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Reading Material

Intensive Mediation Training of East India Regional States

Jointly Organised by :

Judicial Academy Jharkhand

&

Jharkhand State Legal Services Authority

under the aegis of

Mediation and Conciliation Project Committee, New Delhi

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Hon'ble Mr. Justice M. Y. Eqbal
Acting Chief Justice, Jharkhand High Court
cum Patron-in-Chief, Judicial Academy Jharkhand

From the desk of Acting Chief Justice-cum-Patron in Chief Judicial Academy Jharkhand

Dear Participants,

I welcome you all in Jharkhand, the 28th & youngest state of this country.

This short compilation of relevant speeches, articles, case laws etc. relates to **"mediation"** - both, as a concept, as well as a statutory tool for providing effective & efficacious alternative dispute Redressal mechanism to the litigant. This modest attempt, made by the Judicial Academy Jharkhand, Ranchi, under the guidance of the undersigned, is to facilitate a comprehensive understanding of this newly introduced concept in the Indian Justice delivery system and also to provide an insight as to how this is being invoked by the court of law since its statutory recognition vide the 2002 amendments of civil procedure code.

The speeches and articles has been selected primarily on the basis of its relevance and utility for the participants who shall be under going an intensive 40 hours and 10 actual role play mediation training and will have to work as trained mediator after completing this program successfully. The authors of different articles are eminent persons in their respective fields who are endeavoring to strengthen the "mediation" movement in the country in their own right and further trying to give the mediation movement an institutional shape for settlement of disputes.

The section of **"events related to mediation"** has been included to give an insight to the participants as to how in other parts of our country the mechanism is being successfully utilized for provide amicable settlement of disputes between the parties.

The case law section includes varying interpretations on different aspects of this newly introduced concept of mediation as decided by the Hon'ble Apex Court as well as different High Courts. We have purposefully included varying view points on this topic, as pronounced by different court of records, so as to give way to a healthy academic discussion leading to clarity of concept and its usage among the participants.

I hope that this reading material will help the participants in a better understanding of mediation both as a concept as well as a technique of ADR and that they will invoke the tools of mediation in cost effective & speedy disposal of disputes in their respective states.

More when we meet.

M. Y. Eqbal
Acting Chief Justice-cum-Patron in Chief
Judicial Academy Jharkhand
Ranchi

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NATIONAL MEET ON MEDIATION AND CONFLICT RESOLUTION

26th MARCH 2008
PLENARY HALL, VIGYAN BHAWAN, NEW DELHI

K.G. Balakrishnan
Chief Justice of India

Alternative Disputes Resolution (ADR) has now been considered as an integral part of our judicial system. Our laws have been suitably amended to incorporate this method as a form of efficient settlement of cases. Our Mediation Centres in Delhi, Bangalore and Chennai are doing commendable work and producing excellent results. Every High Court has also taken the initiative to start Mediation Centres. The Centres would also be extended to District Courts. Previously, we were concentrating our efforts to settle cases by Lok Adalats. However, the Lok Adalat system was efficient for settling only certain types of cases. Moreover, total discussion of the disputes with the concerned parties and suggestion of any decision would be possible only when more facilities are available and with the involvement of retired judges in the adjudication process. ADR has now become a world phenomenon whether it be adversarial, inquisitive or other forms of judicial systems. It is now well recognized that ADR has an important role to play within the justice delivery mechanism and it gives increasing satisfaction to litigants and inculcates a cooperative culture within courts as well as helping them to deal with their caseloads. The view that mediation should be used more readily by courts and tribunals has attracted considerable support in India and all over the world. Recently, Australian courts have indicated that some ADR processes are of central importance in the court function. The Chief Justice of the Supreme Court of New South Wales has noted that :

"Mediation is an integral part of the Courts adjudicative processes and the 'shadow of the Courts' promotes resolution."

The differing relationship between Courts, policy makers and ADR and the variation in the philosophical approach to ADR varies greatly and produces a range of integration

strategies in some courts and tribunals, such as

(1) Pre litigation ADR – either supervised or unsupervised by Courts and Tribunals and falling within the 'shadow of the court' and often involving mandatory strategies;

(2) Self referred litigation related ADR – where courts and tribunals are not involved and may be unaware that parties are using external ADR processes;

(3) Court connected ADR – involving referral to ADR processes – such processes might be conducted by external or internal practitioners;

(4) Courts integrated ADR – involving judicial and quasi judicial officers within Courts and Tribunals using ADR processes to resolve and manage disputes (processes may vary from settlement conferences, mediation or concurrent evidence approaches) – this integration may involve facilitative judging as well.

