CHAPTER -VII

CONFIDENTIALITY

7.0 While addressing the issue of confidentiality in the opening statement emphasis should ideally be upon the following:

(a) As it is imperative for parties to trust the process of mediation, confidentiality is central to mediation.

(b) Assurance of confidentiality is essential to ensure that parties communicate fully and openly without fear of information being disclosed to the other.

(c) Assurance of confidentiality renders Mediation more appealing as it provides a safe environment to disclose information.

(d) Confidentiality, if assured and demonstrated encourages parties to consider and accept reality.

(e) The confidentiality aspect of mediation is in direct contrast with Courts and Tribunals which are open to public.

(f) A Mediator's manner of talking, body language, and eye contact, must be such that it would create confidence and trust amongst parties that he / she would scrupulously maintain confidentiality.

7.2 **Two concepts need to be considered here**

(a) **Process Confidentiality**

(b) **Caucus confidentiality**

Process Confidentiality

This is usually provided by statute and occasionally by contract. Typically, it applies to statements made during mediation and documents prepared for / during / pursuant to mediation. Process confidentiality does not render the information confidential if it was known by the parties prior to mediation. The

effect of process confidentiality is to make the earlier mentioned statements and documents inadmissible in any civil proceeding (criminal cases are usualiy exempted) and not discoverable.

Note : It is the statement or the document that cannot be admitted or discovered and not the content of such information.

Caucus Confidentiality-

A Mediator assures the parties that he / she will keep confidential any information which the parties want to be confidential.

Note : Process confidentiality and caucus confidentiality are not blanket restrictions as their scope is well-defined and described. Otherwise, all information may have to be treated as confidential and that would interfere with the negotiation. Hence, Mediator going into caucus is required to say, "I will respect your wishes with regard to any information you choose to disclose to me during the caucus and I request you to tell me which items of information should remain confidential. In this manner, any information is not confidential unless the parties expressly request to treat it as confidential. The reality is that, most information that is conveyed during private caucus is not confidential and it is only specific pieces of information that parties wish to keep confidential. This is an important point because the integrity of the process depends on the parties' perception that the mediator is maintaining the promised confidentiality. Hence, it is not desirable to describe confidentiality in absolute terms creating impediments for effective mediation.

7.3 CONFIDENTIALITY OF THE MEDIATION PROCESS INCLUDES THE FOLLOWING.

(a) A guarantee that any information, views, opinions, feelings, sentiments, apprehensions, remarks, adverse comments on the conduct, past or present of the opposite party given in confidence with an express request to keep it confidential , would not be disclosed to any person, including the opposite party without the prior permission of the disclosing party.

(b) A guarantee that no record of information, views, opinions, feelings, sentiments, and apprehensions expressed or remarks and comments made during the mediation process will be disclosed to any third party.

(c) A guarantee that no part of the aforesaid information would be revealed or disclosed to the Court which has referred the case for mediation.

(d) A guarantee that any notes prepared by the mediator during the mediation process will be destroyed at the conclusion of mediation if any of the parties so desire.

(e) A guarantee that the Mediator cannot be called as a witness by either party or by the Court in relation to the mediation proceedings.

(f) A guarantee that if a settlement cannot be reached, reasons for such failure would not be either recorded or disclosed to the Court and the blame for such failure would not be apportioned or identified.

(g) A guarantee that after mediation (successful or otherwise) all records sent by the Court would be returned and no documents would be retained by the Mediator.

(h) An assurance that if at any stage either party is apprehensive of the confidentiality of the mediation process he/she could with draw from the mediation or seek change of Mediator.

(i) A guarantee that anything said in confidence or documents produced in mediation with a request for confidentiality cannot be used in Court against the party in future.

CHAPTER - VIII

NEUTRALITY AND IMPARTIALITY

8.1 Neutrality is key concept in the process of mediation as Mediator is a 'NEUTRAL INTERVENER IN THE DISPUTE BETWEEN THE PARTIES'.

8.2 Mediation is a process involving the assistance of a neutral person or persons.

8.3 Mediation is an attractive option as it holds out a promise of complete neutrality.

8.4 While explaining the concept of neutrality in the mediation process emphasis must be upon the following:

(a) The Mediator should not have any personal interest in the outcome of the dispute though he retains an interest in effecting a resolution of the dispute.

(b) If the Mediator has any prior knowledge or information about the dispute, and its facts or any acquaintance with any of the parties which is likely to effect his neutrality and impartiality, he should withdraw from the mediation.

(c) The Mediator has no bias or prejudice against either party and is not inclined in favour of or prejudiced against either party for any reason.

(d) The Mediator would not, at any time, make any assumptions or a judgement about the parties and/or their dispute and/or their conduct.

(e) The Mediator would enter upon the mediation process without any preconceived ideas/notions about how the dispute should be settled or which party should be the beneficiary.

(f) The Mediator does not make any unnecessary assumptions/opinions about existing power relationship between parties.

(g) The Mediator would take care of the language differences between the parties.

(h) The Mediator would ensure that neither of the parties are acting under FEAR or compulsion, by explaining concepts of the voluntary nature of mediation and their unconditional right to withdraw.

(i) The Mediator could, if necessary, hold a private session to explain terms of settlement to each party.

(j) The Mediator should not appear to be in an undue hurry to record a settlement as such 'hurry' could be interpreted as the Mediator having a personal interest in the outcome thereby affecting impartiality and neutrality.

(k) The Mediator should be aware of and avoid the potential for bias based upon party's background, personal attributes, or conduct during mediation to that impartiality is maintained.

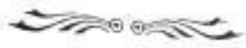
(l) The Mediator should consciously and actively provide a fair proceeding in which each party is given a fair and equal opportunity to participate, as this reiterates the principles of impartiality and neutrality.

(m) The Mediator should apply a uniform standard of responses, interest, -listening skills to ALL the parties and counsel.

(n) if a conflict of interest exists, the Mediator should withdraw from mediation.

(o) The Mediator must disclose information that could lead a party to question the impartiality of a Mediator.

(p) If a party objects to the continuance of the Mediator he / she must withdraw.



CHAPTER - IX

COMMUNICATION SKILLS

9.1 COMMUNICATION is the core of mediation. In the opening statement the Mediator needs to communicate effectively to ALL persons present. At the joint and private sessions, a Mediator should encourage the parties to communicate with the Mediator.

9.2 Communication is different from TALKING or SPEAKING Communication is a process of information transmission. Hence, it is critical that each Trainee understands the meaning of communication .

9.3 Communication could be through the spoken word, written word, gestures, body language, facial expressions etc, Studies have shown that, in any given communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the speaker, and 7% is transmitted through words.

9.4 While explaining the meaning and concept of communication and communication skills the following need to be clearly understood:-

(a) Communication is conveying a message, to another, in the manner in which you want it to reach.

(b) The intension of communication is to convey a message.

(c) Communication is information sent by one to another with intent that it be understood by the other in the same way as the sender..

(d) Communication is usually with a specific purpose. It could be any or all of the following;

- to express our feelings/thoughts/ideas/emotions/desires to others.
- to make others understand what and how we feel / think.
- to derive a benefit or advantage.
- to express an unmet need or demand.

9.5 Communication is initiated by a thought or feeling or idea or emotion and is then transformed into words/ gestures/ acts/ expressions. Thereafter, it is converted to a message. This message is transmitted to the receiver/listener. The receiver decodes the message, assigns reasons, or attributes thoughts, feelings/ideas to the message, and forms/ encodes his/ her message by words, gestures, acts, feelings, emotions and retransmits to the sender. This is called a **RESPONSE**.

9.6 Consequently, a communication would involve:-

A Sender	-	Person who sends a message.
A Receiver	-	person who receives the message.
Channel	-	the medium through which a message is transmitted which could be words or gestures or expressions.
Message	-	thoughts / feelings / ideas / emotions / knowledge / information that is sought to be communicated.
Encoding	-	transforming message / information into a form that can be sent to the receiver to be decoded correctly.
Decoding	-	understanding the message or information.
Response	-	answer / reply to a communicated message.

A deficiency in any of these components would render a communication incomplete or defective.

9.7 An effective response should be: (a) specific (b) un-emotional (c) well timed (d) balanced (e) should consider the needs, interests and goals of sender.

9.8 Communication may be unintentional e.g., in an emotional state feelings could be conveyed involuntarily through body language or gestures, expressed in words etc., A Mediator should be alert to observe such expressions,

9.9 Acquiring communication skills is critical because poor communication may cause the receiver to misunderstand or misinterpret the message leading to confusion, wasted effort and missed opportunity.

