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**DISPUTE RESOLUTION MECHANISMS IN LIGHT OF COMPANIES
(MEDIATION AND CONCILIATION) RULES, 2016 AND THE WAY
FORWARD**

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ABSTRACT

In general parlance, a dispute resolution mechanism means a setting in place a manner to settle the grievance or disputes between two or more parties. To begin with, there were dispute resolution bodies judicial in nature established to resolve the conflict between parties through judicial means. But owing to the ranges of disputes companies get into, the parties were obliged to reach out to various bodies depending upon the subject matter to resolve the dispute, which added burden to the already overburdened judicial system. There was a lack of one such tribunal dealing with every matter concerning company law. In the light of the exact, certain dispute resolution mechanisms were added in place, even in the former Companies Act of 1956. To further streamline the process, the Companies Act, 2013 introduced NCLT and NCLAT as a forum to adjudicate on disputes related to companies in India, which shall be discussed later. Also, in recent years, the government of India has taken several steps to reform dispute resolution mechanisms for speedy disposal of corporate matters. One of which is the introduction of mediation and conciliation rules. Hence, there was a complete turnaround in the resolution of corporate matters in India.

In this research paper, the author highlights the introduction of the National Company Law Tribunal (NCLT) and National Appellate Company Law Tribunal (NCLAT) to replace the Company Law Board as a means of dispute resolution in the light of various committee reports. The reports also highlighted the inadequacies and shortcomings of the Company Law Board.

Further, the introduction of alternative dispute resolution in the light of section 442 of Companies Act, 2013 and the Companies (mediation and conciliation) rules, 2016 will be discussed. Finally, the author will discuss the scope of non-judicial mechanisms to resolve

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disputes in light of current legislation, along with recommendations concerning the mediation and conciliation rules.

Keywords: Dispute, Resolution, Mechanisms, Companies Act 2013, Mediation, Conciliation.

INTRODUCTION

In the world of corporates, disputes between companies are inevitable, mainly due to the ever expanding intricacies companies have to deal with on a day-to-day basis. Earlier, to get the dispute resolved, companies were instead obliged to approach various judicial bodies depending on the subject matter of dispute. The notoriously slow judicial system of India was the final nail in the coffin. Consequently, this resulted in an ever-increasing backlog case. For instance, as per the data from National Judicial Dara Grid, around 4.5 crore cases are pending before the Indian judiciary as of April.² This is considered a significant impediment to the ease of doing business in India.³ Hence, it becomes apparent that there is a need for smooth dispute resolution mechanisms in the legal framework, not necessarily being a judicial mechanism. Even the Supreme Court, on many occasions, had reckoned a need for an alternative that is less formal in nature which can help secure speedy justice and disposal of cases as the judicial processes in India are complex, expensive, and time-consuming.⁴

Hence to address the above issue, The Company Law Board was first established in February 1964⁵ under the Companies Act, 1956, to ensure greater efficiency in administering the day to-day matters. Later, with effect from 31st May 1991, Company law Board was formed again by the central government as an “*independent quasi-judicial body*”.⁶ Powers of Company Law

² Kenneth Mohanty, “Explained: CJI Ramana says 4.5 crore cases pending, here’s what has been fuelling backlog in Indian Courts” News 18, July 18, 2021, available at <https://www.news18.com/news/explainers/explained-cjiramana-says-4-5-crore-cases-pending-heres-what-has-been-fuelling-backlog-3977411.html>(last visited on 17th September 2021).

³ Rashika Narain and Abhinav Sankaranarayan, “Formulating a model legislative framework for mediation in India” 11 NUJS Law Review 75 (2018).

⁴*Guru Nanak Foundation v. Rattan Singh and Sons*, (1981) 4 SCC 634; *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531; *Shyamalika Das v. GRIDCO*, (2010) 15 SCC 268.

⁵ Companies Amendment Act, 1963.