There are some conflicting views on whether judges ought to participate actively in the mediation and conciliation process. In this regard, it would be interesting to note that judicial activism in the settlement process appears to be more acceptable in the United States than in other countries. It is not considered so radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous processes within the judicial system. Noted academic Marc Galanter has observed that :

"Most American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work."

However, there has been some discomfort within academicians, practitioners and others involved in ADR work about the notion of judges acting as mediators. This discomfort may not arise when judges adopt a 'facilitative role'. Even in India, ADR is an integral part of our judicial system. But, for the time being, I am of the opinion that judges should act more in a 'facilitative role' rather than actively participate in the mediation process. If the judges actively participate in the mediation process, problems may arise

because the mediator sometimes has to meet privately with the parties in the dispute and this may lead to controversy. However, the judges can still act as "evaluators" or chairing conventional settlement or conciliation conferences. Frank appraisal by a judge can assist in prompt settlement in some disputes. In cases where judges have acted as mediators and mediation fails, it may be embarrassing for the judges to proceed to hear the case or related disputes at a later stage. The parties may get an attitude bias and the judges should be free from such bias. In considering issues relating to bias, Justice Debelle of the Supreme Court of South Australia recently noted :

"...When a judge acts as a mediator, the judge sheds, as it were, the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other. It is for that reason that the judge will not in any respect adjudicate in that action except with the consent of the parties."

Regarding perception of the role and integrity of the Court, he went on to add :

"In the result, I believe that what is at stake is the integrity of the Court engaging in two forms of dispute resolution and the public interest in upholding the integrity of the Court and public confidence in the Court. It is necessary to uphold public confidence in the integrity of the mediation process. It is equally important to uphold the public confidence in the integrity of the process of adjudication by the Court. It is important that nothing should occur which would suggest any breach of the obligation of confidence attaching to a mediation. Those who engage in mediation should be entirely confident that in no respect will anything said in confidence be revealed. Secondly, the public should have confidence in its judges knowing that, when they adjudicate issues, they are not influenced by anything which might have occurred in a mediation."

Of course, judges would be good mediators as they have the benefit of long years of experience in adjudicating a large number of cases throughout their career in the courts. But are our judges mature ? And, will it be acceptable to litigants if judges participate in the mediation process ? These are the questions which may come up at a later stage. At

present, however, we have to improve our quality and content of mediation and conflict resolution as we are the only country which has got a large number of cases but relatively less number of courts.

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Courts and Alternatives

Justice S.B. Sinha,
Judge,
Supreme Court of India

The adversarial system, which is one of the great legacies of the British rule in India, has worked reasonably well for centuries. However, in view the docket explosion, the faith and confidence in the Judiciary has undergone substantial erosion. The functioning of the system is also being questioned in different quarters having regard to the procedural wrangles, enormous costs and inordinate delay involved in it.

Justice delivery system in India is bursting at the seams and may collapse unless immediate remedial measures are adopted not only by the judiciary but also by the legislature and the executive. The reasons for the present situation are not far to seek. **Firstly**, there is a qualitative and quantitative change in the nature of litigation. Not only have new and diverse areas of litigation have cropped up, there is also immense increase in the quantum of litigation leading to what is often called "docket explosion". **Secondly**, litigation against the State and the State-like entities has grown substantially, and prompt and complete compliance by the State of the orders by way of writs, etc., would be absolutely necessary for bringing the litigation to a conclusion. **Thirdly**, despite an increase in the number of courts and tribunals all over the country not only in the traditional areas of civil and criminal litigation but also in other fields like consumer protection, service matters, etc., no solution for early resolution of dispute has been found out. But the increase in the number of courts and tribunals is not enough to deal with the increase in litigation by geometrical proportions. Often we find that not only there is no proportionate growth in the number of courts and judges, but even the existing vacancies remain vacant for a long time for one reason or the other.

