

# MEDIATION AND CONSUMER PROTECTION

—Sheetal Kapoor\*

**Abstract** *The Consumer Protection Act, 1986 whose sole purpose was to protect the rights of the consumers and to provide speedy redressal to them has become archaic and does not consider modern day consumer market challenges, especially those dealing with online, teleshopping, product recall, unsafe contracts and misleading advertisements. Further consumer courts in India, are burdened with more than 4.3 lakh pending cases and for petty amounts consumers have to wait for years to get justice. In order to strengthen and empower consumer rights in India The Consumer Protection Bill, 2019 which is considered as a milestone in protecting the rights of the consumers has been passed by the parliament. The New Consumer Protection law repeals and replaces the CPA, 1986 and seeks establishment of Central Consumer Protection Authority, mediation, product liability, and faster redressal by the consumer commissions. The author identifies important questions stemming from the discontinuities in the Consumer Protection Act, 1986, the backlog and pendency of consumer cases and discusses how mediation as proposed in the new law can be a game changer in consumer protection.*

## I. INTRODUCTION

With the advent of digital technologies, increasing penetration of e-commerce, smart phones, cloud and internet, global supply chains, have provided new opportunities for consumers by providing easy access of products and services. But on the other hand, today's consumer is vulnerable to new forms of challenges such as, online fraud, ATM data leak, getting defective, substandard, duplicate, poor quality and unsafe products, predatory prices,

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exploitative and unfair trade and unethical business practices. Further, misleading advertisements especially digital, tele-marketing, multi-level marketing, direct selling and e-tailing are some other challenges which never existed in 1986.

Since the consumer cannot check or verify the claimed features of the product or service by the website it relies on the representations made on the e-portals and many times makes advance payments before receiving or opening the product. Lack of knowledge about the address or location of the website and how and where to file a complaint if the seller dupes them are other problems faced by consumers.

The absence of effective and efficient consumer dispute redressal system can result in lack of consumer confidence in the Justice Delivery System. Consumers find it difficult and expensive to have their disputes settled because most of their claims are of small value and some consumers are low-income earners. The Consumer Protection Bill, 2019 seeks to empower consumers against above mentioned challenges and replaces the three-decade old legislature.

In a developing country like India, Alternative Dispute Resolution Mechanism can be one of the best strategies for quicker resolution of consumer disputes and to lessen the burden on the consumer forums and to provide suitable mechanism for expeditious resolution of consumer disputes. The Consumer Protection Bill, 2019 envisages introducing the process of mediation for speedy disposal of consumer disputes.

The objectives of the study are as follows:

1. To understand the shortcomings in the Consumer Protection Act, 1986, especially delay in consumer dispute redressal and the challenges faced by consumers especially while buying online.
2. To study innovative methods such as mediation in consumer dispute resolution.
3. To examine the skills, constraints and dynamics of the negotiation process in relation to consumer protection.
4. To discuss the provisions of Consumer Protection Bill, 2019 on mediation and its acceptance by aggrieved consumers.

## II. SHORTCOMINGS OF THE CONSUMER PROTECTION ACT, 1986

After more than 30 years of implementing the Consumer Protection Act, it is time to reconsider and rethink whether Consumer courts have been able to deliver as promised. Are the consumers getting speedy redressal? Delay in disposal of consumer cases, non-disposal of cases, lack of manpower and poor infrastructural facilities, are other problems related to Consumer courts. There have been allegations that the lawyers have taken over the consumer forums as the consumer is unaware of the legal procedures and processes and hesitates to plead its case in the consumer courts. The three-tier judiciary is totally dependent on the Department of Consumer Affairs for each and everything including appointment of members and financial support. In disputes between consumers and businesses. Alternative Dispute Redressal (ADR) is emerging as a faster, cheaper and cost-effective method for timely disposal of consumer complaints. Since justice delayed is justice denied, the consumer courts these days are facing the problems of huge pendency and delays in disposal of cases. The consumer courts have been established with the twin objective for speedy redressal of consumer complaints and to establish quasi-judicial authorities unlike civil courts to provide compensation to consumers. But over the years there have been heavy pendency of cases in various consumer courts. Some of the lacuna of the Consumer Protection Act, 1986 are:

- a) The Consumer Protection Act, 1986 although a benevolent legislature whose sole purpose was to protect the rights of the consumers has become outdated and does not consider rapid changes in consumer marketplaces, especially those dealing with online, teleshopping, product recall, unsafe contracts and misleading advertisements.
- b) Section 13 (3A) of CPA, 1986 states that “every complaint shall be heard expeditiously as possible and endeavour made to dispose of complaint within a period of three months from the date of notice by the opposite party and five months if it requires testing of commodities.” But it is seen that due to heavy pendency of cases and frequent adjournments delay in getting justice takes place (The Consumer Protection Act, 1986).
- c) The consumer courts have been overburdened with pending cases and the buyer-seller contract is tilted in favour of the seller. Further the procedures are becoming expensive and time consuming.