9.10 Good and effective communication facilities meaningful interaction and thereby enhances quality of mediation.

9.11 Inability to communicate effectively, accurately, and with precision would result in a break down of communication and could consequently lead to litigation. Communication skills is, therefore, an effective tool to bridge the communication gap.

9.12 Better, effective and meaningful communication can be ensured by:

(a) the techniques of reframing [DISCUSSED IN DETAIL IN CHAPTER X]

(b) using simple plain, clear, effective language and short sentences.

(c) using simple understandable sentences.

(d) singing one theme at a time.

(e) avoiding unnecessary or difficult or technical words.

(f) avoiding repetition.

(g) being precise, cogent and logical in use of words.

(h) formulating the message to be communicated.

(i) focusing on the core of the message and explaining the reasons for communication.

(j) responding warmly, with empathy, and interest.

(k) ensuring eye contact.

(l) speaking clearly and in a logical sequence.

(m) being courteous and attentive while listening.

(n) not interrupting during the communication process.

(o) acknowledging receipt of communication and expressing an understanding of the communication.

(p) avoiding making statements, comments or responses that could cause a negative effect.

(q) commencing a dialogue/conversation upon a subject close to the hearts of the parties.

9.13 The Mediator plays a DUAL ROLE in the communication process as she/he acts both as RECEIVER and a SENDER.

In the opening statement the Mediator begins as a SENDER.

At the joint session and private caucus/ sessions the Mediator functions more often as RECEIVER.

9.14 **Attentive and active listening** is the most critical and essential communication skill. The Mediator must listen with interest and encourage the speaker to elaborate. Eye contact is very important in the listening process. While listening the Mediator must be empathetic, not clinical and indifferent. The Mediator does not have to agree with what the parties are saying but they have to show an understanding of the issues and a non-judgemental approach to reactions and responses. Be comfortable with silence.

9.15 In mediation a party communicates with intent to assert or argue his point of view, or to convince the Mediator and the opposite party as to the validity of the case and to find fault, weakness with the opposite party or his case.

9.16 The Mediator communicates not to convince but to explain, not to argue but to understand, and to facilitate parties to find workable solutions.

9.17 The Mediator is required to be especially attentive if a person is ineffective in communication or is a poor communicator.

9.18 Ineffective or poor communication can be caused by:-

(a) Differences is perception viz., where the SENDER'S message or information is not received in the same manner by the RECEIVER.

(b) By the RECEIVER adding his own new ideas, thoughts, feelings, emotions or perceptions to the message.

(c) Differences in language and style.

(d) Poor listening abilities or skills.

(e) By incorrect filtering Viz., where a message is transmitted by SENDER to RECEIVER through a third person who acts as a receiver and sender valuable information may be withheld or distorted during such transmission.

9.19 The following could constitute barriers to effective communication:

Physical barriers:

(a) lack of congenial atmosphere.

(b) proximity, nearness, distance.

(c) presence of third parties.

(d) noise.

Emotional barriers :

(a) nature of parties and their emotional quotient.

(b) feelings of inferiority, superiority, guilt or arrogance.

(c) fear, suspicion, ego, emotional mistrust or bias.

(d) fear of identification or recognition.

(e) hidden agendas.

(f) personality conflicts.

Language barriers: Communication through language, accents, vocabulary or use of words that are not familiar or by being abusive or critical.

Barriers created by prejudices: Feeling uncomfortable with a particular gender, ideas, thoughts or feelings that are inborn.

Differing emotional status: Short tempered, even tempered, emotional outbursts, irritation, anger, crying etc.

Differing backgrounds: Difference in cultural, financial, social, religious, political or religious background.

For the mediation process a Mediator must imbibe and hone his/ her communication skills, which requires higher levels of concentration, continuous eye contact "listening through eyes, speaking through ears", and adopting different communication skills. He/ she should work at mastering one skill at a time and make sustained efforts to retain such skills.

COMMUNICATION IN MEDIATION

	ADVERSARY SYSTEM	MEDIATION
GOAL	To win.	To create workable solutions.
STYLE	Debate	Learn
TALK	To Convince.	To Explain
LISTEN	To find flaws and develop counter arguments	To Understand

CHAPTER - X

RE-FRAMING

10.1 Re-framing is a specialized communication skill where a Mediator, after determining that the parties want to move into a problem-solving mode, re-phrases their complaints/ grievances in terms that emphasize what the party wants to accomplish in the future. One critical skill of a Mediator is to encourage the disputing parties to engage in productive problem-solving rather than to fall victim to the vicious cycle of blaming and fault-finding. One method for moving parties from a backward focus (on the history of past events) to a forward focus (on resolving the dispute) is to re-frame the dispute in terms of the parties' underlying INTERESTS rather than in terms of their entrenched positions and views. A resolution of a dispute is possible only if parties persuaded to change their views. Therefore, these views must be sufficiently unsettled in the process of mediation to facilitate consideration of alternatives.

10.2 Parties in conflict with each other believe that their viewpoint is THE correct one and therefore, continuously focus and assert such viewpoints, most often in aggressive, unpalatable and violent language, resulting in a negative connotation and vitiated atmosphere.

10.3 The process of shifting focus from the negative connotation to a positive connotation is termed re-framing. Re-framing should only be used when the Mediator has determined that the parties are ready to move into a problem-solving mode after having completed their description of the background of dispute.

10.4 Re-framing is an integral component of communication skills and could be practised in fields of activity other than Mediation.

10.5 In Mediation re-framing is essential as it substantially reduces the intensity of emotions of parties thereby creating an atmosphere conducive to effective communication.

10.6 Re-framing could be used to build an atmosphere of mutual trust and confidence as it removes the avoidable "sting" in my communication.

10.7 Re - framing would result in changing focus from:

- ❑ blame to understanding
- ❑ the person to the problem
- ❑ positions to interests
- ❑ positions to feelings
- ❑ values to interests
- ❑ negativity to productivity
- ❑ past to the future
- ❑ the object of a complaint to the needs/interests of the speaker

10.8 While explaining the meaning and concept of re-framing the following to be clearly understood:

(a) any communication could be re-framed without changing the context, by changing a negative connotation to a positive connotation / communication.

(b) re-framing from negative to positive connotation can be achieved by actively listening followed immediately by reframing.

(c) in re-framing, the Mediator would modulate or restructure the contents of a communication, without losing its intended message.

(d) re-framing of a party's claim, statement or comment is intended to achieve a mind set for considering alternatives and possible settlement.

(e) re-framing can be used to remove aggressive, offensive and unacceptable language, intent or words which vitiate the atmosphere.

10.9 Re-framing could be achieved in many ways:

(a) by using different words and sentences.

(b) by for using on positive connotations in communications.

(c) by proposing an alternative method of communication.

(d) by moving from abstract propositions to specific, or specific to general.

(e) by stating new ideas with intent to stimulate though and discussion.

(f) by focusing thoughts upon the future.

(g) by dealing with emotional outbursts calmly and with control.

(h) by offering choices or options.

(i) by using direct questions.

(j) by bringing to surface the underlying emotions, causes or sentiments.

10.10 Most often emotions are the prime movers in litigation and therefore, parties wait for an opportunity, such as in mediation, to vent their emotions. This is achieved by accusations, abuse, allegations or imputation of motives, any of which could adversely affect the mediation process.

10.11 Statement made by one party with deliberate intent to abuse or discredit or bring into disrepute the other party could be neutralised by converting such specific statements to a generalized comment or statement. In this process the Mediator would act indirectly without confronting or directly arguing with the person making such statement.

Example of Re-framing

1. *The only way I am settling this case is if I get every paise I lost.*

   Possible re-framing : You want to be compensated in this case. Let us discuss how we can try and get that.

2. *My employer is never around, he is always travelling.*

   Possible re-framing : So, what you would like is for your employer to be in the office more often.

3. *She insults me and does not obey me.*

   Possible re-framing : You want respect and obedience. How would you want her to show you respect and obedience?

4. *Title to the property is with me.*

   Possible re-framing : You want to resolve the issue of titie to the property.

5. *He shows no respect to my parents.*

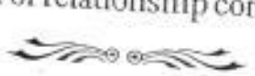
   Possible re-framing : You want him to respect your parents. What are some specific situations where you would like him to show respect to your parents?

10.12 A Mediator must cultivate the art of active listening and be sensitive to perceive the underlying emotions and sentiments of parties.

10.13 Skillful use of language is essential to manoeuvre parties from their rigid stands to a more amenable state.

10.14 One form of re-framing is humor, which must be used selectively and with utmost care so as not to offend any of the parties.

