1988, r. 1.4(e). This was treated as the fist initiative of the court in England to promote ADR. Another major change by the influence of Woolf's report is the making of pre-action-protocol for each dispute, which describes the procedure to be followed by the litigants before the litigation commences. The Practice Direction issued by the Master of the Rolls endorsed this Pre-action-protocol and after 2006, every pre-action-protocol shall contain a clause that the parties should consider some other ADR, which is more suitable than litigation, and mention the endeavor to opt that ADR. The parties should produce evidence to show that they considered the alternatives before approaching litigation. If the parties failed to follow the clause of the protocol, the court will consider such conduct of the party while determining the cost.
19. The CPR, 1988, Rule 44.5 provides that while deciding the cost, the court should consider the conduct of the parties during the proceeding, especially regarding the efforts taken for resolving the dispute.
20. [2002] EWCA Civ 302. The complainant in this case lost her case in the first instance, preferred an appeal to the Court of Appeal and Court of Appeal suggested mediation for which she agreed and the defendant refused. She

the court paved the way for promotion of mediation.[21] In this case, the court refused to award the cost to a successful party, which he is otherwise entitled in usual course, for his refusal to participate in mediation.[22] The court held that the party who refuses to participate in mediation unreasonably shall be punished when the court compel mediation.[23] This legal position was followed in *Leicester Circuits Ltd* v. *Coats.*[24] As per the Woolf Reforms[25], the costs shall be imposed when the party unreasonably fails to mediate.[26] These judgments led lawyers to advise their clients to agree for ADR, which resulted in settlement of majority of the cases. However, this created confusion because the mediation process is a voluntary process and if the parties are not interested in mediation, they should not be compelled to go for mediation. In 2004, this problem was sorted out by the Court of Appeal in *Halsey* v. *Milton Keynes General NHS Trust*[27] , Dyson L.J. held that the court cannot require a party to proceed to mediation against his will as this would contravene Article 6 of the European Convention on Human Rights.[28] Hence, the

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lost her case and the defendant claimed cost from her. The Court of Appeal refused the plea on the ground of refusal for mediation by the defendant.

21. Jacqueline M Nolan-Haley, " Is Europe Headed Down the Primrose Path with Mandatory Mediation?", *37 N.C.J. Int'l L. & Com. Reg*. 981 2011-2012, p. 999.

22. Brooke LJ pointed out in this case that "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide." This judgment was followed in *Halsey* v. *Milton Keynes NHS Trust*, [2004] EWCA Civ 76, *Reed Executive* v.*Reed Business*, [2004]EWCA Civ 159 and *Burchell* v. *Bullard*, [2005]EWCA Civ 358.

23. Gary Meggitt, "PGF II SA v OMFS Co and Compulsory Mediation", *C.J.Q*. 2014, 33(3), p. 336. Dunnet judgment was followed in *Shirayama Shokusan Co Ltd* v. *Danovo Ltd (No.2)*, [2004] 1 W.L.R. 2985.

24. [2003] EWCA Civ.333.

25. Lord Woolf, Access to Justice: *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*,1996.

26. Lord Phillips of Worth Matravers, "Alternative Dispute Resolution: An English Viewpoint", *Arbitration*, 2008, 74(4), 406-418. The parties due to the exorbitant cost of litigation settle 90% of the cases before the cases comes to the courts in England. The party who loses his case is bound to pay the cost to the other side. The loss of the party is immeasurable in the event of failing a case. This led the parties to opt for ADR methods.

27. [2004] EWCA Civ 76. See also, Karen Akinci, Christopher Cox and Ceyda Sural, "Mediation: a Comparative Discussion of the Laws and Practice in the UK and Turkey", *Arbitration*, 2014, 80(3), p. 238.

28. Matthew Brunsdon-Tully, "There is an A in ADR but Does Anyone Know What it Means Anymore?", *C.J.Q*. 2009, 28(2), 218, p. 218.

court shall not compel parties to opt for mediation, but the court may instruct the parties to opt for mediation. Compelling parties for mediation violates fair trial.[29]
This is a departure from the general rule on costs, the court explained:

> "In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown that the successful party acted unreasonably in refusing to agree to ADR" .[30]

The court observed that "the following factors are considered as relevant to the question whether a party has unreasonably refused ADR[31] - (a) the nature of the dispute[32]; (b) the merits of the case[33]; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high[34]; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. An unreasonable refusal to commit to ADR will have adverse costs consequences".[35]

29. Karen Akinci, Christopher Cox and Ceyda Sural, "Mediation: a Comparative Discussion of the Laws and Practice in the UK and Turkey", *Arbitration* 2014, 80(3), p. 238.
30. *Halsey*, [2004] EWCA (Civ) *576*, [13].
31. *Id*. at p. [16].
32. Bernard Rix, "The Interface of Mediation and Litigation", *Arbitration,* 2014, 80(1), 21, p. 23. . Even the most ardent supporters of ADR acknowledge that the subject-matter of some disputes renders them inherently unsuitable for ADR.
33. If a party reasonably believes that he has a strong case for him, it is reasonable to refuse ADR. .
34. Since the prospects of a successful mediation cannot be predicted with confidence at the time of giving consent for mediation, the possibility of the ultimately successful party also being required to incur the costs of an abortive mediation is a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR.
35. Matthew Brunsdon-Tully, "There is an A in ADR but does anyone know what it means anymore?", *C.J.Q*. 2009, 28(2), 218, p.219.