⁶ Companies Act, 1956, s. 10E

Board were enlarged by the Companies (Amendment) Act, 1988, and were regulated by the central government.⁷

To make the dispute resolution process streamlined, various steps were taken by the government of India to ensure a better dispute resolution machinery through the Companies Act, 2013, among others. The introduction of Insolvency and Bankruptcy Code, 2016, amendments in the Arbitration and Conciliation, 1996, constitution of NCLT and NCLAT, just to name a few. Furthermore, to reduce the role and burden on the judiciary, alternative means of dispute resolution were given importance. In this light, the companies (mediation and conciliation) rules, 2016 was introduced under section 442 read with section 469 of Companies Act, 2013. These rules empower the central government to set up a panel of experts for facilitating mediation and conciliation proceedings between the parties.⁸

In the light of the shift in the approach towards dispute resolution mechanisms incorporate, the author will analyse the transformation of the company law board into NCLTs and NCLAT based on various committee reports. Further, keeping in mind the growing importance of ADR as a dispute resolution mechanism, the author will analyse the mediation and conciliation rules, 2016 and how the companies can benefit from it and suggest some changes which can be incepted in the same.

TRANSFORMATION FROM COMPANY LAW BOARD TO NCLT

Before the Companies Act, 1956, Companies Act 1913 was in force in India. Later, when World War II came to an end, the government of India decided to review the Companies Act, 1913, the inspiration for which was taken from the English Companies Act, 1948.⁹ To make it happen, a committee was constituted headed by C.H Bhabha on 28th October 1950. The committee submitted its report to the government of India in 1952.¹⁰ After accepting most of the recommendations made by the committee, the legislature created the Companies Act, 1956.¹¹

⁷ Companies Act, 1956, s. 10(1A).

⁸ The Companies (mediation and conciliation) rules, 2016, Rule. 3.

⁹ Department of Company Affairs, “Report of the Company Law Committee” (1952).

¹⁰ *Id.*

¹¹ Companies (Amendment) Act, 1956.

Under the 1956 act, the authority to undertake investigation and inquiry was bestowed to the central government and Company Law Board, instituted in 1964¹². This was done to ensure convenient and better administration of the Companies Act, 1956¹³. The board consisted of not more than nine members, whom the central government-appointed.¹⁴ Among them, one member was appointed by the chairman of the board by central government¹⁵.

Recommendations of committees

Sachar Committee (“Report of the High-Powered Expert Committee on Companies and MRTP Act”).

The first recommendation on the company law board was made by the Sachar committee back in August 1978. The committee recommended that Company Law Board be restructured so that it becomes an independent and a quasi-judicial body with permanent branches in various parts of the nation, just like the Income Tax Appellate Tribunal, so that provisions of the law could be better administered.¹⁶

The committee suggested that various powers were exercised by Central Government which should be delegated to the Company Law Board, provided that matters entirely administrative in nature should be with the centre.¹⁷ And matters which require the exercise of quasi-judicial powers should vest with the Company Law Board.¹⁸ However, rulemaking powers should be vested with the central government.¹⁹ Also, because the Company Law Board is a specialised body meant for administration of Companies Act, 1956, matters of company law that civil courts dealt with must be handled by the Company Law Board itself.²⁰

¹² Supra Note 4.

¹³ Vikalp, “Critical Analysis of the Transformation of The Company Law Board into The National Company Law Tribunal in the Light of Various Committee Reports” 4.2 *RFMLR* (2017).

¹⁴ Supra Notes 5.

¹⁵ *Id.*

¹⁶ Ministry of law, justice and company affairs “Report of the high-powered expert committee on companies and MRTP Act” (August 1978).

¹⁷ *Id.*

¹⁸ *Id* at 7.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 16.