Under the International Covenant on Civil and Political Rights, 1966 which is an optional protocol to Universal Declaration of Human Rights, 1948, every country shall have to ensure that a citizen shall have an effective remedy for enforcing his rights or freedoms. This is not a new concept. Since the ages, the Civilization has recognized the right of every person to seek redressal in a Judicial Tribunal. The legal maxim *ubi jus ibi remedium* is not an empty promise. This principle is well adumbrated in Sec. 9 of the Code of Civil Procedure, 1908. Unless the Civil Court's jurisdiction is explicitly or by necessary implication is ousted, all rights can be enforced in a Civil Court. Disputes do arise among people in relation to their personal life, family life, community life, economic life and political life. In a democratic society, people should be free to have access to adjudicative processes in Courts or other Tribunals. In a vast country like India with varying cultures and firm economic stratification, all sorts of disputes are brought before the Civil Courts. Number of cases have increased so fast that the entire adjudicative system and /or justice delivery system is over burdened.

Indeed, a leading weekly magazine puts the total number of pending cases in our Courts at 24 million. With an average time to settle each case being put as 20 years, we

require 324 years to clear the legal backlog. Is it a cause for despair? Should we ignore this huge backlog and still adhere to traditional adjudicative process in the Civil Courts?

Recourse to alternative dispute resolution mechanism has been thought of because courts are over-burdened. The said system emanates from dissatisfaction of many people with the way in which disputes are traditionally resolved resulting in criticism of the Courts, the legal profession and sometimes lead to a sense of alienation from the whole legal system.

Its emergence is one of the most significant movements, both in terms of judicial reforms as well as conflict management. It has become a global necessity. Its utility is now unquestionable.

The mechanism to settle the dispute by reference to a third person had been in practice in ancient India, where in ancient India when people needed their disputes resolved by arbitrator or tribunal not established by the King. People used to get their disputes resolved by arbitrators or tribunals not established by the King. Yajnavalkya and Narda stated that Village Councils *(Kulani)*, Corporation *(Sreni)* and Assemblies *(Gorth/ Puga)* used to decide law suits. These institutions have been described as arbitral tribunals which have a status of *Panchayat* in modern India.

In the Panchayat system the word Panch (arbitrator) and Panchayat (arbitration) are as old as Indian history. Panchayats in village, Panchayats of caste, Panchayats of creeds etc. had played important role and exercised considerable influence in many racial and caste questions.

The need of the day is to explore the possibility of creating a dispute resolving machinery other than the court.

Emphasis must be laid to the need of establishing a culture of amicable solution of disputes whether at a post-litigation or pre-litigation stage.

The philosophy of ADR is to motivate people to resolve their disputes amicably and for this purpose it is necessary to examine ADR's main trends and underlying objectives.

One of the motivations of ADR is the principle of **"Cooperative problem solving"** which bring within its fold theories and strategies of negotiation, including in particular problem - solving theories of negotiation.

Another benefit of ADR is reduction of costs apart from avoidance of delay in litigation. In short, it allows the parties greater control over resolving the issues between them, encourage problem solving approaches and provides for more effective settlements covering substance and nuance. It also tends to enhance cooperation and preservation of relationship.

The experience abroad shows that it has found increasing favour in many countries and particularly in U.S.A.

Let me take up the role of the Court in ADR movement like the United Kingdom, in many matters like Commercial suits, directions may be introduced with reference to

relevant rules, e.g., practice directions, specimen documents and check list in the light of paragraphs 72/A1 0 72/A-30 of the Supreme Court Practice introduced in March 1990 by Hobhouse J.

In United Kingdom alternative dispute resolution has more recently come to form an integral part of the Commercial Courts' own procedure. By a Practice Statement issued on 10th December, 1993, Crasswell J stated that in future cases, the Commercial Court would invite the parties to consider possible additional methods of resolving their dispute, and would retain a list of bodies offering conciliation and arbitration services. This would be emphasised where the amount at stake was relatively small in relation to the likely costs of a full trial.

The role of ADR under the 1993 practice note was extended by a further Practice Notes issued on 24th January 1995, which is concerned with the length and cost of civil litigation, and sets out check list of questions to be answered and lodged with the Court not later than two months before the date of hearing. Some of the said questions are as follows:

10. Have you or counsel discussed with our client(s) the possibility of attempting to resolve this dispute (or particular issues) by alternative dispute resolution (ADR)?

11. Might some form of ADR procedure assist to resolve or narrow the issues in this case?

12. Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by ADR?

It is necessary to make reforms in Court organisation and Court procedures. ADR should be employed by the Courts and legal practitioners as frequently as possible.

