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INDIA ADR WEEK 2023 DAY 3 - MUMBAI

2

SESSION 7

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5 **HOST:** Thank you so much, ladies and gentlemen and welcome again to our last session of
6 the MCIA in Mumbai today. It is my pleasure to call to the podium senior advocate, Mr. Vikram
7 Nankani, to introduce our keynote speaker for the evening. Please sir.

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9 **VIKRAM NANKANI:** Good evening. May I on behalf of the Mumbai Centre of International
10 Arbitration extend a hearty welcome to the Honourable Chief Justice, Justice Upadhyaya and
11 other dignitaries whom I can see here Justice Kamal Khata, Justice Arif Doctor, Justice Dr.
12 Gokhale, Justice Dr. Deshpande and other retired judges and retired Chief Justice of the
13 Bombay High Court, Justice Shah. I have been assigned the pleasant task of introducing the
14 Honourable Chief Justice, and for those who would not have already seen this which is I have
15 picked up partly from the public domain, I think the modesty of Justice, Chief Justice was that
16 his office gave us a very short resume or a background of the Chief Justice. But I have the
17 pleasant task of introducing him. And therefore, I will do that. Born on 16 June 1965 in District
18 Ambedkar Nagar, Uttar Pradesh, the Honourable Chief Justice had his education in Colvin
19 Taluqdar's College in Lucknow. He graduated in law in the year 1991 from Lucknow University
20 and enrolled as an advocate on 11th May 1991 and joined the chambers of his father, Shri RA
21 Upadhyaya practicing at the Board of Revenues for last 60 years. Shri Mohammad Arif Khan
22 Senior Advocate, Mr. SK Kalia Senior Advocate and the Honourable Chief Justice practiced,
23 mainly in civil and constitutional matters at the High Court of Judicature Allahabad at
24 Lucknow. He was also the standing appointed as a Chief Standing Counsel for the State of
25 Uttar Pradesh in May 2007 and continued to hold that office to elevation as a Judge of the
26 Honourable High Court of Allahabad. He was appointed as a Judge of the Honourable High
27 Court of Allahabad on 21 November 2011 and took oath as a permanent judge on 6th August
28 2013. The Honourable Chief Justice became the Senior Judge of the Lucknow Bench on 28th
29 March 2023, until his elevation as the Chief Justice of our Court, Mumbai High Court, on the
30 29 July 2023. With these words may I once again, Your Lordship, welcome the Honourable
31 Chief Justice, and will not come in the way of his keynote address. May I invite you, sir, to the
32 podium?

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34 **JUSTICE DEVENDRA KUMAR UPADHYAYA:** A very good evening to all present here.
35 The Chief Executive Officer of Mumbai Centre for International Arbitration, its Registrar and



1 Secretary General, Honourable Justice Mohit Shah, Justice Bhosale, the Chief Justice, who
2 has been my Chief Justice as well at Allahabad, my colleagues presently at Bombay High Court,
3 other senior members of the bar, dignitaries present on this occasion today, all the participants
4 in the ADR Week, ladies and gentlemen. It gives me immense pleasure to be a part of India
5 ADR Week being organized by this Centre. I was going through the small booklet published by
6 the centre, which gives details about the procedure and practices which are being followed by
7 the Centre while dealing with arbitrations. However alternative dispute resolution is not
8 confined to arbitration alone. Since it is an ADR week, therefore, apart from a strengthening
9 the arbitration, we need to talk about and discuss other ADR mechanisms, such as mediation
10 as well. It is widely acknowledged that India is not only an emerging economy, but is a leading
11 country so far as economic and other related activities are concerned globally. As one of the
12 fastest growing economies, India needs to find its way forward to create an environment where
13 ease of doing business can be felt and realized by all stakeholders. Be it the businessman or
14 the Industrialist or entrepreneurs or startups or all those who intend to contribute to the
15 overall growth of the country. To facilitate ease of doing business, our country needs to
16 strengthen the dispute resolution systems both in the adversarial system of adjudication of
17 disputes as also in the fora which are alternative to adversarial system of administering justice
18 and resolving the disputes. We have had a statutory regime for arbitration as an alternative
19 dispute resolution mechanism since long. By enacting Arbitration and Conciliation Act 1996,
20 the central legislature took a step forward to remodel the entire arbitration scenario in the
21 country. Since in arbitration resolution of disputes is by a third party, that is the arbitrator,
22 who conducts an adjudication process and gives a verdict on the issue, the mode remains
23 adversarial. In this process, the parties at dispute choose a neutral third party who conducts
24 the process of adjudication and makes an award which is enforceable by a court. Though in
25 the process the strict rules of evidence do not apply, however, exchange of pleadings and
26 documents an examination of witnesses followed by award and after the award is made the
27 same is challengeable in a court albeit on limited grounds. Though, the process of arbitration
28 is less formal than what we find in a court, however, the process still remains adversarial, and
29 our experience has been that as an alternative dispute resolution mechanism, the process of
30 arbitration is yet to achieve the desired success in our country. The question as to whether
31 arbitration after 1996 enactment has succeeded at all is being raised in the legal discourse of
32 our country. It is this discourse which has given rise to the need of more and more institutional
33 arbitrations. With the advent of liberalization of economy and globalization, which process
34 had started in our country in early 1990s, footfall of global players in every walk of life in our
35 country has enhanced manifolds and is increasing in geometrical progression. A lot of foreign
36 direct investment is knocking the doors of our country. This trend however, will not succeed
37 in case industry and other players find our justice delivery system cumbersome. It is in this



