
EVALUATING THE SCOPE OF MEDIATION IN CRIMINAL TRIALS

Mradul Singh, School of Law, Forensic Justice and Policy Studies, National Forensic Sciences University, Gandhinagar

The National Judicial Data Grid mentions that in India there is a total number of 3,42,63,787 pending cases in the country. The pendency of some of these cases (around 90,000 cases) extends to even beyond 30 years. The figures of pendency in the country is at a very alarming rate, which is a scary sight and causes a huge burden on the functioning of the courts especially when there are more than 2,69,45,563 cases are filed each year.¹ This alarming rate of increase in pendency of cases is a cause of concern and the present research tries to absolve the particular issue with the aspect of mediation process in specific reference to criminal trials.

The huge number of pending cases may not be the only reason why the Courts opted for alternate dispute resolution methods but it surely was one of the reasons stressed upon to reduce the burden on the courts². Option for including alternate dispute resolution methods were for the first time incorporated in section 89 of the Civil Procedure Code 1908³. The main purpose of inserting this section was to provide the litigants with an option of speedy and effective resolution of disputes which will also in turn reduce the pendency of the courts and lessen their burden.⁴ Apart from this specific provision, the courts have time and again laid down various other categories of cases which are normally suited for alternative dispute resolution processes such as that of disputes arising out of contracts, disputes related to family⁵, cases pertaining to tortious liability,⁶ consumer disputes,⁷ negotiable instruments,⁸ amongst others. The Courts in such regard have also mentioned cases which are beyond the scope of the alternate dispute

¹ National Judicial Data Grid, Summary Report of India, available at <https://njdg.ecourts.gov.in/njdgnew/index.php> (Last visited on 07-11-2021 at 12:37 hours).

² ¶ 9, p. 55, *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, (2003) 1 SCC 49.

³ Inserted by Act 46 of 2002, §7 (w.e.f. 01-07-2002).

⁴ ¶ 9, p. 31, *Afcons Infrastructure Limited & Anr. v. Cherian Varkey Construction Company Private Limited and Others*, (2010) 8 SCC 24 : (2010) 3 SCC (Civ) 235.

⁵ § 9, Chapter IV, Duty of the family court to make efforts for settlement, The Family Courts Act, 1984.

⁶ ¶ 28, p. 39, *Afcons Infrastructure Limited & Anr. v. Cherian Varkey Construction Company Private Limited and Others*, (2010) 8 SCC 24 : (2010) 3 SCC (Civ) 235.

⁷ *Bijoy Sinha Roy (dead) by Legal Representative v. Biswanath Das and Others*. (2018) 13 SCC 224 : (2018) 4 SCC (Civ) 149.

⁸ *Damodar S. Prabhu v. Sayed Babulal H.* (2010) 5 SCC 663 : (2010) 2 SCC (Cri) 1328.

resolution mechanisms, the court calls it the excluded category which includes suits for grant of probate, claims against the Government, cases involving serious and specific allegations of frauds, forgery, prosecution of criminal offences and others.⁹

It is necessary to note here that there exists a specific provision which provides for settlement or resolution of civil disputes through the process other than that of court processes meaning through the procedures based out of the court which is provided under section 89 of the Civil Procedure Code. However, there exists no such similar provision in the criminal procedural law of the country. Non-existence of a provision under the criminal law which provides for resolution of the dispute through the processes based outside court and easier settlement processes is necessary and calls for an urgent attention in the dispute resolution processes of our country's civil and criminal codes.