Further, the committee recommended a change in the definition of "court."²¹ Under Companies Act, 1956, in a manner that Company Law Board can be vested with the power to penalise for not following the provisions.²² Based on this, an amendment was made by Amendment act, 1988, which added clause four under section 10E and section 634A. This made the orders by Company Law Board enforceable as a decree of a civil court. Considering all other recommendations made by the committee, the Companies (Amendment) Act, 1988 was passed, making Company Law Board a quasi-judicial body capable of regulating its procedure.²²

Eradi Committee ("Report of the High-Level Committee on Law Relating to Insolvency and Winding up of Companies")

The Eradi Committee was formed with Justice V. Balakrishna Eradi as the chairman. The committee was constituted by the Former Prime Minister Shri Atal Bihari Vajpayee on 22nd October 1999.²³ The committee was formed to scrutinise the then prevailing laws concerning companies' winding up, make recommendations, and advise improvements accordingly to revamp it as contemporary times.²⁴

The committee observed that there were various agencies like the Company Law Board, Board for Industrial and Financial Reconstruction (BIFR), High Courts dealing with multiple aspects of company law.²⁵ There had been conflicts of decisions, confusion, and delayed justice due to a multiplicity of agencies²⁶. Hence, as a solution to this, the committee recommended that there should be one national tribunal that will have the powers of BIFR, High Courts, and Company Law Board. Therefore, all the pending cases must be transferred to such a national tribunal because the High Courts were not able to deal with winding up matters. The BIFR, too, could not keep up with the expectations right from its inception in 1987. To set up a national tribunal, the

²¹ Companies Act, 1956, s. 2(11).

²² *Supra* note 15. at 16.

²² *Supra* note 5.

²³ Department of Company Affairs "Report of the High-Level Committee on Law Relating to Insolvency and Winding up of Companies" (October 2000).

²⁴ *Id.*

²⁵ *Id.* at 7.

²⁶ *Id.*

committee recommended amending article 323B²⁷ of the constitution and to repeal section 10E of Companies Act, 1956.²⁸

Therefore, in the light of recommendations provided in the Eradi Committee report, the Company Law (Amendment) Act, 2002 was passed, which brought some significant changes to the Companies Act, 1956. It provided for the dissolution of the Company Law Board²⁹ and part 1B and 1C were introduced for NCLT and NCLAT, respectively, which provided for composition, constitution, etc. Part 1C empowered NCLAT to hear appeals against the orders of NCLT. These tribunals were bestowed with concerned High Courts, Company Law Board, and the BIFR.

J.J Irani Committee (“Report of The Expert Committee on Company Law 2005”)

J.J Irani committee was formed on 2nd December 2004 under the chairmanship of Jamshed Jiji

Irani, an Indian Businessmen. The committee was formed to “*comprehensively revise the Companies Act, 1956, to enable a simplified compact law to replace the existing act, that would address the changes taking place in the national and global scenario.*”³⁰

The demand for revamping of the Companies Act, 1956 was growing back then due to the liberalization policies introduced back then because the procedures in the Act were long, bulky, and complex.³¹ The complexity of the Companies Act, 1956 was acknowledged by the committee and emphasized an urgent need for new legislation. The committee suggested, “*we should have simplicity in laws and it should be contemporary in nature so that we don’t need anybody to interpret.*”³²

The committee also emphasized on speedy disposal of corporate disputes and observed that the time taken by the framework under the Companies Act, 1956 is longer than usual. Especially when matters concerning mergers and amalgamation, liquidation, winding up, etc., required

²⁷*Id.* at 39.

²⁸*Id.* at preface (vi).

²⁹ Companies Act, 1956, s. 10FA.

³⁰ Ministry of Corporate Affairs “Report of the Expert Committee on Company Law” (December 2005).

³¹ *Supra* note 12.

³² *Supra* note 30

speedy disposal. In the light of this recommendation, the committee appreciated the 2002 amendment, which introduced NCLT and NCLAT. The committee observed that “*it is the time for the forum with specialisation to deal with corporate issues, bringing together expertise from various disciplines.*”³³ The committee also recommended that for speedy disposal of matters concerning corporate crime, the NCLT should have benches having criminal jurisdiction, which is appealable only in NCLAT.

The provision of a Limitation period was recommended for the prosecution of offences under the Companies Act to avoid multiplicity of proceedings. In the light of this recommendation, section 422 of the Companies Act gave discretion to tribunals to dispose of the cases within three months.