10.15 Mediator must convert statements made by the parties about their 'positions' into statements about their 'interest'. A 'position' is a desired outcome (e.g. demand, client, compensation, terms of settlement) or a perception (e.g., view of liability, view of the other party). An 'Interest' is an underlying need of the party (e.g., personal, professional and/or business concerns; social, familial or relationship concerns).



CHAPTER -XI

ETHICS

11.1 Ethics is a part of the code of conduct applicable to a Mediator in ıe process of Mediation. It is based upon certain values that are intrinsic to ſediation. These would be:

(a) every act, conduct, dealing of the Mediator related to or con ɔcted with Mediation, the parties and the process is required tc be FAIR, UNBIASED, IMPARTIAL and EQUITABLE.

(b) the conduct of the Mediator should be above board, and in ɔnformity with the highest moral standards.

(c) the Mediator must maintain confidentiality.

(d) the conduct of the Mediator must reflect and be in conform y with the universally acceptable 'good practices'.

(e) the Mediator should refrain from promises or guarantee of sults.

(f) the Mediator should not conduct himself in a manner th could be reasonably considered as unbecoming of a Mediator.

(g) the Mediator would withdraw from the Mediation if h /she even remotely sense that he / she cannot be impartial.

(h) the Mediator shall not be judgemental nor express an opi on on my issue even if requested or demanded by parties.

(i) the Mediator will uphold the integrity and fairness of the ſediation process.

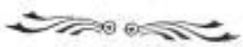
(j) the Mediator should not compel parties to enter into a settle ent.

(k) the Mediator shall disclose any interest in or relationsh with the subject matter of dispute or parties which is likely to eff t his / her impartiality or lead to bias or apprehension of bias.

(l) the Mediator will not render legal advice to any party even if requested.

(m) the Mediator shall satisfy himself / herself that he is able to complete the assignment in a professional manner.

(n) the Mediator shall recognize that Mediations is based on principles of self determination by the parties and that the Mediation process relies upon the ability of parties to reach an agreement voluntarily.



CHAPTER - XII

IMPASSE

12.1 In the language of Mediation impasse would mean and include a stalemate, standoff, deadlock, gridlock, bottleneck, hurdle, barrier or hindrance.

12.2 During a Mediation the Mediator may be confronted with an impasse which needs to be overcome to ensure that the parties move towards a settlement of the dispute.

12.3 An impasse can be caused by any or all of the following:-

(a) **Vengeance:** Where the motive in filing a case is vengeance against the other, a party will not disclose his / her true intent and refuse to resolve the dispute. The party's effort would be to STALL the proceedings.

(b) **Emotion:** Inspired by the freedom to express their thoughts, emotions and feelings, parties begin to abuse each other emotionally and verbally, leading to a deadlock and hence an impasse.

(c) **Adamant attitude of parties:** Where each party believes absolutely in the strength of his / her case and of winning the case in Court, an attitude of stubbornness is manifested with both parties willing to face consequences of litigation at all costs.

(d) **Personal animosity:** Where litigation is motivated by personal animosity of the litigants irrespective of the merits of the case, no suggestion for alternative solutions would be considered.

(e) **Ego:** Where either party considers it an affront to his/ her ego if a settlement were to be accepted, an impasse is created as focus would be on the party rather than the issues involved.

(f) **Lack of knowledge of facts or law:** Where legal proceedings have been motivated by lack or incorrect knowledge of law or facts, the parties would refuse to consider proposals for a settlement.

(g) **Interference by third parties:** Where well wishers, parents, friends, advisors, Counselors or associates of litigants who participate in

Mediation instigate parties not to settle the dispute or obstruct the settlement process for extraneous reasons.

(h) **Undue focus** only on the rights and obligations of the parties without consideration of their interests.

(i) **Use of distributive bargaining techniques** during mediation instead of using integrative and interest-based bargaining also.

12.4. An impasse could be created at any of the following stages:

(a) **At the time of opening statement:** The could be by a party refusing to participate in the mediation or by causing interruptions during the opening statement or by objecting to participation of third parties to the mediation or by insisting upon presence of only the parties or by constant assertion and demand that the case be settled by Court and not by mediation.

(b) **In a Joint Session:** This could be caused by parties making accusations against each other, or by use of indecent and abusive language or by making inflammatory and provocative statements against each other, thereby vitiating the atmosphere, or by parties offering patently absurd solutions for settlement.

(c) **In a Private Session or Caucus:** This could be by a party offering proposals that are entirely in his favour and interest so as to render further negotiation, impractical or difficult or by suggesting proposals that are unrealistic and inherently unworkable.

(d) **At the time of arriving at or drawing up of the settlement:** This could be by either or both parties being adamant about the wording, format, and content of the settlement, leading to threat of withdrawal from Mediation.

12.5 It is to be emphasized that a Mediator has a crucial and vital role in breaking an impasse, if a solution has to emerge.

12.6 A Mediator could take resource to any or all of the following (not necessarily in the sequence it is recorded) to break an impasse:

(a) be a sensitive observer and active listener while parties express their views,

(b) if a deadlock occurs at the time Mediators opening statement, he/ she should request parties to allow him/ her to complete his/ her statement; reassure parties that in the mediation process all decisions would be taken by parties themselves; that his/ her role is to act as a facilitator; that he/ she is not biased against either party and that they are entitled to withdraw at any time.

(c) assure the parties that the Mediator is not entitled to and would not pressurize or impose a decision upon the parties.

(d) assure the parties that if no settlement is reached the case would be referred back to the Court for trial.

(e) assure the parties that if no settlement is reached, proceedings of the mediation would not be considered by the Court and the Court would examine the case independently in accordance with law.

(f) assure thte parties that the Mediator will act impartially.

(g) immediately move into a private caucus with each party, where WATNA, BATNA and MLATNA could be explored and parties persuaded to offer proposals.

(h) assure the parties that confidentially would be maintained and that no confidential information disclosed in a private session would be disclosed to the opposite party.

(i) alert and caution the parties that the consequences of tailing to settle the dispute in mediation could lead to unrest, enmity, mental agony, hatred, continuance of and delay in litigation and increased costs.

(j) impress upon the parties that by settling the dispute at mediation, mental agony and multiplicity of legal proceedings could be avoided as a permanent solution to all disputes.

(k) the Mediator could request the parties themselves to suggest options to overcome the deadlock.

(l) persuade a party in a private caucus to be realistic, fair and reasonable while selecting options, and alert the party that any unworkable or unjust demands could be counter productive and against his / her own interest.

(m) if circumstances warrant, allow the parties to have a conference by themselves without intervention of any person including the Mediator.

(n) take a break.

(o) acknowledge the progress, if any, the parties have made.

(p) focus on goal of settlement.

(q) focus on participants interests.

(r) restrat the mediation process.

(s) change the subject and move to other topics.

(t) maintain silence for some time.

(u) change focus from gain to loss.

(v) have a break for coffee/food.

(w) use humour.

(x) suggest third party / expert intervention.

(y) change sides of the table.

(z) propose hypothetical offers.

(aa) Mediator's proposal.

12.7 If, in spite of every effort at breaking an impasse, the impasse remains, it is best to return the case to Court as being **"not fit for mediation".**

CHAPTER - XIII

ROLE OF ADVOCATES IN MEDIATION

13.1 It is a common belief that in mediation the participation of Advocates is optional and / or that they have no role to pay. This belief is erroneous. Advocates play an active role in the mediation process viz., during preparation, during mediation, and after mediation is concluded.

13.2 Mediation of a case is incomplete without the consent, presence and active participation of the Advocates of parties to the Mediation.

13.3 Advocates assist the Mediator in educating and informing the Mediator of the validity and sustainability of the legal contentions urged in the case. Quite often parties to a dispute become aware of the strengths and weaknesses of their case only at the mediation. Hence, the information provided by Advocates could make the difference between a successful and failed mediation.

Advocates may prepare mediation briefs to summarize the legal issues/claims/defenses for the mediator. Advocates typically prepare exhibits for mediation, including relevant documents, bills, expenses, etc., Before mediation, Advocates should discuss with their clients the strengths and weaknesses of their case, their overall negotiation goals, their opening offer, their bottom line (reservation price), and their role as an Advocate in mediation.

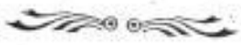
13.4 During the process of educating the Mediator about the legal issues involved, the relative strengths and weaknesses of each others case is assessed by the Advocate of the opposite party thereby leading to a REALITY CHECK. The reality check assists the Mediator in moving the parties towards resolution of the dispute as unrealistic claims become apparent.