1 scenario that the institutional ADR assumes importance, and I hope that Mumbai Centre for
2 International Arbitration, is an effort to fill the gap for providing a robust and effective ADR
3 Centre.

4 The term alternative dispute resolution encompasses in its fold every process of adjudication
5 other than litigation. It includes arbitration, conciliation, mediation, and even a hybrid process
6 of using both the arbitration and mediation simultaneously. It can safely be said that ADR is
7 now becoming appropriate dispute resolution. However, on a lighter side in some circles it is
8 termed as alarming decrease in revenue. The lawyers have their own fears. Mediation in our
9 country has a statutory backing now. Mediation Act 2023 has been passed to promote and
10 facilitate mediation that lays emphasis on institutional mediation for resolution of disputes
11 not confined to commercial nature of disputes, but even the disputes otherwise. Now this is a
12 departure. In our country, remediation has been viewed, and it has worked not in any
13 institutional form, but this enactment creates an environment. And I hope that mediation
14 processes, as institutional mediation processes, will be strengthened by passage of this Act.
15 Though this Act has yet not been notified but we are very near to that. The Act talks about
16 mediation agreement between the parties and also pre litigation mediation. It also speaks
17 about establishment and incorporation of a mediation council, which is to be known as
18 Mediation Council of India, which is to be a body corporate. The Act of 2023 also provides for
19 registration of Mediated Settlement Agreement. This again is a very welcome, move by the
20 legislature. Such settlement is also enforceable under the Code of Civil Procedure as a
21 judgment or decree passed by a court, as is the case of the Arbitration Awards. Such settlement
22 agreement has been made challengeable under the act on the ground. The grounds are very,
23 very limited. The grounds are fraud, corruption, impersonation, or where mediation is
24 conducted in disputes or matters which are not fit for mediation as enlisted in the First
25 Schedule appended to this Act. The new statutory regime of mediation also provides for online
26 mediation. The Mediation Council to be established under the act will provide the manner of
27 registration of mediators as it has also laid down the standards of professionals and ethical
28 conduct of the mediators. Besides, the Council is saddled with the duty of developing India to
29 be a robust centre for domestic and international mediation, and also to hold trainings
30 workshops and courses in the area of mediation in collaboration with all mediation service
31 providers, law firms, academic institutions, and other stakeholders, both Indian and
32 international. Mediation service providers are recognized by the Counsel, which are interested
33 to perform certain functions, such as accreditation to mediators to provide all facilities,
34 secretarial assistance and infrastructure for efficient conduct of mediation and promote
35 professional and ethical conduct amongst mediators. Now this again is a departure from past
36 practice which our country has been adopting in the area of mediation. This is a step forward,
37 perhaps for institutionalizing the mechanism of mediation. Thus, the Act of 2023, in my



1 opinion, is a step towards creating an effective institutional mediation environment in the
2 country. Another important feature of the new and statutory mediation regime created by
3 2023 Act is community mediation. This is again a very important area where disputes which
4 affect peace, harmony, and tranquillity amongst the residents of an area or locality may be
5 settled through community mediation, of course, with the consent of the parties to the dispute.
6 The entire scheme of the act of 2023 is to create an environment where disputes' not only
7 between individual entities but also between public entities can be settled with the special
8 emphasis on institutional mediation the 2023 legislation thus it is a welcome step. As we all
9 know in advanced countries disputes seldom go to court. In a study, it has been estimated that
10 approximately 90% disputes arising in United States of America gets settled at a pre-litigation
11 stage. I need not emphasize the benefits of ADR process as they are very well known.