Furthermore, the Irani committee contended for the central government's control over the new Act as it was in the case of 1956's Act. Or else, various state legislation would create chaos and confusion, which would be detrimental to the economy.³⁴

As evident from the recommendations of the reports mentioned above, creating a national tribunal will help in the speedy disposal of corporate disputes. The importance of a tribunal becomes even more relevant in the Indian scenario because compulsory adherence to Civil Procedure Code and the complex Companies Act, 1956 delayed the matters by leaps and bounds. In furtherance to the same and considering the recommendations of the Eradi Committee report, which came up with the idea of replacing Company Law Board with NCLT and NCLAT, the Companies (Amendment) Act, 2002 was passed. The NCLT will have combined powers of Company Law Board, under Companies Act, 1956, BIFR and Appellate Authority for Industrial and Financial Reconstruction (AAIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985. The SICA (Special Provisions) Act, 1985 was repealed based on the recommendations of the Eradi Committee.³⁵

But the provisions of the Companies (Amendment) Act, 2002, were challenged before the Madras High Court and later before SC in the case of “Union of India vs. R Gandhi, President,

³³Supra note 30.

³⁴Supra note 30. chap. II.

³⁵Supra note 19.

Madras Bar Association.”³⁶ The petitioners contended that the constitution of NCLT is violative of Article 14. But the Supreme Court rejected their contentions, ruling that the legislature had the powers to enact laws that can transfer cases from courts to tribunals. This case lasted for ten years, and that's why the introduction of NCLT was notified on 1st June 2016 under³⁷ instead of the former Companies Act, 1956.

The transfer of powers and cases took place in two phases. In the first phase, the powers were transferred to NCLT, and in the second, the powers of BIFR and respective High Courts. Transfer of matters from the company law board to NCLT took place based on the guidelines mentioned under section 434 of Companies Act, 2013. Needless to say, the introduction of NCLT brought with it a much-needed reform in dispute resolutions in the corporate world, which is apparent from the recommendations of committees. All the matters concerning company law stood transferred to NCLT, and the company law board stood dissolved.

CHANGES INTRODUCED WITH THE ESTABLISHMENT OF NCLT/NCLAT.

NCLT and NCLAT were constituted by the central government on 1st June 2016, under section 408 and section 410 of the Companies Act, 2013, respectively. On a positive note, the NCLT had eleven benches initially, compared to a mere five benches of the Company Law Board.³⁸ This contributed to a massive backlog of pending cases.

With an objective of speedy disposal of matters, the NCLT and NCLAT are required to dispose off applications filed before them within three months from the date of filing.³⁹ However, an extension for ninety days can be granted by the president of NCLT or the chairperson of NCLAT for disposing of the matter.⁴⁰

Furthermore, to avoid multiplicity of proceedings, civil courts were barred from deciding such cases in which a tribunal had the jurisdiction.⁴¹ Barring civil courts from entertaining suits concerning company law had remedied a significant problem of multiplicity of proceedings and

³⁶*Union of India vs. R Gandhi, President, Madras Bar Association*, (2010) 11 SCC 1.

³⁷ Companies Act, 2013, s. 408.

³⁸ *Supra* note 12.

³⁹ Companies Act, 2013, s.422.

⁴⁰ *Id.*

⁴¹ Companies Act 2013, s. 430.; *see also, Shashi Prakash Khemka vs. NEPC Micon and Ors.* CA 1965-66/2014.

conflicting judgements. Strict adherence to procedural law is also used to delay matters due to technicalities involved.

Constitution of NCLT

As per section 408 of the Companies Act, 2013, an NCLT shall consist of a president and a number of judicial and mechanical members deemed fit by the central government, which will be appointed by notification. So far as NCLAT is concerned, there shall be a maximum of eleven members, including judicial and technical members, who shall be empowered to hear appeals against the order of NCLT⁴².