In Texas, courts may order parties to undertake non-binding ADR procedures such as Arbitration, Mediation, Settlement Conference, Settlement Weeks, Ministerials, Summary jury trials and Early neutral evaluation.

Courts can also direct parties to refer a case to be dealt with by way of arbitration by a third party, whose finding is initially non-binding. Such practices are prevalent in United States of America, Australia and some other countries. It is known as **Court Annexed Arbitration**.

Similarly court annexed mediation process may also be taken recourse to and is regarded as complementary rather than alternative to litigation.

Conciliation has been extended by courts in family matters including children's issues, which may cover also financial, and property issues.

In U.S.A. Judicial settlement conferences and settlement weeks have resulted in a high success rates.

Courts also appoint 'Neutral Expert Fact Finding' to provide evidence before the court which may then be tested in courts.

With a view to evaluate the strength and weakness of the respective cases of the parties, disputes are referred to third-party lawyer within 160 days of the commencement of litigation. The system is known as **Early Neutral Evaluation**.

In some of the federal states of U.S.A., legislation has been passed to provide for private judging (also known as 'Rent a Judge') such as Texas, California, New York, Ohio and Oregon.

High-low contract is a procedure where the parties may agree that if the finding on an issue by adjudication is decided against a party the amount of damages, etc., shall be within the parameters of the financial award.

Multi-Door Courthouse system which has been developed in U.S.A., if followed, could offer the prospect of greater access to justice and more economical and faster resolution of disputes.

Professor Frank E.A. Sander who was the author of the said system identified two important questions:

1 What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?

2 How can these characteristics be utilised so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?" Upon analysing various factors of the comparing systems the learned Professor recommended.

"....A flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes(or combinations of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature, that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively, one might envision by the year 2000 not simply a court house but a Dispute Resolution Centre where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case."

The theory of Professor Sander has been tested in different States of United States of America such as Columbia, New Jersey, Houston and Philadelphia and a number of American cities or countries now offer multi-door programme.

The programmes enable a member of the public to contact the court in person or by telephone, with a complaint or dispute. A preliminary analysis will then be made of the case in order to be able to recommend which dispute resolution process is most suitable to resolve it. Various criteria will be applied including, for example, the kind of issues involved, what kind of compensation is likely to be awarded if successful, whether witnesses or other evidence will be needed, whether rights need to be protected and what services are available. The inquiring party is then advised about the processes that

might be most appropriate to the case and is given relevant referral details, which may be to departments within the court, or may perhaps be to outside agencies.

Making ADR Compulsory in India

The legislative policy in India is to cast a duty upon the court to make efforts and to assist the parties in arriving at a settlement in litigation by or against the Government or public officers in their official capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance,adoption, succession etc..

The mechanism of conciliation has also been introduced for settling industrial disputes under Industrial Disputes Act, 1947 and by the Arbitration and Conciliation Act, 1996. However, in order to appreciate and find out whether ADR methods can substitute the formal method of settlement of disputes within the framework of formal procedures conceived in the Code of Civil Procedure and other enactments, the Government asked the Law Commission to look into the matter. Justice Malimath Committee was also appointed to study the subject.

A Recommendation of Law Commission

The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various courts of urban areas. It was pointed out that as on 31st December 1984, 2,48,845 cases were pending in Sessions courts, 77,41,459 cases in Magisterial courts, 29,22,293 cases in Civil courts of original jurisdiction and 10,91,760 cases on the appellate side. Special attention was given in the Report to house rent/ possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, four distinct modes were considered. They are:

i Establishment of Nagar Nyayalaya with a professional Judge and two lay Judges on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure;

ii Hearing of cases in Rent Courts by a Bench Judges, minimum two in number, with no appeal but only a revision on questions of law to the district court;

iii Setting up a Neighbourhood Justice Centres involving people in the vicinity of the premises in the resolution of dispute; and

iv Conciliation court system, which is now working with full vigour in Himachal Pradesh.

Malimath Committee's Recommendations

The Malimath Committee while making a study on 'Alternative Modes and Forums for Dispute Resolution' endorsed the recommendations made in the 124th and 129th Report of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the courts to compel the parties to a private litigation to resort to arbitration or mediation, requires to be filled up by necessary amendment being

carried out. The Committee stated that the conferment of such power on courts would go a long way resulting in reducing not only the burden of trial courts but also of the Revisional and appellate courts, since there would be considerable divergence of work at the base level and the inflow of work from trial courts to the Revisional and appellate courts would thereby diminish.