The only provision in the criminal procedural code of the country which is somewhere related and connected to section 89 of the Civil Procedure Code is the section 320 provided under the Criminal Procedure Code which provides as to how and under what conditions can an offence mentioned in the list of offences provided therein can be compounded at the instance of the adjudicating parties to the said crime. It provides that an application for compounding ordinarily referred to as to compromising of the compoundable offence, meaning entering into such an agreement between the parties which would have the effect as that of settlement of the dispute though undertaken with the permission of the court¹⁰, which has to be moved by the litigants during the pendency of the case. This section also states in its last clause that the offences not mentioned in the section shall not be compounded (called as non-compoundable offences).¹¹

The Supreme Court's view with regard to the compounding of offences has been very strict. The Courts have time and again allowed only compounding of offences which finds mention in the section 320 and strictly interpreted the restriction mentioned in sub-section 9 of section 320 by not allowing compounding of non-compoundable cases.¹²

⁹ ¶ 27, pp. 38-39, *Afcons Infrastructure Limited & Anr. v. Cherian Varkey Construction Company Private Limited and Others*, (2010) 8 SCC 24 : (2010) 3 SCC (Civ) 235.

¹⁰ ¶ 6, *Abasaheb Yadav Honmane v. State of Maharashtra*, 2008 SCC OnLine Bom 271 : (2008) 2 Mah LJ 856 (FB).

¹¹ § 320 (9) "No offence shall be compounded except as provided by this section", Criminal Procedure Code 1973.

¹² *Surendra Nath Mohanty v. State of Orissa*, (1999) 5 SCC 238 : 1999 SCC (Cri) 998.

With time, the courts have moved to a more relaxed approach where when the parties approached the court for compounding of a non-compoundable offence, the courts while maintaining the conviction initiated reduction in the quantum of sentence on the fact of compromise between the parties.¹³ The courts while reducing the sentence also noted that the restriction mentioned in sub-section 9 of section 320 does not limit the powers of the court under section 482 of the Criminal Procedure Code¹⁴. This time around a rise in the compounding of non-compoundable cases such as the offence of section 498-A of the Indian Penal Code was seen. The Court even held that it is the duty of the court to encourage genuine settlement of matrimonial disputes.¹⁵ Courts have further not just encouraged settlement of disputes through the process of arbitration but has also taken lead in cases where the parties to a marriage have started residing with each other on their own¹⁶ or where one of the spouse moves to the other spouses house and starts to enjoy marital bliss in which case also the Courts have allowed compounding of offences.¹⁷ However, the Courts have repeated time and again that such power of the court should not be used with the purpose of abusing the process of the court or to surpass the ends of justice. Courts have reiterated that the exercise of power of quashing of non-compoundable offence under section 482 would not amount to circumvention under section 320, hence exercise of power under section 482 has to be exercised with due care and caution.¹⁸ The Supreme Court has reiterated time and again that exercise of the inherent powers of the court in reference to the authority of the court to undertake compounding of offences should not be done of cases which are very heinous and which impact the society in an extreme manner. The Supreme Court has held that compounding of offences such as that of rape, murder, dacoity shouldn't be permitted by the court as they have a huge societal impact and the courts shouldn't encourage their settlement even if the parties to the crime intend to settle the same.¹⁹ However, crimes with predominantly civil character such as that of financial crimes whether should be permitted to be settled as that would still qualify as the settlement of

¹³ *Ram Pujan and Others v. State of Uttar Pradesh*, (1973) 2 SCC 456 : 1973 SCC (Cri) 870; *Unnikrishnan v. State of Kerala*, (2018) 15 SCC 343 : (2019) 2 SCC (Cri) 854.

¹⁴ *B. S. Joshi and Others v. State of Haryana and Another*, (2003) 4 SCC 675: 2003 SCC (Cri) 848.

¹⁵ ¶ 12, p. 682, *B. S. Joshi v. State of Haryana and Another*, (2003) 4 SCC 675 : 2003 SCC (Cri) 848.

¹⁶ *Radhabai v. State of Maharashtra*, 1992 SCC OnLine Bom 17 : (1993) 1 Mah LJ 735 : (1992) 2 Bom CR 459.

¹⁷ *Suresh Nathmal Rathi and Others v. State of Maharashtra and Another*, 1991 SCC OnLine Bom 236 : 1991 Mah LJ 1106 : 1992 Cri LJ 2106.