Appeal procedure under Companies Act, 2013

The number of appellate authorities is two under the Companies Act, 2013, the NCLAT and Supreme Court. A person aggrieved by the decision of NCLT can file an appeal against the decision within forty-five days of the order being passed before the NCLAT⁴³. If a party is aggrieved with the decision of NCLAT, it can file an appeal before the Supreme Court within 60 days from the date of the order passed by NCLAT on any question of law.⁴⁴ Whereas in the 1956 act, an appeal against the order of the company law board can be filed only before the respective High Court, that too if the matter is related to a question of law.⁴⁵

ADR AS A CORPORATE DISPUTE RESOLUTION MECHANISM

In the past few years, it is apparent that several old laws have either been replaced or repealed, and new laws are put in force to keep up with the dynamic business environment. The common objective behind this process of repealing and amending is faster dispute resolution in commercial and corporate matters.

There have been various legal developments in the field of Alternative dispute resolution mechanisms in India. Back in 1988, the “129th Law Commission Report on Urban Litigation and

⁴² Companies Act, 2013, s. 410.

⁴³ Companies Act, 2013, s. 421.

⁴⁴ Companies Act, 2013, s. 423.

⁴⁵ Companies Act, 1956, s. 10F.

Mediation as Alternative to Adjudication" reported that increasing congestion in Indian courts is leading to an explosion of cases in urban litigation. In the light of this, the report emphasized the need for various alternative ways of dispute resolution between parties involved, failing which the matter could be sent back to courts. The Supreme Court in the case of *Vikram Bakshi vs. Sonia Khosla*⁴⁶ laid emphasis on mediation and noted that "*mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.*"⁴⁷

A significant rise in ADR use happened in 2002 when section 89 was added to Civil Procedure Code, 1908 vide the amendment to CPC.⁴⁸ Section 89 permitted a court to refer the dispute to an ADR forum when it deemed elements of settlements existing.

To give an impetus to ADR in the corporate world, the legislature added section 442 in the Companies Act, 2013, making it mandatory for the central government to maintain a mediation and conciliation panel to mediate commercial disputes between parties involved. Tribunals or central government can also refer a dispute to mediation if it deems appropriate. The mediation should be concluded before three months.⁴⁹ In an attempt to formally add mediation and conciliation as dispute resolution process, the Companies (Mediation and Conciliation) Rules, 2016 was enacted, which provides for mediation and conciliation as an option for parties involved at any stage of proceedings before the central government, NCLT or NCLAT, either on its own motion⁵⁰ or on an application made by the parties.⁵¹

Introduction of The Companies (Mediation and Conciliation) Rules, 2016

The Companies (Mediation and Conciliation) Rules, 2016, were notified by the central government pursuant to its powers under section 442 read with section 469 of Companies Act, 2013. The objective behind enacting these rules was to reduce the burden on NCLT and NCLAT and provide parties an option of ADR to resolve their disputes.

⁴⁶ *Vikram Bakshi vs. Sonia Khosla*, (2014) 15 SCC 80.

⁴⁷ *Id.*

⁴⁸ The Code of Civil Procedure Code (Amendment) Act, 1999.

⁴⁹ Companies Act, 2013. s. 442(5).

⁵⁰ The Companies (Mediation and Conciliation) Rules, 2016, rule 6(4).

⁵¹ The Companies (Mediation and Conciliation) Rules, 2016, Rule 6(2), 6(3).

The procedure of dispute resolution under the Companies (Mediation and Conciliation) Rules, 2016.