13.5 As Advocates represent the disputing parties in Court, their knowledge of the real needs / interest of their clients and current Judgements, law relating to the subject matter of dispute would be up to date. Providing such information in the mediation process to the Mediator ensures that neither party suffers injustice and that settlements are in accordance with prevalent law.

13.6 Advocates are Officers of the Court, and owe a duty to the Courts to be fair and assist the Court in dispensation of justice. Similarly, in mediation they are expected to render assistance in settlement of cases, thereby contributing actively to the dispensation of justice in the country.

13.7 The presence of Advocates at the mediation is reassuring to parties as they feel safer and more secure in the presence of their respective Advocates. It allows parties to seek advice/opinion from their Counsel whenever they desire, during the process.

13.8 When an impasse occurs, the skill and knowledge of the Advocates is requested for by the Mediator to resolve the impasse.



CHAPTER - XIV

QUALITIES OF A MEDIATOR

14.1 As the Mediator plays a crucial role in resolution of disputes by using the facilitative, communication, and persuasive skills, and as trust and confidence form the corner stone of the mediation process, it is of utmost importance that every Mediator imbibe the following qualities:

(a) complete, genuine and unconditional belief in the process of Mediation and its efficacy.

(b) a commitment to contribute positively to the process and its growth.

(c) belief that he / she would contribute to the long term welfare and happiness of all parties to mediation.

(d) be willing to strive to achieve excellence in the art of mediation by constantly updating skills and knowledge.

(e) ensure that he / she is up to date in respect of developments in law and judicial pronouncements.

(f) be sensitive and alert and be able to perceive, appreciate and respect the needs, aspirations, emotions, sentiments, mind-frame of parties to Mediation.

(g) possess and manifest the highest standards of honesty and integrity in conduct and behavior.

(h) be impartial, without bias or prejudice.

(i) refrain, under any circumstances from being judgemental about parties, their claims, conduct, behaviour or demands.

(j) refrain from imposing or preaching personal values, opinions or be a Counselor.

(k) be an active and attentive listener.

(l) cultivate a calm, easy, peaceful, and cheerful disposition as it creates confidence and trust among parties in the process.

(m) respect and maintain confidentiality.

(n) be pleasant in his / her demeanour, be well and suitably dressed (not ostentatious).

(o) avoid wearing the attire of an Advocate (including a black coat) while acting as Mediator.

(p) imbibe qualities of patience, persistence and perseverance.

(q) be willing to devote quality time to mediation.

(r) possess an ability to perceive and deal with issues and problems in a "non-legal" perspective.

(s) be aware of social realities and be sensitive to changing social needs.

(t) strictly adhere to the code of conduct and professional ethics prescribed under the Mediation Rules.

CHAPTER - XV

INSTRUCTIONS FOR MEDIATION TRAINERS

This manual contains the basic framework and structure for the Mediator training programme. In each session, to supplement the narrative method, Trainers must use case studies, educational stories, role plays, interactive exercise and demonstrations to illustrate the principles of mediation. Whenever available power point presentations can be used. Reference to personal experiences in mediation is permissible but it must be on a selective basis and only used to illustrate a principle. Trainers are free to improvise or adopt other effective techniques suited to local conditions. However, it must be ensured that the contents of training are not diluted. Within the prescribed framework, there is immense scope for innovation and customisation of the training program by individual Trainers.

Trainers are advised to develop their communication and oratorical skills so that the basic information contained in the manual is effectively elaborated and communicated to trainees.

CHPATER - XVI

GUIDELINES TO BE OBSERVED WHILE PLANNING A MEDIATION TRAINING PROGRAMME

1. Set up a rectangle / square arrangement with tables and chairs for Trainees. Chairs for Trainees should be comfortable.
2. Do NOT set up an elevated platform for Trainers i.e., No dais.
3. Ensure that tables for Trainers / Trainees are at the same level.
4. Ensure that reading / training material intended to be used has been provided to all Trainees well before training commences.
5. Ensure that teaching aids / training aids / electronic equipment like LCD projectors, screens, computers, DVD players / sound systems have been installed and are working satisfactorily, if possible, wireless, microphones for use by trainees should be made available.
6. Ensure that Trainees are aware of the training schedule and the number of hours they need to devote for the training.
7. Provide all Trainees with appropriate identity cards. It facilitates an easy and healty interaction amongst them.
8. Ensure that adequate note pads, pens/pencils are provided to Trainees.
9. Ensure that in the first instance Trainees are allowed to choose their seats OR if a profile of Trainees is available earlier to the training, you could predetermine the seating arrangements so as to facilitate interaction.
10. Ensure that specific modules of training are allotted in advance to Trainers so that each of them is well prepared for his / her session.
11. Structure the Training Programme and allot a specific time for each session. Ensure adherence.
12. Ensure that Trainees are put at ease and are ready for a new experience.

13. Try an "ice breaker" if mood and atmosphere is tense, uncomfortable or apprehensive.

14. Ensure satisfactory arrangements for water, beverages and food.

15. Clearly explain ground rules applicable during the period of training and provide satisfactory replies to queries.

16. Provide an adequate introduction of the programme, the trainers, the trainees, the subject matter, and the learning process. Reference may be made to the history and development of mediation and the contemporary use of mediation to resolve disputes and the opportunities that exist for work in the field of mediation.

MEDIATION — ITS IMPORTANCE AND RELEVANCE

by

Justice R.V.Raveendran, Judge, Supreme Court of India

(Based on the C.L.Agrawal Memorial Lecture at Jaipur on 15.05.2010)
(Reported in (2010) 8 SCC (Journal Section) J-1 to 16)

There are two types of dispute resolution. The first is by adjudication, a binding process resulting in a decision by a third party. The second is by negotiations, a non-binding process dependent upon the volition of parties, which if successful, does not result in a "decision", but in a "solution" agreeable to the parties.

A binding dispute resolution can be achieved in two ways: First is adjudication by a public forum (courts or statutory tribunals). Second is adjudication by a private forum (Arbitral Tribunal). In the first method, a party raises a dispute by petitioning to the court or statutory tribunal, presided by adjudicator(s) appointed by the State, for a decision. The parties have no choice in the selection of the adjudicator and the decision-making is governed by the procedural laws and the decision is based on the substantive laws of the country. In the second method, a reference is made to an Arbitral Tribunal consisting of person(s) chosen by the parties for adjudication and decision. The adjudication process is governed by the Arbitration and Conciliation Act, 1996. The decision of the Arbitral Tribunal is based on the substantive laws, unless parties authorize the Arbitral Tribunal to decide the disputes *ex aequo et bono* or as *amiable compositeurs*. In the binding mode, there is always a certainty of a decision with one party ending up as the winner and the other being the loser. However, the decision may or may not be to the liking of one of the parties, or sometimes both the parties. Usually, the decision is open to challenge before an appellate or other forum as provided by law.

The non-binding dispute resolution can also be by two methods – either by direction negotiations or by negotiations with the assistance of a neutral third party. Direct negotiations are the process by which parties to a dispute endeavour to settle it by adopting a friendly and unantagonistic attitude towards each other. There are no set rules governing this mode of settlement. Any agreement reached is governed by the Contract Act, 1872. Negotiations with the assistance of a neutral third party can be by any of the three modes – mediation, conciliation and Lok Adalats.

The frequently asked questions about mediation are: What is so important about mediation? If mediation is given importance, will not courts and lawyers become redundant? What cases are suitable for mediation? Who should be mediators? What happens in mediation? Who are mediators?

Mediation vis-à-vis litigation

If the advantages of mediation (or any non-adjudicatory dispute resolution process) are to be highlighted, it will be necessary to set out the disadvantages of litigation as a dispute resolution process. But that does not mean that the adjudicatory process by way of litigation in courts is outdated, impractical or has lost its relevance. It only means that for certain categories of litigation, non-adjudicatory dispute resolution process is better suited and beneficial to the parties. The question therefore is not whether mediation is better or litigation is better. The question should be: "Which process is more suited for a particular type of dispute?"

Criminal cases, cases involving public interest, cases affecting a large number of persons, matters relating to taxation (direct and indirect) and administrative law have to be decided by courts by adjudicatory process. Even among civil litigations, cases involving fraud, forgery, coercion, undue influence, cases where a judicial declaration is necessary as, for example, grant of probate or letters of administration, representative suits which require declarations against the world at large and election disputes have to be necessarily decided through adjudicatory process by courts and not negotiations.