¹⁸ *Gopakumar B. Nair v. Central Bureau of Investigation and Another*, (2014) 5 SCC 800 : (2014) 2 SCC (Cri) 853

¹⁹ *Gian Singh v. State of Punjab*, (2012) 10 SCC 303 : (2012) 2 SCC (L&S) 988.

a crime which is against the society at large, but the Court continued to held that in case the securing the end of justice is appropriate then such criminal case could be put an end to.

At this juncture, it is necessary to note that there is a fine distinction between first, having a specific enabling provision to explore alternate dispute resolution as provided and further mandated by virtue of section 89 of the Code of Civil Procedure and whereas, having a provision such as that of section 320 of the Criminal Procedure Code which provides a specific list of offences that can be settled. It is necessary to mention here that additional applications moved under section 320 for taking permission of the court for compounding of a non-compoundable offence, eventually leading to an increase in more proceedings before the courts of law. This moving of applications under the exercise of inherent powers of the court as provided for under section 482 of the Criminal Procedure Code merely stretches and increases more litigations before the courts of the country, which could have been avoided at the very outset only.

In fact in one case of *Ramgopal*²⁰ the Apex Court has held that it is time that a suitable amendment is brought in the Criminal Procedure Code for making non-compoundable offences such as that of offences of section 326, section 498-A compoundable. The Court in a very important judgement suggested that such an amendment would not only relieve the courts of the burden but it would also increase the chances of reconciliation between the aggrieved parties without causing any extra burden on the court.²¹ This is a very important decision as it highlights how multiplicity of proceedings could be avoided as there were already more than 76000 cases which were reported in the year 2014 and now to have that further litigation only to settle the already reported cases, sounds not so well in terms of statistics.²²

In most of these cases, there is a pattern followed by the litigants before the Supreme Court of India. When the non-compoundable offences are not compounded or settled by the trial courts, then the litigants move to higher courts for exercise of the Court's inherent powers under section 482 of the Criminal Procedure Code. The higher courts are then only required to decide on the point whether such a non-compoundable offence be compounded by the trial court or

²⁰ *Ramgopal and Another. v. State of Madhya Pradesh and Another*, (2010) 13 SCC 540 : (2011) 2 SCC (Cri) 145.

²¹ ¶ 3, p. 540, *Ramgopal and Another. v. State of Madhya Pradesh and Another*, (2010) 13 SCC 540 : (2011) 2 SCC (Cri) 145.

²² Open Government Data Platform India, *Cases registered and their disposal under Cruelty by Husband or his Relatives during 2014*, available at <https://data.gov.in/resources/cases-registered-and-their-disposal-under-cruelty-husband-or-his-relatives-during-2014> (Last visited on 25-11-2021 at 11:00 hours).

not.²³ This whole process of seeking a decision by the higher court consumes a lot of time and also leads to an increase in pending cases and sadly this has become a very usual course of action for the litigants.

All of the extra procedures and steps taken by the litigants to apply for compounding of compoundable offences or to seek compounding of non-compoundable offences could be avoided, only if there was a provision enabling the parties to make use of alternate dispute resolution mechanisms themselves, established under the powers and directions of the trial court. This process will help achieve procedural finality of cases at an earlier stage.

In one recent judgement, the Supreme Court has held that the power to quash a criminal proceeding under section 482 is attracted even when the offence is non-compoundable, and that there needs to be a distinction in determining settling of disputes on account of gravity of the offence and its impact on the society.²⁴ In one other case of *Dayawati*,²⁵ the Court has mentioned that mediation is a court assisted process where the parties tend to negotiate and settle the matter. In this case, an observation that the Supreme Court has started to accept compromises/ settlement in non-compoundable offences just after evaluation of the case on the grounds of fairness, genuineness, equity, interest of justice and stage of the criminal proceeding²⁶ and had thus suggested sanction under Contempt of Courts Act 1971 in the case of violation of execution of the settlement agreement in the said respective case.²⁷ The Court went ahead and suggested that there is a need for proper rules in order to ensure the systematic compounding of non-compoundable offences, which can be formulated under the powers of the High Court as provided under section 477 of the Criminal Procedure Code.