It is mandatory for the adjudicating authority (the NCLT or NCLAT) or central government to refer the matter before it for mediation or conciliation if an application is made in form MDC2 along with the fees required.⁵² The adjudicating authority appoints a panellist from the mediation and conciliation panel notified by the Ministry of Home Affairs.⁵³, who will hold the mediation or conciliation session at a place decided by adjudicating authority, or as agreed by parties and panellist.⁵⁴ After consulting the parties, the panellist will decide the date and time of each mediation and conciliation session.⁵⁵ It must also be noted that the parties must deposit probable cost for the session as it is only after such fee is deposited that the session will commence.⁵⁶ In case if the cost is not deposited, the session shall be deemed to have terminated.⁵⁷

Ten days before the commencement of the session, parties involved are required to submit a memorandum.⁵⁸ The memorandum should state the issues that need to be resolved, the party's position so far as the matter is concerned, and any other information which may be required by the panellist to understand the issue.⁵⁹ A copy of the memorandum should be given to the opposite party too⁶⁰. Furthermore, there will be no audio or video recording of the session and statement of parties and witnesses.⁶¹

Sessions will be conducted in the presence of parties or their authorised representatives.⁶² The panellist is at the liberty to either conduct joint or separate sessions with the parties.⁶³ If a party

⁵² The Companies (Mediation and Conciliation) Rules, 2016, Rule 6.

⁵³ The Companies (Mediation and Conciliation) Rules, 2016, Rule 3.

⁵⁴ The Companies (Mediation and Conciliation) Rules, 2016, Rule 11.

⁵⁵ *Id.*

⁵⁶ The Companies (Mediation and Conciliation) Rules, 2016, Rule 27.

⁵⁷ *Id.*

⁵⁸ *Supra* note 54.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The Companies (Mediation and Conciliation) Rules, 2016, Rule 21.

⁶² Rule 13 & 22.

⁶³ *Supra* note 54.

deliberately or wilfully fails to attend the session twice consecutively, the session would be deemed to have failed, and the panellist shall report the same to the adjudicating authority.⁶⁴

It must also be noted that the panellist is not bound by the provisions of the Indian Evidence Act, 1872 and the Civil Procedure Code, 1908. But instead will be “*guided by the principles of fairness and natural justice, having regard to the parties and obligations of the parties usage of trade, if any and the circumstances of the dispute.*”⁶⁵

To safeguard parties' interest, no party during the pendency of mediation or conciliation session can initiate judicial or arbitral proceedings concerning any matter which is the subject matter of mediation or conciliation⁶⁶. But if a party deems it necessary for protecting its rights, it is allowed to do so.⁶⁷ The time limit provided for completion of mediation or conciliation proceedings is three months, after which the proceedings shall stand terminated.⁶⁸ However, the period can be further extended for a period not exceeding three months if the parties involved or the panellists move an application towards the same before NCLT or NCLAT, as the case may be.⁶⁹

Suppose the mediation or conciliation proceedings turns out to be successful. In that case, the same is required to be reduced in writing in the form of the settlement agreement, which must be signed by parties or by their authorised representatives.⁷⁰ The settlement agreement then will be submitted to the panellist, who forward the same to adjudicating authority.⁷¹ But if there is no settlement reached before the expiry of time, the panellist shall report the same in writing to adjudicating authority⁷². After receiving the report, the adjudicating authority fixes the date of hearing within fourteen days from the date the receipt was received. After such a hearing, if the adjudicating authority is satisfied that the disputes between parties are resolved, it will pass

⁶⁴ The Companies (Mediation and Conciliation) Rules, 2016, Rule 14.

⁶⁵ The Companies (Mediation and Conciliation) Rules, 2016, Rule 12.

⁶⁶ The Companies (Mediation and Conciliation) Rules, 2016, Rule 29.

⁶⁷ *Id.*

⁶⁸ The Companies (Mediation and Conciliation) Rules, 2016, Rule 19.

⁶⁹ *Id.*

⁷⁰ The Companies (Mediation and Conciliation) Rules, 2016. Rule 25. *See also, Jiwan Kumar Bansal vs. Ganpati Township Ltd. and Ors.*, 2018 SCC OnLine NCLT 23229.