Therefore, it is time that ADR and mediation process are being adopted.<sup>1</sup>

- d) The Presidents and Members of the consumer courts constitute the backbone of the consumer dispute redressal system. They play a major role in enhancing the faith of the consumers in the redressal mechanism. But it has been seen that there are more than 400 posts of President and members in various consumer forums which are lying vacant. The State governments do not show any interest in immediately filling up the vacant posts and the issue of consumer protection is not a part of any political parties agenda.
- e) Consumer courts are functioning with staff deputed from other departments who do not have any experience in judicial practices. It is necessary to provide intensive training to the members of the Consumer courts before putting them on the job. The present practice is to provide training after assuming charge as a member.
- f) Many times, it is seen that the award given by consumer courts is very meagre and petty and the consumer has to run from pillar to post to get the orders implemented.
- g) There has been lack of proper coordination among the President and members of the consumer court, for timely adjudication of cases and many times around ten or fifteen adjournments are allowed.
- h) The President of the National Commission or State Commission are not empowered to take up suo motu action in consideration of the damages affecting a sizable number of populations e.g. misleading advertisements.

### **III. ANALYSIS OF THE CASES DISPOSED BY CONSUMER COURTS**

According to the data available from the Department of Consumer Affairs more than 4.3 lakh cases are pending in the various consumer courts, which is an alarming figure. When the consumer courts were formed their main purpose was to provide inexpensive and speedy redressal to consumers, where a consumer could itself plead its case in the consumer courts (Aggarwal V.K., 2015).<sup>2</sup> Since the law was complex in nature, many con-

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<sup>1</sup> Sheetal Kapoor, *Consumer Affairs and Customer Care* (Galgotia Publishing Company, 2nd edn., 2019).

<sup>2</sup> V.K. Aggarwal, *Consumer Protection: Law & Practice* (Bharat Law House 2015).

sumers started hiring lawyers and there were frequent adjournments which were given by these consumer courts which started delaying the entire adjudicatory process.

Table 1.1: Total number of Cases Disposed by Consumer Forums Since Inception (Update on 5-7-2018)

<i>Sl. No.</i>	<i>Name of Agency</i>	<i>Cases filed since inception</i>	<i>Cases disposed of since inception</i>	<i>Cases Pending</i>	<i>% of total Disposal</i>
1	National Commission	122042	103520	18522	84.82%
2	State Commissions	788463	678124	110339	86.01%
3	District Forums	3903706	3605673	298033	92.37%
	TOTAL	4814211	4387317	426894	91.13%

Source: [www.ncdrc.nic.in](http://www.ncdrc.nic.in)

Analysis of data regarding number of cases disposed by consumer courts shows that on 5<sup>th</sup> July 2018, at National, State and District level, a total number of **48,14,211** cases were registered out of which **43,87,317** cases have been disposed. Thus, there is an astounding figure of **4.3** lakh cases which are still pending in various consumer forums and the disposal rate is 91.13%. Table 1.1 depicts that **1,22,042** cases were registered since inception up to 5<sup>th</sup> July 2018 with the National Commission out of which 84.82% cases were disposed of, while 11% were still pending with the National Commission. In case of State Commission **7,88,463** cases were registered since inception up to July 2018 and 86.01 percent cases were disposed of. A staggering number of **39,03,706** cases were registered throughout the District Consumer Forums in the country and performance of District Consumer Forums was better as 92.37 % cases were disposed of. Justice delayed is justice denied, therefore the huge number of pending cases in the various consumer forums is a major drawback of the CPA, 1986. For petty amounts such as getting compensation in case of defective products, deficiency in service consumers have to wait for years to get justice.

#### **IV. NEED TO IMPROVE: MEDIATION AN INNOVATIVE AND PRACTICAL METHOD**

As mentioned in earlier section, the growing number of pending cases in consumer courts and delays in getting redressal requires some fast track alternatives so that justice reaches to the aggrieved consumers immediately.

There are huge challenges faced by online buyers such as breach of data privacy and security, substandard and duplicate products, phishing, territorial jurisdiction.