On the other hand, settlement by settlement by negotiations would be the appropriate method of dispute resolution in the following types of civil cases:

(i) *All cases arising from strained or soured personal relationships, including:*

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/ coparceners/co-owners; and
- disputes relating to partnership among partners.

(ii) *Causes relating to commerce and contracts, which include –*

- Disputes arising out of contracts (including money claims);
- Disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants; and licensors and licensees;

(iii) *Cases where there is a need to maintain the pre-existing relationship in spite of the disputes, which include –*

- disputes between neighbours (relating to easementary rights, encroachment, nuisance);

- disputes between employers and employees;
- disputes among members of societies/associations/apartment owners association.

(iv) *Cases arising out of tortuous liability,* which include claims for compensation in motor accidents/other accidents; and

(v) *Consumer disputes* where a trader or service provider is keen to maintain his business/professional reputation and credibility.

Of course, if the parties are willing, other categories of civil disputes may also be referred to mediation.

The relevance of mediation vis-à-vis the courts can be effectively brought out by the following illustrations, by comparing a litigant approaching a court to a patient approaching a hospital for treatment.

The Government, desiring to provide medical facilities to the residents of a town, establishes a ten-bed hospital with an operation theatre and employs only a surgeon to treat the patients. Will it serve the needs of the residents? The answer obviously is "No". The hospital should not be equipped with an operation theatre but also an out-patient clinic. It is not sufficient to have only a surgeon to perform surgeries, but also a physician to treat ailments which do not require surgery. In fact, the number of patients requiring medical advice and prescription of medicines will be many times more than those who require treatment as in-patients by subjecting them to surgery. Of course, if the physician finds that the patient is suffering from a serious ailment requiring surgery, he may prefer the surgeon. Imagine a hospital without a clinic and physician, but only an operation theatre and a surgeon. Imagine all patients, howsoever minor their ailments are, being admitted as in-patients and made to undergo surgery, simply because there is no physician to attend to them. Courts without mediation centres are like hospitals are like hospitals without out-patient clinics and physicians. Courts should have mediation centres to settle those cases which do not require a trial and adjudication, so that the courts can concentrate upon those cases which require adjudication.

Let us see from another angle. A hospital has to differentiate between patients who require in-patient care and patients who require out-patient care. If all patients, though they may require a mere prescription for medicine, are admitted as in-patients, merely because they are rich or because they are criminals masquerading as patients or hypochondriacs who want to be treated as in-patients, without ascertaining whether they really require to be treated as in-patients, the consequence will be that when really serious patients who require treatment as in-patients, seeking admission to the hospital, will have to be sent back or made to wait, for want of vacant beds for admission. As a result, the serious patients may die even before their treatment begins, as the much needed hospital

facilities are hogged by non-needy patients who do not really require such facilities. Similarly if cases which do not really require adjudication by trial and which are fit for negotiated settlements are not referred to mediation, those cases will fill the courts' board and take up cases which require their urgent attention and decisions.

Let us look at the matter from a third angle. A patient approaching the hospital may have a serious ailment or a comparatively simpler lifestyle related ailment like hypertension. The patient with hypertension is normally treated by a physician as an out-patient by prescribing some medicines and by suggesting a regimen of diet and exercise. A patient with a serious ailment, on the other hand, is admitted to the hospital as an in-patient and subjected to surgery or other medical procedures. Imagine the reverse situation. It will be disastrous to admit a patient with a non-serious ailment to the hospital and subject him to a surgery. It will be equally disastrous if a patient in an emergency situation requiring surgery is treated as an out-patient by prescribing some medicine. The question is not whether treatment by a physician is better or treatment by a surgeon is better. The question is which type of treatment is required by the patient, having regard to the nature of his ailment. Similarly, when a litigant approaches a court, what requires to be seen is whether the dispute requires to be adjudicated by a court or is a fit one to be settled by mediation. Disputes that are suitable for a non-adjudicatory process like mediation should be first referred to mediation and only if mediation fails, taken up for adjudication. On the other hand, disputes which are not suitable for mediation, should not be sent to mediation, but straightaway adjudicated.

Let us examine from yet another angle. When someone extols the benefits of yoga-cum-diet regimen for physical well-being, it does not mean that hospitals and surgeries have become outmoded or redundant. It only means hat yoga-cum-diet regimen can prevent ailments and can also cure when the ailments are not serious. But if the ailments are serious, in-patient treatment in a hospital is a must. Similarly, when the advantages of mediation are highlighted or the disadvantages of litigation in courts are pointed out, in the context of encouraging ADR processes, it does not mean that mediation is "better" than adjudication by courts. It only means that the mediation is a different process which is suitable and appropriate for resolving certain types of disputes. For other types of cases, and in cases where though appropriate, has failed, courts alone can provide a remedy.

The object of mediation is to offer to the litigant public, a speedy and satisfactory alternative dispute resolution process in certain types of civil cases. When the cases suitable for negotiated settlements are referred to mediation, the benefits are twofold. First, the parties find an amicable solution by the negotiated settlement. Second, the courts will have more space to deal with cases which require to be adjudicated by courts. Building awareness regarding mediation and invoking mediation as an alternative dispute resolution process is only to supplement the functioning of courts, with reference to certain

types of civil cases. With this clarification, we may proceed to see the need for urgency in introducing court annexed mediation.

Mediation, conciliation and Lok Adalat

Mediation, conciliation and Lok Adalat, are all basically non-adjudicatory dispute resolution processes, where a neutral third party renders assistance to the parties to the dispute to reach a satisfactory settlement. In all the three processes, the neutral third party listens to the parties, ascertains the facts and circumstances and the nature of dispute, identifies the causes for the difference or conflict and facilitates the parties to reach an amicable settlement.

Mediation is a non-binding, non-adjudicatory dispute resolution process, where a neutral third party renders assistance to the parties in conflict to arrive at a mutually agreeable solution. To put it differently, it refers to a voluntary and flexible negotiated conflict reduction process with the assistance of the experts. It involves a structured negotiation where the mediators listens to the parties, ascertains the facts and circumstances as also the nature of the grievances, conflict or dispute, encourages the parties to explore various alternatives and ultimately facilitates the parties to find a solution or reach a settlement. In short, it is a professionally and scientifically managed negotiation process.

Conciliation is statutorily regulated by the Arbitration and Conciliation Act, 1996 but not defined by that statute. Section 67(1) of the Act however impliedly defines "conciliation' as the assistance rendered by a conciliator to the parties to a dispute, in an independent and impartial manner, in their attempt to reach an amicable settlement of their dispute.

Where the reference by the court is t a forum consisting of two or more members – a Judge (serving or retired) and others (preferably an advocate or social worker) constituted under Section 19 of the Legal Services Authorities Act, 1987 to facilitate the parties to the proceeding to arrive at a compromise or settlement, the settlement process as also the members constituting the third-party team facilitating the settlement, is known as a "Lok Adalat".

Though mediation and conciliation are the same in principle, in practice, conciliation and mediation are understood to be different processes. Initially there was considerable confusion as to what is conciliation and what is mediation. One view was that where the person facilitating the settlement also suggests the terms of settlement, the process becomes a conciliation; and where the person facilitating the settlement merely facilitated the disputing parties to arrive at a settlement without suggesting the terms, so that the parties themselves find a solution and reconcile their difference, the process is a mediation. There was also a diametrically opposite view, that is, where the third party facilitated the

settlement by suggesting the terms on which the disputes may be resolved, the process is a "mediation" and where the third party only attempts to bring the disputing parties together to arrive at a settlement, the process is "conciliation". A third view was that both refer to the same process, and where the third party-facilitator is a non-professional (that is, a friend, relative or a well-wisher) the process is "conciliation", and where the third party-facilitator is a professionally trained in assisting parties to settle disputes, the process is known as "mediation". The fourth view was that if the settlement process through a third party is on a reference by a court in a pending litigation, it is "mediation"; and if the settlement is attempted with the help of a third party, when there is no litigation pending, it is "conciliation". In other works, a pre-litigation third party assisted negotiated settlement is "conciliation" and a neutral third party assisted negotiated settlement in a pending litigation "mediation". But none of the four views is accurate.