12 Before I conclude, I wish to speak a few words to the lawyers to allay the apprehensions from
13 their mind. And the apprehension is that the process of mutation will affect the income of
14 practicing lawyers. Lawyers first of all, must know that the mediation is a new approach to
15 dispute resolution, which lays emphasis on the mutual benefits of arriving at a consensus,
16 rather than the need to defeat the other side as happens in adversarial litigation system. What
17 is the basic duty of a lawyer if I may ask. His basic duty is to protect his clients interest. With
18 the changing economic scenario, a lawyer must, first of all, acknowledge that mediation is a
19 new method of dispute resolution, which is going fast and also that it is possible to act both as
20 a mediator and a lawyer at the same time. He should also realize that the purpose of legal
21 profession is conflict resolution and thus the potential of mediation process in conflict
22 resolution needs to be recognized by the lawyers. The legal practice by a lawyer can include
23 representing his clients in mediation as well. Now, these are some of the thoughts which came
24 to my mind yesterday only. There are a lot of apprehensions among the minds of the lawyers
25 resorting to the process of mediation. Arbitration of course, they have been representing the
26 parties before the arbitrator, so that's not a problem. But mediation, it is generally thought
27 that the dispute will be settled amongst the parties, then what will the lawyers do? So now with
28 the statutory regime introduced by the 2023 Act with the emphasis on institutionalizing the
29 mediation process in the country, we have the provisions for accreditation of the mediators.
30 We have also the provisions for registering the mediation agreements and also registration of
31 mediation settlement agreements as well. For record, and it is now enforceable as a judgment
32 and decree under the CPC. So these apprehensions should be allayed from the minds of the
33 lawyers as well.

34 Something about some practices in the arbitration, which are not conducive to the whole
35 environment. Now in Uttar Pradesh we come across many a times the arbitrations awards
36 being directly challenged in a writ petition. Brother Justice Bhosale knows about. Now, what
37 leads a litigant to challenge this arbitration award directly by instituting a proceeding under



1 Article 226. What is happening is that there are various financial institutions, mostly the non-
2 banking financial institutions which put up a small kiosk in some small kasbas, some very
3 small cities alluring the farmers to take loan for agricultural implements like tractor and other
4 implements. Now the poor farmer does not know as to what goes on in that loan agreement.
5 That loan agreement contains an arbitration clause the seat of arbitration, being at Madras, or
6 Bombay. For a farmer to attend the arbitration proceedings, either at Madras or Bombay from
7 UP in a remote, remote area of UP, that's impossible. So then if the arbitration process is
8 undertaken by the NBFCs against such a poor farmer who does not know what exactly has
9 gone into that agreement, loan agreement then he seldom responds to the notices. It's very
10 difficult for him to get involved himself with the entire arbitration process in the scenario.
11 Then *ex parte* awards are passed, the orders are passed under Section 17. When it comes to
12 execution then the award is sent to the decisions concerned in UP. Then once he receives notice
13 he feels he has been befooled utterly. So that's one of the practice which I wanted to flag today
14 amongst the audience here. So these are some of the misuses also, we have to be very cautious
15 about. Why I laid so much of emphasis on mediation. There are certain benefits which are not
16 available in case the dispute resolution is resorted to arbitration. Despite all our efforts, despite
17 having a new institute in 1996 perhaps the question still remains whether we have succeeded
18 in arbitration or not. Whether it has served the purpose or not. As you are all aware the purpose
19 to take recourse to arbitration proceedings is to make the dispute resolution mechanism less
20 cumbersome. But then again there is an award then Section 34, then 37 then might be SLP. So
21 that time which the arbitration proceedings generally take is very, very crucial to lay emphasis
22 now on the mediation processes. That will be my message to all present here because the
23 Centre I am told, is not confined to taking up the arbitration matters alone. So perhaps
24 this new legislative regime, the new enactment which has been passed by the Parliament, once
25 it is enforced, the emphasis of ADR is perhaps going to shift from arbitration to mediation.
26 That is my hunch. So I would request this Centre to take up the mediations as well. Mediation,
27 as you know, till now has been normally court annexed mediations. Wherever the references
28 are made by the court to the mediators either individually or in some High Courts, some
29 District Courts also we have trained mediators, having obtained 40 years compulsory training
30 as designed by the MCPC of the Supreme Court. But now we are going to have some kind of a
31 mechanism where institutions like the Centre, this Mumbai Centre for International
32 Arbitration that can act as a model to develop as an institutional Mediation Centre in Bombay,
33 which can be copied elsewhere, as well. So to the CEO and the other office bearers of the
34 Centre, my request would be to lay some emphasis on mediation as well, because just see the...
35 I need not emphasize the importance of dispute resolution through meditation process. In the
36 arbitration ultimately the one party wins and the other party loses. And then the chances of
37 the matter being taken up further in an appeal, or in an SLP, that still remains. But mediation