In Indian Legal System, appropriate methods of disputes resolution such as, arbitration, conciliation, mediation and Lok Adalat can be used for easy consumer dispute resolution. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict, salvage relationships and have significant savings in time and cost.<sup>3</sup>

Thus, innovative methods such as alternative dispute resolution (ADR) provides procedural flexibility, saves valuable time and money and avoids the stress of a trial and a three-tier hierarchy structure should be used. ADR is a mechanism of resolution of disputes of conflicting parties without resorting to adjudicatory process. ADR can be one of the best strategies for quicker disposal of disputes to lessen the burden on the consumer forums and to provide suitable mechanism for expeditious resolution of disputes. Mediation, one of the tools to resolve a dispute by direct negotiation by the opposite party has now been brought under the Consumer Protection Bill, 2019.

Mahatma Gandhi also described his experience at amicable dispute resolution as an exercise in uniting parties riven asunder in his autobiography which is the essence of mediation<sup>4</sup>. Mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their disputes. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. The parties can appoint a Mediator with their mutual consent or a mediator can be appointed by the Court in a pending litigation. Mediation always leaves the decision-making power with the parties. A Mediator does not decide what is fair or right, does not apportion blame, nor renders any opinion on the merits or chances of success if the case is litigated. Rather, a mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement. The Mediation Process consists of:

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<sup>3</sup> Omkar Anuroop and Krishnamurthy Kritika, *The Art of Negotiation and Mediation* (LexisNexis 2015).

<sup>4</sup> [www.delhimediationcentre.gov.in](http://www.delhimediationcentre.gov.in).

1. Structured Process
2. Neutral third party
3. Facilitates resolution of disputes
4. Mutually acceptable to parties
5. Specified negotiation and communication techniques

## V. NEED FOR MEDIATION IN CONSUMER CASES

The concept of mediation is ancient and deep rooted in our country. In olden days disputes used to be resolved in a panchayat at the community level. Panch used to be called Panch Parmeshwar i.e. were equated to God. Our judicial system is one of the best in the world and is highly respected, but there is lot of criticism on account of long delays in the resolution of disputes in civil court and consumer forums. Many times, consumers are wary of approaching the consumer forums or civil courts for a decision of their dispute.

Mediation in comparison to a lawsuit is quick, private, fair and inexpensive. It is a different paradigm and path from litigation which focuses on the past, establishing blame and liability and a win-lose results. In mediation the emphasis is on the future cooperation and direct communication with objective of sustainable solutions with win-win situation for all parties. It is a voluntary and flexible process where the parties participate in decision-making process and are only bound when they enter into a written agreement. It works in disputes before they are taken to court, to disputes pending in courts and even after a Court verdict has been given. It is a strong tool in the hands of the parties to devise solutions which could be more effective than judicial verdict.

In Western countries the response to mediation is very successful. Courts of law have set up Court Annexed Mediation Programmes. Lawyers have found that mediation is a new skill, which aids their clients. Clients have realised that mediation is a cost and time effective process and prefer lawyers who can suggest mediation before going to court. In USA ADR has been practiced for about 30 years and 90% cases settled through ADR in USA whereas in UK, Australia and other countries ADR has been practiced for about 20 years with huge success rate (Panchu Sriram 2015).<sup>5</sup>

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<sup>5</sup> Panchu Sriram, *Mediation Practice and Law: The Path to Successful Dispute Resolution* (LexisNexis 2015).

In India, after the incorporation of Sec 89 in Code of Civil Procedure, 1908, mediation in the legal way was first introduced and became operative w.e.f. 1-7-2002. Before that the utility and application of mediation in dispute resolution was not known. In 2002, mediation, was stated to be a new concept for the justice delivery system and for the resolution of disputes outside the traditional court mechanism. When Section 89 was introduced, concept of mediation was not known and trained mediators were neither available nor mediation centres were established in the judicial districts (Karachiwala Kassam Firdosh, 2010).<sup>6</sup> In *Afcons Infrastructure Ltd.* case also it was argued that if one party agrees to go for mediation then the court can consider it and this method of resolving dispute can be adopted<sup>7</sup>.

The process of adjudication of consumer disputes is adversarial in nature and is characterised with numerous and complex rules of form and procedures. Filing a consumer complaint comprises of many rules and procedures where the process of the issuance of legal notice to the opposite party and adjudication through a three-tier consumer courts is very time consuming. Many times, consumers face the situation of David and Goliath where the consumers have to fight against big players such as MNC's who engage a battery of lawyers and are ready to fight the case for years.

The mediator through its expertise, thinking power and maturity generates solutions for the parties to resolve disputes amicably. A good mediator possesses active listening, communication skills, option generation, reframing the case by avoiding harsh language used by one party, transposing, reality testing and maintain confidentiality. Delhi Mediation Project is a unique model. It is a pilot project and is running under the guidance of the Supreme Court of India since 2005. The first batch of Senior Additional District Judges were imparted Mediation Training of 40 hours duration. A permanent Mediation Centre was established at Tis Hazari court complex (Central Hall, 3rd Floor, Room No. 325) in October, 2005 and other mediation centre are working at Karkardooma Court Complex, Rohini, Dwarka, Saket and Patiala House Courts Complex.