There is no etymological difference between "conciliation" and "mediation" as both are processes relating to negotiated settlement with the assistance of third parties. The two words are considered to be interchangeable in other jurisdictions. In India, however, having regard to the provisions of the Arbitration and Conciliation Act, 1996 and the provisions of Section 89 of the Code of Civil Procedure, the terms "conciliation" and "mediation" have different connotations. If both parties to a dispute agree to negotiate with the help of a neutral third party (or third parties) to arrive at a settlement and appoint conciliators for that purpose, the process is a conciliation governed by the provisions of Arbitration and Conciliation Act, 1996. Where in a pending suit, only one party is agreeable for negotiations and the other is not (or where neither party is agreeable for negotiations), and the court is of the view that the parties should attempt a settlement by negotiations with the assistance of a neutral third party, and refers the matter to an institution or to a third party for that purpose, then the resulting ADR process is termed as mediation.

In other words, a conciliation is a negotiation process commenced with the consent of parties, where the conciliators are appointed by the parties themselves, under Section 64 of the Arbitration and Conciliation Act, 1996. When a settlement is arrived at by conciliation, it will have the status of an executable decree under Section 74 of the Arbitration and Conciliation Act, 1996. On the other hand, if a court refers a case to a mediation centre or a third party, to enable the parties to negotiate with the assistance of a neutral third party, the ADR process is a mediation. In mediation, the reference is by the court to the mediation centre or a mediator, either with or without the consent of the parties. In a mediation, the court retains control over the entire process and consequently whatever settlement is arrived at the mediation, is placed before the court and the court makes an order or decree in terms of the settlement.

The words "mediation", "conciliation", "Lok Adalat" and "judicial settlement" are defined in Section 89 of the Code of Civil Procedure. Mediation, conciliation and Lok

Adalats are different *avatars* of negotiation process for arriving at a settlement, with the assistance of third parties. Though "conciliation" and "Lok Adalats" are governed by statutes – the first by the Arbitration and Conciliation Act, 1996 and the second by the Legal Services Authorities Act, 1987, "mediation" is statutorily regulated and this clear from Section 89 of the Code. Great confusion is however caused by the erroneous mix-up of the definitions of "mediation" and "judicial settlement" in Section 89 of the Code. "Mediation" is erroneously defined in Section 89 of the Code as the process where the court effects a compromise between the parties by following the prescribed procedure. "Judicial settlement" is erroneously defined in Section 89 of the Code as reference to a third party, who will assist or facilitate the parties in arriving at a settlement. But the courts, lawyers and litigants have all recognized that mediation is the process where the court refers to a third party or institution, for facilitating the parties to the proceedings to arrive at a settlement. Amendment to Section 89 is an urgent necessity, as otherwise "mediation" as practised and "mediation" as defined would be completely different. (For a more elaborate discussion on this aspect see the article *Section 89 CPC: Need for an Urgent Relook [(2007) 4 SCC J-23].*

Mediation, conciliation and Lok Adalats are not new to India. They have been in vogue in our villages from time immemorial as *Dispute Resolution Panchayats*. So long as the village wisemen, committed to the welfare of the villagers, were the panchayatdars, mediation by such panchayats flourished. Their neutrality, impartiality and wisdom enabled them to find mutually acceptable solutions which benefited the parties to the conflict. But things began to change when respected village wisemen were gradually replaced by "leaders" based on caste, money or political affinity, for whom neutrality and impartiality were secondary and asserting their views and will was primary. Instead of attempting to serve the interests of the parties to the dispute, they started flaunting their power by issuing *fiats* based on their superstitions, moral beliefs, political compulsions and personal financial interests and started enforcing them by imposing sanctions like excommunication or lying penalties for disobedience or non-compliance. As a result, such panchayats resolving disputes, slowly and steadily lost the respect, trust and confidence which they earlier enjoyed. Courts, functioning under codified laws, replaced them as arbiters or disputes.

Why mediation? Disadvantages of adjudicatory process

The dispute resolution by courts, as noticed above, is adjudicatory and adversarial in nature resulting in a binding decision, whether the parties like it or not. Litigants have identified the following six shortcomings with reference to adjudication by courts: *(a)* delay in resolution of the dispute; *(b)* uncertainty of outcome; *(c)* inflexibility in the result/solution; *(d)* high cost; *(e)* difficulties in enforcement; and *(f)* hostile atmosphere. We may refer to each one of them briefly.

(a) Delay in dispute resolution: Courts function under procedural laws which were made to ensure fair play, uniformity and avoidance of judicial error. The procedural laws encourage appeals, revisions and reviews. They permit the litigants to file a series of interlocutory applicants which often results in the main matter being delayed or even lost sight of. Seeking adjournments and granting of adjournments is considered to be normal and routine. The proliferation of laws and increase in population have resulted in an increase in the volume of litigation. The overloaded judicial system is finding it difficult to cope up with the demands on it, having regard to the inherent limitation of the system placed by age-old procedural laws and several redundant or archaic substantive laws. The demands for more Judges, more courts, better infrastructure, and better laws have remained unfulfilled. Those laws were intended to ensure fair play, uniformity and avoidance of judicial error. They permit appeals, revisions, reviews, innumerable interlocutory applications, and adjournments. Civil disputes are fought for several decades through the hierarchy of courts. Delay has thus virtually become a part of the adjudicatory process. Delay leads to frustration and dissatisfaction among litigant public and erosion of trust and faith of the common man in justice-delivery system. In commercial litigation, delay destroys businesses. In family disputes, delay destroys peace, harmony and health, thereby turning litigants into nervous wrecks.

(b) Uncertainty of outcome: The outcome of a case depends, among other things, on the facts, the legal position, the evidence that is let in, the ability and efficiency of the advocate, and the perception and capacity of the Judges at trial and appellate stages. The personal philosophy of the Judges also adds to the uncertainty and inconsistency in views. Benjamin Cardozo in *The Nature of the Judicial Process – Lecture I*, put it aptly thus:

> *"There is in each of us a stream of tendency,* whether *you choose to call it philosophy or not, which gives coherence and direction in though and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions....It is often through these subconscious forces that Judges are kept consistent with themselves, and inconsistent with one another."*

On account of their personal philosophies, some Judges are identified as acquitting Judges and some as convicting Judges; some as liberal and some as strict; some as pro-landlord and some pro-tenant; some as pro-labour and other as pro-management. In the words of Mr. Fali S. Nariman, "Justice is so often a matter or perception on which opinions can genuinely differ" *(Before Memory Fades...* – published by Hay House India, 2010 Edn., p. 46). Resultantly, many cases similar on facts and law, end up with different results with different Judges. In short, there are several factors which may result in uncertainty in regard to the outcome. A litigant may win in the trial court, but lose in appeal. He may win in the trial court and first appellate court, but may lose in a further

appeal. On the other hand, he may lose before the trail court as also in the first appellate court but succeed in a further appeal. The hierarchy of appeals and revisions leads to reversal and further reversals. These again lead to uncertainty as to what the result will be, when someone wants to initiate a legal action. Nothing is certain.

(c) Inflexibility in the result/resolution: When a party with a grievance approaches a civil court, the decision is regulated by law. Courts cannot grant relief which is most beneficial to parties, nor a decision which is most convenient, just and equitable, but can only grant a relief or render a decision that is prescribed or permissible in law. As a result a party may succeed in a case but he may not be satisfied with the decision or result. A party to a conflict would therefore prefer a system which will enable him t find an amicable solution to the conflict or dispute, tailored to take note of his viewpoint, claims, hardships and conveniences, or which gives him choices in the solution.

(d) High cost: A court litigation means payment of court fee, lawyer's fee, clerical fee and expenditure for securing documents and witnesses. All this costs money. Mere expenditure of money is not sufficient. He must be willing to invest his time. Innumerable adjournments mean that many times of attendance in courts and visits to lawyers' office and consequential absence from work or business. He has to secure the documents and get witnesses and conduct the case. He has to stay motivated for decades and keep his lawyer "motivated". It is not realized that a litigation does not mean merely spending money and time, but also requires spending energy and staying committed. Dealing with the delay, procedural wrangles, technicalities, expenditure and the need to co-ordinate with lawyers and witnesses in a non-friendly atmosphere, requires considerable perseverance, commitment and energy to pursue the litigation.

(e) Difficulties in enforcement: It is said that the difficulties of a litigant often begin, not when he files a case but when he obtains a decree. The process of execution or enforcement is more arduous and time consuming than the main litigation. Pendency of executions for periods exceeding the time spent for obtaining the decree, is quite common. Many a time, a decision obtained by a plaintiff remains a paper decree and he never see the real fruits of such decree. Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many trail Judges tend to concentrate only upon the adjudication of the right (which is considered as a judicial function) and do not give importance to the final decree proceedings and execution proceedings (which are considered to be ministerial functions). The focus is on disposing of cases, rather than ensuring that the litigant gets the relief. Even among lawyers, importance is given only to securing of a decree and not securing of relief. Many lawyers handle suits only till preliminary decree, and then to their clerks for conducting the execution proceedings. Many a time, a party exhausts his finances and energy by the time he secures the preliminary final relief. As a consequence, we have cases where the

suits are decreed or preliminary decrees are granted within two or three years but the final decree proceeding and/or execution takes decades for conclusion. This is an area which contributes to the loss of credibility of the civil justice delivery system.