The need of undertaking of mediation in criminal trials has gathered not just attention of the public but has also caught notice of the judges of the Court, where Justice S. B. Sinha (Retired Judge of the Supreme Court of India) has said that one needs to look beyond the process of court and arbitration but involve and include within its scope the power of mediation, either at pre-litigation stage or at post-litigation stage as that shall not only assist the court in amicable

²³ ¶ 4, p. 682, *Mahesh Chand and Another v. State of Rajasthan*, 1990 Supp SCC 681 : 1991 SCC (Cri) 159.

²⁴ *Parabathbai Aahir @ Parabathbai Bhimsinhabai Karmur v. State of Gujarat*, 2017 SCC OnLine 1189.

²⁵ *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032.

²⁶ ¶ 69, *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032.

²⁷ ¶ 132, *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032.

resolution of the dispute as the flexibility which mediation provides isn't provided in the court processes or through arbitration processes.²⁸

In contrast, in another recent judgement, the Court held that the criminal court is not a revolving door where the accused can come at his own whims and fancies for the settlement of the dispute but existence of discipline plays a very important role too. The Court herein held that settling of a serious matter through mediation is no answer for disposing of a criminal matter as there are several other facets to a criminal adjudication.²⁹ Criminal matters are those crimes which are committed against the government and if the court allows for mediation of such matters, then that may negatively impact the authority of the government as it shall be perceived as if the government permits the resolution of the serious criminal offences with an authority not to be considered serious enough.

The evaluation whether what category of cases could be resolved through the process of mediation has been discussed but whether even such resolution should be provided which could actually undermine the authority of the government, but not forgetting how such speedy resolution of the cases through the process of mediation could actually assist the judicial system but whether it could harm the government's authority or in fact assist the government in supporting the speedy resolution of the cases through the show of improvement in statistics.

It may be noted here that the Courts have had no trouble in invoking its inherent powers to decide on quashing of proceedings under section 482 of the Criminal Procedure Code, but this has surely led to an increase in several steps in criminal adjudication. If it were a case that the litigants had the option to settle the dispute on their own accord by way of court annexed mediation as recognised by the Civil Procedure Code and deriving such reference to the existing criminal law, then the adjudication by such criminal court would have been limited to only determining the legality of the terms of settlement entered into between the parties of such settlement report. In such a case, the litigants would not be required to move further applications to the higher courts as the power of adjudicating on the settlement report would vest with the trial court judge only. The only issue which would then arise is the enforcement of such mediation report, if taken on record by the respective trial court judge. The idea here is

²⁸ S.B.Sinha, J., 'Mediation: Constituents, Process and Merit', available at <http://patnahighcourt.gov.in/bslsa/pdf/Publication/6.pdf> (Last visited on 24-11-2021 at 14:00 hours).

²⁹ *Yashpal Chaudhrani and Others v. State (Govt. of NCT of Delhi)*, CrI. M.C. 5765/2018, decided on 22-04-2019.

to not invoke inherent powers of the higher courts which has sadly now become a usual trend in criminal litigation in the High Courts.

The discussion whether the moving of several applications before the High Court under section 482 for the compounding of non-compoundable offences is required which though has become a usual trend now or whether could it be avoided only on the basis of terms of reference as entered into between the parties or whether it is a must that such applications must be moved for the due consideration by the judicial body as the stakes are very high as the settlement and resolution of a criminal matter is in the picture, and thus such determination is a must. These are few perspectives to the very large issue as to whether mediation is just for the compounding and resolution of criminal matters and whether it is worthy of being put into multiple criminal litigation at both trial and high court level.