Some other innovative ADR methods available to consumers before going for judicial mediation or going to consumer courts include National Consumer Helpline (NCH) and Online Consumer Mediation Centre at NLU established by Government of India. NCH with its toll-free number

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<sup>6</sup> Firdosh S. Kassam (Karachiwala), *Conflict Resolution through Mediation* (Snow White Publications Pvt. Ltd. 2010).

<sup>7</sup> *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

1800-11-4000 or 14404 provides advice, information and guidance to empower consumers and persuade businesses to reorient their policy and management systems to address consumer concerns and grievances adopting global standards. The NCH Project recognizes the need of consumers for a Telephone Helpline to deal with multitude of problems arising in their day-to-day dealings with business and service providers. A consumer can call NCH to seek information, advice or guidance for its queries and complaints<sup>8</sup>.

The Online Consumer Mediation Centre, established at the National Law School of India University, Bengaluru under the aegis of Ministry of Consumer Affairs, Government of India aims to provide for a state-of-the-art infrastructure for resolving consumer disputes both through physical as well as online mediation through its platform. The center provides innovative technology for consumers and organisations to manage and resolve conflicts and to propel online mediation as a first choice to resolving consumer disputes<sup>9</sup>.

## VI. MEDIATION AS THE NEW TOOL (THE CONSUMER PROTECTION BILL, 2019)

In *SpiceJet Ltd. v. Ranju Aery*<sup>10</sup> the consumer had to fight its case from the district forum to State Commission to National Commission and then finally to the Supreme Court regarding the contract of service entered through internet and the cause of action of the complaint. In order to accelerate the process of adjudication, The Consumer Protection Bill, 2019 envisages establishment of Central Consumer Protection Authority, mediation, product liability, and faster redressal by the consumer commissions. Since the adjudication process in consumer courts is slow, setting up of mediation centres at District, State and National Commissions annexed to the consumer courts can play an important role in delivering justice.

Clause 74-80 added in the New Consumer Protection Bill, 2019 contain provisions for “Mediation” as an Alternate Dispute Resolution (ADR) mechanism. It aims to provide legislative basis to resolution of consumer disputes through mediation thus, making the process less cumbersome, simple and

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<sup>8</sup> <<http://www.nationalconsumerhelpline.in/>>.

<sup>9</sup> <<https://www.nls.ac.in/>>.

<sup>10</sup> SLP(C) No. 25206 of 2017, decided on 4-8-2017 (SC) available at <<https://www.dailypioneer.com/2017/page1/online-buyers-can-sue-sellers-anywhere-sc.html>>

quicker. The mediation centres would work under the aegis of the Consumer Commissions and the State Government and the Central Government would decide the composition of the mediation cell.

Sec 74 of the New Consumer Protection law mentions that the State Government would establish a consumer mediation cell which would be attached to the consumer courts and each of the regional benches. Every consumer mediation cell would submit a quarterly report to the District Commission, State Commission or the National Commission to which it would be attached. Thus, every consumer mediation cell would maintain:

- (a) a list of empanelled mediators;
- (b) a list of cases handled by the cell;
- (c) record of proceeding; and
- (d) any other information as may be specified by regulations.

The tenure of the panel of mediators would be valid for a period of five years, and the empanelled mediators shall be eligible to be considered for re-empanelment for another term, subject to such conditions as may be specified by regulations. The mediation shall be held in the consumer mediation cell attached to the various consumer Courts (Clause 75).

Clause 76 provides that it shall be the duty of the mediators to disclose certain facts which may likely to give rise to a justifiable doubt as to his independence or

Impartiality whereas Clause 78 provides for replacement of a mediator by the consumer courts on the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator. Further procedure of mediation is discussed in Clause 79 and Clause 80 discusses provisions relating to settlement through mediation and the role of mediator when an agreement is reached between the parties with respect to all of the issues involved in the consumer dispute or with respect to only some of the issues, and in the event where no agreement is reached between the parties.

## VII. CONCLUSION

Growing backlog and delay in resolution of consumer disputes can erode the consumers trust in the legal system where the claims are of small value. Mediation can play an important role in consumer dispute resolution,

especially in cases which are pending for more than five years in the consumer courts. In comparison to a complaint filed in a consumer court, mediation can take away a lot of burden from the consumer courts and can be quick, private, fair and inexpensive. Thus, increasing and strengthening consensual alternatives through mediation would help in reducing backlog and improve the chances for the resolution of consumer disputes, by providing justice in time and hence can play a vital role in the economic growth of India.