(f) Hostile atmosphere: The litigants find court's atmosphere intimidating and unfriendly. They find the procedures, complicated; the Judges, lawyers and the staff, discourteous; and the infrastructure, wholly inadequate with little or no facilities or amenities for them. They feel that no one in courts (Judges, lawyers or staff) understands their difficulties, tensions, worries and no attempt is made to make the procedures and formalities user-friendly. The entire litigation process is structured in a manner where the litigant is required to adjust himself to the convenience of the Judges and lawyers rather than the courts and lawyers adjusting themselves to serve the common man.

The delay, the uncertainty and inflexibility, the technicalities and frequent changes in laws, the absence of choice, the difficulties in execution, and the enormous expenditure of time, energy and money associated with adjudicatory process take a toll on the litigant. Many a time, the litigant feels that the remedies, reliefs and solutions, are all illusive and elusive. This leads to frustration, dissatisfaction and erosion of faith in courts and the adjudicatory process. As a result, persons with grievances start looking for a quicker and satisfactory remedy. They are tempted to approach the underworld or unscrupulous elements in police and politics, to secure relief. This leads to criminalization of civil society and weakens the rule of law. Therefore, there is an urgent need to introduce quicker alternative dispute resolution processes and also improve the adversarial adjudicatory process by giving speedy, satisfactory and cost-effective justice.

Weaker and downtrodden sections of the society, who are subjected to injustices, being ignorant of their rights and remedies, and not being able to get effective and speedy justice, tend to take law into their own hands. Several disputes which ought to have found solution in civil litigation end up in crimes. It has, therefore, become necessary to educate the weaker and downtrodden sections of the society, about their rights and obligations, as also about the remedies and fora that are available for securing justice, and also make available free legal aid to approach relevant fora, for securing relief. When there is a gradual increase in such awareness, there will be more and more seekers of justice demanding enforcement of rights and claiming equitable and effective distribution of nation's resources. The overloaded adjudicatory dispute resolution process will not be capable of effectively taking such additional load, resulting in further frustration and again driving justice-seekers towards extra-judicial remedies.

What is required to be done?

There is, therefore, an urgent need to make available alternative dispute resolution processes for civil litigation, capable of providing speedy justice and effective and efficient

solutions. There is an urgent need to create "space" in courts for accommodating cases which require trial, which require adjudication and which require speedy decisions.

Let us look at the causes for disputes and litigations. Conflict, disharmony and misunderstanding which lead to differences and disputes, are the manifestations of negative or ugly side of human feelings and frailties such as *(i)* greed and avarice; *(ii)* ego and pride; *(iii)* jealousy and intolerance; *(iv)* anger and hate; and *(v)* prolongation and indecisiveness. Conflict and disharmony lead to "differences". When differences and disputes arise, any of the following three consequences may follow: *(a)* The parties may sort out the differences and disputes; *(b)* The parties may ignore and bury the differences and disputes; and *(c)* The parties may escalate the differences and disputes, requiring third-party intervention. Such third-party intervention may be through an adjudicatory forum (courts and arbitrations) or by a non-adjudicatory forum (conciliation, mediation or Lok Adalats). If the underlying cause for the dispute is identified, addressed and dealt with, conflict and disharmony will disappear. The existing adjudicatory for a for dispute resolution do not deal with the causes for the dispute but only adjudicate upon the consequences of the disputes. The adjudicatory form of justice delivery system through courts, even if made more efficient, may not reduce the ills that afflict the society. Adjudicatory dispute resolution is like surgery – intended to be curative. Negotiated settlements, on the other hand, may prove to be palliative and curative and, many a time, preventive.

Therefore, it is necessary to find an alternative non-adjudicatory dispute resolution process which will yield the following results:

- reduce conflict and foster fraternity;
- improve relationships – both personal and commercial;
- reduce tension and spread peace to make the society more civilized;
- reduce cost, save time and avoid harassment;
- provide flexibility in solutions, by taking note of long-term interests, and short-term effects;
- enable the parties to communicate with each other, to understand the weaknesses and strengths of both sides and participate in finding solutions; and
- ensure that the aggrieved party gets actual relief and not merely paper relief.

The search leads us to mediation/conciliation, which will provide all these benefits in a satisfactory manner.

What are the advantages of mediation?

Mediation saves precious time, energy and money of parties, apart from saving them from the harassment and hassles of a prolonged litigation. Its procedure is simple, informal and confidential and reduces worry and tension associated with litigation. Its advantages are:

(1) By disclosing the strengths and weaknesses of their case, mediation enables parties to find and formulate realistic solutions to their conflicts.

(2) Mediation provides an opportunity to communicate with the opposite party, in a neutral non-hostile atmosphere. It attempts to mend and restore strained/broken relationships. It focuses on long-term interests and relationships and fosters amity and friendship.

(3) As the mutually agreeable solution reached by a negotiated settlement is tailor-made for the parties, the solution by mediation can be moulded, shaped, adjusted to suit the requirements of the parties. It gives choices and options in the solution to the conflict. It removes uncertainty and inflexibility from the result.

(4) As mediation is voluntary, a party can opt out any time. The party (and not a Judge or advocate) is always in control of the dispute and its resolution. (This may also be viewed as disadvantage. Because it is non-binding and non-adjudicatory, the resolution of the dispute purely depends upon the volition of parties).

(5) The process is simple, flexible and confidential. It enables settlement of disputes which are not the subject-matter of legal proceedings. This enables settlement of several connected matters also.

An adjudicatory dispute resolution by means of litigation invariably leads to bitterness, hostility and enmity between the parties to the *lis*, as the loser will continue to nurture a grievance against the winner. The gloating by the successful party also aggravates the situation. In a civilized society, parties are expected to accept the decision of court with grace, but in reality it seldom happens. The advantage of a negotiated settlement is that at the end of the day, there are no winners or losers and the result is acceptable to all. In short, the adjudicatory process terminates relationship and creates permanent enemies whereas negotiated settlement creates friends.

Disadvantages of mediation

Mediation has its limitations and is not without its disadvantages. As noticed above, it is effective and useful only in certain types of civil litigation. It can be restored only when the parties mutually agree. Reference to mediation does not guarantee a settlement or solution. Unless the parties show maturity, understanding, tolerance and co-operation, there can be no solution or settlement. Where even if one of the parties is cantankerous or

greedy or egoistic, or refuses to negotiate, there cannot be mediation and conciliation. Where no settlement is reached, the matter will have to go back to court for adjudication.

There are also several factors working against mediation/conciliation. We may refer to some of them briefly:

(a) Mindset of litigants: Each litigant normally believes or is led to believe that he has a very strong case. Such impression may either be on account of his own perception of the legal or factually position or based on the opinion expressed by his counsel. He, therefore, feels that any settlement involves giving up a part of his rights or claim and showing a concession to the other side. As a consequence, there is resistance to any suggestion of mediation.

(b) Absence of incentive: The litigant has no incentive to seek mediation in a pending litigation. The major part of the expenditure for a litigant would have been incurred when he commences the litigation, by way of court fee and lawyer's fee. Litigation costs awarded by the courts in India are inadequate when compared to other jurisdictions. Even the court fee payable is usually a nominal amount, except in a few categories of cases where it is payable ad valorem. Once a litigation reaches the stage of trial, there is no compelling reason for a litigant to settle a case. Unlike in countries like USA, UK and Australia, where once a civil dispute goes to trial, the costs escalate and the losing party will have to bear huge costs; whereas a litigant in India, on losing a litigation does not bear and pay the actual costs of the succeeding party, but only pays nominal costs. As there is no fear of heavy costs at the conclusion of the trial, there is no incentive to a party to litigation to settle the matter.

(c) Reluctance of advocates: The reluctance on the party of some sections of advocates, to settle cases, stems from their fear that they may lose the fee, if the case is settled. The fee received for a case involving a full-fledged trial with possibilities of appeal, it is felt, is several times more than the fee that can, legitimately, be claimed if a matter is settled without trial. Many lawyers are reluctant to participate in the settlement process. Unless the Bar recognizes and accepts negotiated settlement as part of an effective alternative dispute resolution process, no significant success can be achieved in mediation. There is therefore an urgent need to educate the lawyers and litigants about the advantages of the alternative dispute resolution methods in general and mediation, particular.