Having regard to the absolute necessity to evolve an alternative mechanism, Parliament enacted three Acts: (1) Legal Services Authorities Act, 1987 which has been amended by Legal Services Authorities (Amendment) Act, 2002; (2) Arbitration and Conciliation Act, 1996; and (3) The Code of Civil Procedure (Amendment) Act, 1999.

The concept of resolution of dispute through arbitration, mediation, conciliation and negotiation was institutionalized by Legal Services Authority Act. The said Act provides for holding Lok Adalats where disputes are pending in courts of law. It also provides for settlement of disputes at pre-litigation stage.

The Legal Services Authority (Amendment) Act, 2002 provides for a radical change.

As regards disputes between the consumers and the statutory bodies or public corporations providing public utilities, dispute at the pre-litigation stage may be referred to a permanent Lok Adalat comprising of a judicial officer and experts in the field. The permanent Lok Adalat would try to arrive at a conciliatory settlement but if does not succeed, they may adopt an adjudicatory role. No appeal lies from such judgment, which became an executable decree.

Arbitration is an old concept, which had been prevailing in India even before coming of East India Company. The Code of Civil Procedure, 1859 permitted reference to arbitration without intervention of the court. The Code of Civil Procedure, 1882 also contained similar provisions. Although at one point of time Civil Procedure Code, 1908 contained similar provisions but in the meantime the Arbitration Act, 1899 was enacted which extended to only presidency towns. When Arbitration Act, 1940 came into being, the Code of Civil Procedure was amended.

The 1940 Act did not lead to a desired result. Thereafter the Arbitration and Conciliation Act 1996 came into being. The 1996 Act ushered in a wholly new set up for resolution of dispute through arbitration and conciliation by implementing the two basic aims of mechanism of party autonomy and mechanism of judicial intervention. Part III of the 1996 Act provides for resolution of disputes through conciliation.

Parliament had however felt that the Legal Services Authority Act, 1987 or Arbitration and Conciliation Act, 1996 would not be enough to confer power upon the courts to take recourse to ADR mechanism and with that end in view, the Civil Procedure Code was amended in the year 1999 incorporating the recommendations made by the Malimath Committee, which came into effect from 1. 7. 2002. Sections 26, 27, 32, 60, 95, 96, 100-A, 115 and 148 were amended and Section 89 was inserted. Likewise, various orders in the first schedule to Civil Procedure Code were also amended and Rules 1-A, 1-B and 1-C of order X were inserted. We are, at this moment, only concerned with the provisions relating to alternative disputes resolution.

Section 89 lays down that where it appears to the Court that there exists an element of settlement, which may be acceptable to the parties; the Court shall formulate the terms of settlement and give time to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer to either (i) arbitration (ii) conciliation (iii) Judicial Settlement including the settlement through Lok Adalat or (iv) Mediation. As per sub-section (2) of Section 89 as amended when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply. When the Court refers the dispute to Lok Adalat for settlement by an Institution or person, the Legal Services Authorities Act, 1987 alone shall apply. It is only in the case of mediation that the Court itself shall effect compromise and shall follow such procedure as may be prescribed by Rules made by the High Court under Section 122 read with Section 130 of the Code of Civil Procedure.

Rules 1-A, 1-B and 1-C of Order X deal with different situations. These provisions are applicable where at the first hearing of the suit the Court ascertains from each party or the counsel whether the parties admit or deny the allegations of fact as are made in the plaint or the written statement. After referring to the admissions and denials, the Court shall direct the parties to the suit to opt for either mode of the ADR as specified in Section 89 (1) i.e. Arbitration and Conciliation, Lok Adalat or Mediation.

As noticed above, the method of Arbitration, judicial settlement, mediation etc., are now made compulsory and even the procedure before such authorities is now determined by the Parliamentary enactment or the Rules made by High Court.

The Courts in India at all levels are required to actively encourage the ADR movement and use those methods extensively.

We must take the Alternate Dispute Resolution mechanism beyond the cities. The Gram Nyayalayas as contemplated by the Law Commission should process 60 to 70 percent of rural litigation leaving the regular courts in districts and sub-divisions to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have a fair, quick and inexpensive system of dispute settlement.