1 it's a win-win situation for both the parties so that emphasis should be given to the mediation
2 process. And I understand now that with the introduction of the pre litigation mediation, not
3 only in the Commercial Court Act, I personally feel that Section 89 of the CPC has yet not been
4 utilized to its fullest potential. If you read Section 89 of this Code of Civil procedure as
5 interpreted by the Honourable Supreme Court in Afcon's case, the first step to be taken by a
6 court whereas a suit is instituted is to refer the matter for either of the ADR processes. The
7 potential of Section 89 has yet not been utilized, but with the advent of new statutory regime
8 of meditation I hope and I have a feeling that the emphasis of ADR systems is now going to
9 shift from perhaps arbitration to mediation. So I would request the Bombay Centre to work in
10 this area as well. So, today I feel glad to be amongst all of you and I wish all success to this
11 centre and hope that centre as an institutional mediation centre, as an institutional arbitration
12 centre, shall set up an example which can be followed by rest of the country. Thank you very
13 much. I must tell about Justice Bhosale, he is a great fan of mediation process.

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15 **VIKRAM NANKANI:** I'm here for two things. One for personal apologies to the former Chief
16 Justice of Allahabad High Court and Andhra High Court, My Lord Justice Dilip Bhosale, I
17 forgot to mention him in the introduction. My personal apologies, Sir. Of course, taking a cue
18 from what the Honourable Chief Justice said, I think no one in this room would agree anything
19 lesser. So this is a notwithstanding Section 12(a) in the Commercial Courts Act and Section 89
20 as you said sir. This is going to be a watershed moment, this new Act. And we at the Centre are
21 going to take it seriously. I will however reserve that prerogative to Madhukeswar and Neeti
22 to elaborate a little more on that. But as a Centre, this is now certainly going to be a very big
23 area of focus for us. Thank you, Your Lordship. Thank you for your words of wisdom and
24 advice.

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26 **HOST:** Thank you so much sirs for those inspiring words. And with that we bring to a close
27 the Mumbai Chapter of the India ADR Week 2023. And all that stands between us now and
28 the cocktails and the dinner is a vote of thanks. So my, please request Shreya Aren, Co-chair
29 of the Young MCIA Committee, to come up to the stage and give the vote of thanks.

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31 **SHREYA AREN:** Thank you, honourable Chief Justice Upadhyaya for your very insightful
32 and articulate words today. It's a real honour to be giving this vote of thanks, especially because
33 I share the home state of Uttar Pradesh with you. So it's actually a real honour for me. And I
34 think we should all take to heart the call to action that you made to make business easier,
35 especially to bolster the economic progress of India and to not just think about arbitration
36 when we're thinking about ADR. So thank you for providing a real overview of the cutting edge
37 Mediation Act 2023. And I hope Madhukeshwar and Neeti are ready to start a separate branch



1 of mediation with the MCIA? Thank you very much, everyone special sponsors for making this
2 event a success that it has been. I understand dinner has been served. So please let's all proceed
3 for that. Thank you very much.

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~~~**END OF SESSION 7**~~~

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