At what stage should mediation be attempted?

Mediation can be attempted either at pre-litigation stage or during the pendency of the litigation. If the parties so desire, it can be attempted even post-litigation, during execution proceedings. So long as there is a dispute or conflict, there can be mediation.

Who can be a mediator?

Anyone who has patience and perseverance and who is a good listener and clear communicator, positive and optimistic in outlook and committed to the cause of justice and dispute resolution, can be a mediator. Any Judge, advocate, psychiatrist or social worker and abundant common sense and understanding, can, with appropriate training, become a mediator. Specialists in various fields can also be mediators as, for example, engineers and architects in building/engineering disputes, doctors in medical negligence claims, assessors in insurance claims etc.

Some training is necessary to learn the process and the nuances of mediation, before one practices mediation. Experience has shown that mediation by persons without proper training and understanding has resulted in a high rate of failures, leading to loss of faith in, and credibility of mediation as an effective dispute resolution process. It is found that a minimum of 40 hours of specialized theoretical training by experts followed by conducting of 10 actual mediations under the supervision of expert trainers gives the mediators the required skills, knowledge and attitude required for mediation.

What is expected of a mediator?

Only a trained, experienced and committed mediator can increase the chances of settlement. Any half-baked or half-hearted or clumsy attempts will be counterproductive. Let us see what are the qualities expected of a mediator.

(a) Neutrality: A mediator should be neutral and also seem to be neutral. Consciously or even unconsciously, he should not take sides.

(b) Understanding of human nature: Mediation is conflict resolution. Conflicts arise on account of selfishness, greed, jealousy, ego, lack of understanding and sometimes feeling of hurt or wounding of pride. To remove conflicts, one has to understand the reasons for the conflict and be able to recognize the area of conflict. The mediator should remember that the more closer the earlier relationship, more bitter will be the fight when disputes occur. For example, disputes between two parties who have no personal relationship are the easiest to settle. Slightly more difficult are commercial disputes. The degree of difficulty increases in proportion to the previous closeness in relationship in the following ascending order: member of societies, employer/employee, landlord/tenant, neighbours, partners, siblings, parent/child, and the most difficult being husband/wife relationship.

(c) Persuasive skills: Mediator should have communication skills and felicity of language. He should be able to freely communicate with the parties. He should be also be able to persuade parties to open up and disclose their mind and heart, their grievances and the solution they expect, so that he can assess them and suggest solutions.

(d) Legal/technical knowledge: A mediator should have the ability to assess the strengths and weakness of the case and be able to put across the same to respective parties. He should also be able to highlight the strength of the opponent's case, so as to make a party to see reason. But at the same time, he should remember that he is not a Judge, and it is not his duty to render judgment or decide who is right or who is wrong, but only to facilitate a mutually acceptable solution/settlement.

(e) Patience: Only a few cases can be settled in a single sitting. Different types of cases may require different skills and different number of sittings. A mediator should be able to give the time needed for the parties to proceed from stage to stage, step by step.

(f) Common sense: Abundant common sense gives a mediator understanding and an awareness of ground realities, enabling him to identify the nature and cause for the conflict, and suggest practical and acceptable solutions. It creates trust and confidence in the parties.

(g) Confidentiality: The parties tend to openly discuss their problems with the mediator. The strengths and weaknesses of the case of the parties become known to the mediator. Matters which would not be divulged in a court hearing including trade secrets and family secrets will be routinely disclosed during the negotiation process. A mediator has to be discreet and maintain confidentiality. He should neither disclose the facts/secrets of the parties to outsiders, nor use them for personal benefit or to the detriment of the parties.

How is mediation conducted?

The mediation procedure is not complicated. Though there is a settled procedure, it is flexible and user-friendly and enables the mediator to make appropriate changes in the procedure to pave the way for a clear and satisfactory solution. Let us now briefly refer standard stages of mediation.

(i) Opening statement by the mediator: The mediator informally chats with the parties and explains his position, experience and neutrality, explains the advantages of a negotiated settlement or conflict resolution as also the limitations and disadvantages of court adjudication. The object is to make the parties relaxed, gain the trust of the parties and motivate them to arrive at a negotiated settlement. [*Mediator explains*]

(ii) Joint session: The mediator encourages both parties to explain their side of the dispute/difference, put forth their claims, and express their grievances and complaints. This gives an opportunity to the mediator to understand the dispute and the underling cause. This also enables each party to hear and understand the other party's viewpoint and grievances. [*Mediator listens*]

The litigant should understand the process of mediation so that he is convinced that by having recourse to mediation, he can secure better reliefs and benefits and improve his personal, business and social relationships and make society a better place to live.

How to spread mediation and make it successful?

The following steps are required to be taken to make mediation gain wide acceptance:

- Drawing up a national plan for making mediation a regular recognized alternative disputes resolution process, and provide for inclusive participation of lawyers, Judges, NGOs and social workers in the process of mediation.
- Conducting programmes for increasing the awareness among Judges, lawyers and litigant public relating to mediation and its advantages.
- Providing necessary infrastructure for mediation centres.
- Framing necessary rules and regulations relating to registration of mediators, conduct of mediation, ethical standards of mediators, conduct and discipline of mediators, and maintenance of records and registers relating to reference to mediation and settlements through mediation.
- Providing appropriate training: *(i)* to those who want to become mediators (ideally 40 hours of lectures and 10 mediations); *(ii)* to Judges for identifying and referring cases to mediation; and *(iii)* to trainers to train trainers.
- Preparing a user's manual for mediators and an ADR reference handbook for Judges; and manual for *(i)* training mediators; *(ii)* conducting awareness programme for building awareness among referral Judges, lawyers and general public; and *(iii)* training mediator-trainers.
- Evolving a scheme for using the infrastructure and facilities of State Judicial Academies and State Legal Services Authorities for mediation related activities where no separate infrastructure or funds are available for mediation programme.
- Ensuring reference of adequate number of suitable cases to mediation.

Conclusion

The Twenty-First Century requires a dispute resolution system, which provides user-friendly, speedy and cost-effective solutions. A dispute resolution system that can provide multi-options solutions. A dispute resolution system that will permit the litigant to have his say in the ultimate solution which can be tailor-made to meet his requirements and, at the same time, meet the requirements of the other side. Mediation appears to be the only solution on the horizon.

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IMPORTANT CITATIONS WHICH ARE HELPFUL TO THE MEDIATORS

1. AFCONS Infrastructure Limited and another

Vs.

Cherian Varkey Construction Company Private Limited and others, reported in (2010) 8 SCC 24 = AIR SC_____:

In this ruling, the Hon'ble Supreme Court (Bench headed by Hon'ble Sri Justice R.V.Raveendran) has interpreted the scope of Section 89 and Order 10 Rule 1-A CPC and has discussed in detail the different ADR mechanisms and its processes. The relevant paragraphs at 36 to 45, in so far as mediation is concerned, are extracted as hereunder:

The other three ADR processes

> "36. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the Court has to consider which of the other three ADR processes (Lok Adalat, mediation and judicial settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of mediation centre or qualified mediators) necessarily the Court will have to choose between reference to Lok Adalat or judicial settlement. If the facility of mediation is available, then the choice become wider. If the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear-cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

Whether the settlement in an ADR process is binding in itself?

> 37. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the Arbitral Tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of the ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any

settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

38. The other four ADR process are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the settlement agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms.

39. Where the reference is to a neutral third party ("mediation" as defined above) on a court refer4ence, though it will be deemed to be reference to Lok Adalat, as the court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.

40. Whenever such settlements reached before non-adjudicatory ADR fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject-matter of the suit/proceeding. In regard to matters/disputes which are not the subject-matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of the AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a mediator). Only then such settlements will be effective.

41. Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the Court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

42. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

43. We may summarize the procedure to be adopted by a Court under Section 89 of the Code as under:

[a] When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The Court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

[b] The court should first consider whether the case falls under any of the category of the cases which are required to be tries by courts and not fit to be referred to any ADR processes. If it finds that the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

[c] In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR

processes to the parties to enable them to exercise their option.

[d] The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

[e] If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation, which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator(s), the court can refer the matter to conciliation in accordance with Section 64 of the AC Act.

[f] If the parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes: (a) Lok Adalat; (b) mediation by a neutral third-party facilitator or mediator; and (c) a judicial settlement, where a judge assists the parties to arrive at a settlement.

[g] If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiation, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.