In a subsequent case, *Rolf* v. *Guerin*[36], it was observed that "a proper judicial concern that parties should respond favourably to offers to mediate or settle, warning those who ignore such approaches that their conduct in this respect could be taken into account in awarding costs". The important points that emerged in this case are as follows:

1. "Refusal to agree for mediation by one party without valid reason may invite cost;
2. The decision also in tune with Article 6 as participation in the mediation does not force the party to settle the dispute. In the event of failure of mediation he can voluntarily leave without any consequence and proceed with the litigation".

It is still in debate how far the court can use its authority to refer matters for mediation. The Court of Appeal elaborately discussed it in *PGF II SA* v. *OMFS.*[37] The court for the first time considered the issue regarding the response of the court when one party refused for mediation as suggested by other party. The post PGF position can be summarized as follows:-

> "If there is objection from one or the other party for mediation, the courts may not order mediation (per Halsey). A party must engage with an invitation to mediate at the time of the invitation (per Rolf and PGF). If a party keeps, silence in response to an invitation to mediate that will be interpreted as an unreasonable objection to mediation (per Rolf and PGF). An objection to mediation may be reasonable if it comes within the factors[38] mentioned as per Halsey or some other appropriate factor. It is the duty of the objecting party to demonstrate that the objection to mediation was reasonable (per PGF). Objections to mediation are to be settled by the parties or determined by the court so that mediation may take place (per PGF). Penalization by costs is ordered by the court if a party takes an

36. [2011] EWCA Civ 78.
37. *PGF II SA* v. *OMFS Co* 1 Ltd, [2012] EWHC 83 (TCC, *PGF II SA* v. *OMFS Co 1 Ltd,* [2013] EWCA Civ 1288.
38. (a) The nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

> unreasonable position at mediation (per Carleton) or a party fails to engage with mediation or makes an unreasonable objection to mediation (per Rolf and PGF Halsey; and Carleton respectively). The decision in PGF focuses on the prospects of mediation leading to the resolution of the dispute. CPR, r. 44.3(2) provides that the court may make a different order from the normal costs rule, having regard to all the circumstances, including the conduct of the parties. Rule 44.3(5) provides that this includes, a conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol".[39]

There are legislative provisions also to encourage party to participate in mediation. As per the provisions of the Legal Services Commission's Funding Code and Guidance, the parties are denied legal representation or funding if they failed to approach pre litigation ADR process before filing cases before the courts.[40] For getting the fund or legal representation, it is the duty of the party to prove with sufficient reason for not approaching the ADR process or the failure of the process.

There are two approaches in mandatory mediation — categorical and discretionary referral approaches.[41] In the former, certain statutes themselves provide for mediation for specified disputes and in the latter the judges can refer any matter he thinks appropriate for any ADR method. Mandatory mediation emphasizes party's self-determination[42], collaboration and creative ways of resolving a dispute and an opportunity to address the underlying concerns of

39. Gary Meggitt, "PGF II SA v OMFS Co and Compulsory Mediation", *C.J.Q*. 2014, 33(3), p. 344.

40. Access to Justice Act, 1999, s. 5.4.3 reads: "An application may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.

41. Dorcas Quek, "Mandatory Mediation: an oxymoron? Examining the feasibility of implementing a Court-Mandated Mediation Program", *11 Cardozo J. Conflict Resol.* 479, 2009-2010, p. 2.

42. Jacqueline M Nolan-Haley, " Is Europe Headed Down the Primrose Path with Mandatory Mediation?", *37 N.C.J. Int'l L. & Com. Reg.* 981 2011-2012, p. 984.

each party. The importance of mandatory mediation will arise in this situation. Some of the countries, like, Argentina and Israel, have provisions for mandatory mediation in their laws.[43]

The legislative and judicial initiatives of U.K can be considered for a great extent under the Indian situations. The large pendency and unmanageable inflow of litigation can be controlled only by supplementing the traditional litigation process with effective alternatives like mediation.

5. Conclusion

Effective implementation of the rules regarding mandatory mediation is essential to tackle proliferation of litigation and its resultant pendency. Reluctance of Referral Judges and lawyers to promote mandatory mediation at the initial stages of introduction of mediation due to the reason of unawareness of the object of mediation, apprehensions about losing out judicial powers and the lawyers' apprehension of reduction of briefs and income is changing gradually. Effective sensitization programmes to Referral Judges, mediators, lawyers and clients is necessary to inspire the stakeholders of mediation to promote mandatory mediation in cases where there is a higher probability of settlement through mediation. Mandatory mediation can be effectively implemented in all civil cases in the same way as that of the implementation of mandatory mediation in matrimonial disputes. To ensure it instead of relying on the Mediation Rules framed by the High Courts, introduction of appropriate legal provision is necessary in the existing laws.

[43]. Daniele Cutolo, Mark Alexander Shalaby, "Mandatory Mediation and the Right to Court Proceedings", *4 NO. 1 Disp. Resol. Int'l* 131, pp. 13-18.