⁷¹ *Id.*

⁷² *Id.*

relevant orders.⁷³ But, if the issues are not disposed of, the adjudicating authority will proceed further to decide the issues remaining.⁷⁴ Expenses such as panellist's fees, administrative costs, etc., will be borne equally by the parties or as the adjudicating authority directs.⁷⁵ The adjudicating authority will decide the panellist's fees when referring the matter to mediation, and the parties themselves will bear conciliation and cost of producing witness or production of documents.⁷⁶

CONCLUSION

In recent years, it has become apparent that there has been a concerted push to promote alternative disputes mechanisms to resolve a dispute. Even though arbitration is always preferred over mediation due to its binding nature, the latter is slowly gaining importance recently. A statutory backing to it by the Companies (Mediation and Conciliation) Rules, 2016 is acting as a catalyst for the same. Even though the enactment of mediation and conciliation rules is a welcome move and seems to have a great potential to resolve corporate and commercial disputes, there are still specific issues with the rules. Which, if rectified, can attune our mediation practices at par with the global level.

Issues with the mediation and conciliation rules and the way forward

The panel which the rules refer to be set up is the mediation and conciliation panel. But still, the act state that it is set up for the purpose of "mediation" alone,⁷⁷ Notwithstanding the fact that Companies (Mediation and Conciliation) Rules, 2016, and section 442 of Companies Act, 2013 were enacted for both mediation and conciliation. This makes very evident the fact that section 442, along with mediation and conciliation rules, do not make the differentiation between mediation and conciliation clear enough, as laid down by the Jagananntha Rao committee report in 2003⁷⁸ After the Salem I judgement⁷⁹. For instance, rule 17 of the Companies (Mediation and Conciliation) Rules, 2016 describes the role of a mediator and conciliator to be similar. In

⁷³ Rule 26.

⁷⁴ *Id.*

⁷⁵ Rule 27.

⁷⁶ *Id.*

⁷⁷ Companies Act, 2013, s. 442(1).

⁷⁸ Law Commission of India "Concepts of conciliation and mediation and their differences" (2003).

⁷⁹ *Salem Advocate Bar Association (I) v. Union of India*, (2003) 1 SCC 49.

contrast, the report of 2003 acknowledged that both play different roles, and a conciliator has a much active role.⁸⁰ The committee stated that mediation could be "evaluative" and "facilitative." In contrast, the role of a conciliator is of an interventionist who tries to bring the parties together to arrive at a settlement.⁸¹ This distinction is evident in the Arbitration and Conciliation Act, 1996, section 30 of which refers to mediation and conciliation separately.

Hence, section 442 of the Companies Act, 2013 blurs the line between mediation and conciliation. This is worrisome because it's not clear whether the Companies Act, 2013 intends to create a different framework for conciliation or did the legislation intended to create a framework for mediation of commercial disputes different from conciliation.

Furthermore, rule 17 states that a mediator or conciliator should "*attempt to facilitate voluntary dispute resolution of dispute by the parties.*"⁸² It further emphasizes that "*it is the responsibility of the parties to take decision which affect them and he (mediator or conciliator) shall not impose any terms of settlement on parties.*"⁸³ Rule 18 also affirms the fact that the mediator or conciliator shall not impose a settlement, nor should he give any assurance that the session shall result in a settlement. These rules do seem to be in line with facilitative mediation.

But upon a perusal of rule 4, which describes nine qualifications for admission as a mediator to the mediation or conciliation panel, it becomes evident that the first eight require no formal training in facilitative mediation. Hence, those falling under these criteria may probably fail to follow facilitative mediation as prescribed by the rules. The eligibility criteria further raise the question of whether the legislature actually understood the meaning of facilitative mediation and its process. The legislature should have understood the process of facilitative mediation and prescribed eligibility criteria based on the skills and efficiency rather than setting a panel of retired quasi-judicial and judicial officers. If such officers are appointed as panellists, it can definitely affect the functioning of these rules in an affirmative manner. Hence making it even more "*tailored to the needs of the parties*"⁸⁴ as emphasized by the Supreme Court.

⁸⁰ *Supra* note 78.

⁸¹ *Supra* note 78.

⁸² The Companies (Mediation and Conciliation) Rules, 2016, Rule 17.

⁸³ *Id.*

⁸⁴ *Supra* note 46.