ADR mechanism should ensure that not more than 15% of the cases go for final adjudication. This is the trend in the legal systems of developed countries where the most of the cases are resolved by alternate dispute resolution mechanisms like conciliation, mediation and arbitration. Pre-trial conciliation accounts for the disposal of a large number of cases.

It is necessary to evolve ADR processes which may be found necessary keeping in view the changing scenario in the economic and industrial policies in India.

It has also to be borne in mind that in India many people are not aware of their rights and/or do not intend to enforce the same. The non-governmental organisation and the legal aid committees should make all endeavors to make people aware of their rights and get them enforced.

If a complainant approaches any organisation propagating ADR, it is possible to have quick justice through mediation or conciliation.

Let the adversary system and ADR system not confront with each other. But they may act collectively so as to confront the necessary evil, namely, litigation in general and mounting arrears of cases in particular. This is necessary in order to revive the erosion in the faith of the judiciary and the judicial system itself.

The slogan of the day should be 'mediate' and do not 'litigate'.

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Legal Framework of ADR: Section 89 and ADR Rules

Justice S.B. Sinha

Recently a message was issued by the Judges of the U.S. District Court (Northern District of California) wherein the Court pledged to do everything it can to help parties resolve their disputes as fairly, quickly and efficiently as possible. They urged the litigants to consider using an ADR process, which is faster, less expensive, more creative and better tailored to all parties' underlying interests, in any civil case at any time. In U.S.A., other methods of Alternative Disputes Resolution are being tried. These include: (i) Case Management; (ii) Early Neutral Evaluation (iii) Negotiation, (iv) Mediation, (v) Arbitration and (vi) Rent a Judge/Private Judging and (vii) Court sponsored ADR processes which consist of (a) settlement conference and (b) settlement week.

Dispute resolution system consists of resolution through courts and ADR. Litigation is costly, time-consuming and complicated which discourage parties from approaching the courts of law. It resulted in widespread acceptance of Alternative Dispute Resolution. Arbitration, Conciliation and Negotiation are the important ingredients of ADR. Disputes like matrimonial disputes, family disputes, contractual disputes, motor accident claims, disputes with neighbours, and several other categories of civil and petty criminal cases, which form a substantial percentage of pending litigation, can be more satisfactorily settled by ADR than court. It has been very rightly said that "An effective judicial system requires not only that just results be reached but that they be reached swiftly." There is a need to clear mounting backlog of cases and make litigation affordable to the ordinary people. Indian legislature has made many efforts by making and improving ADR laws in India to address these problems of delays and backlog of cases.

It is not an exaggeration to say that mediation and conciliation are part of Indian native genius. Not only in the hoary past but also in the pertinent present many disputes are settled through "village elders" very amicably and often with full concurrence of both the disputant parties. On the other hand, some dispute settlement procedures are such that in the process of 'settling' the dispute they create rancour and enmity between the parties leading to more disputes. Litigation is often a breeding ground for disputes.

The disputes concerning family like dissolution of marriage, maintenance, partition of family property were used to be invariably settled by village elders, Kulas, Srenis, etc. The judgments of village elders were also given judicial recognition by the Courts.[1]

Introduction to Section 89

Having regard to the absolute necessity to evolve an alternative mechanism, Parliament enacted three Acts: (1) Legal Services Authorities Act, 1987 which has been amended by Legal Services Authorities (Amendment) Act, 2002; (2) Arbitration and Conciliation Act,

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1 LEGAL & CONSTITUTIONAL HISTORY OF INDIA' VOL. I, by M. RAMA JOIS (pages 562 & 563).

1996; and (3) The Code of Civil Procedure (Amendment) Act, 1999. Parliament had however felt that the Legal Services Authority Act, 1987 or Arbitration and Conciliation Act, 1996 would not be enough to confer power upon the courts to take recourse to ADR mechanism and with that end in view, the Civil Procedure Code was amended in the year 2002 incorporating the recommendations made by the Malimath Committee, which came into effect from 1. 7. 2002. Sections 26, 27, 32, 60, 95, 96, 100-A, 115 and 148 were amended and Section 89 was inserted. Likewise, various orders in the first schedule to Civil Procedure Code were also amended and Rules 1-A, 1-B and 1-C of order X were inserted.

ADR has been successful to the extent that over 90 percent of the cases are settled out of court in certain countries like USA. There it is a legal requirement that the parties to the suit must indicate the form of ADR which they would like to resort during the pendency of the trial of the suit. A similar provisions have been introduced by adding a New Section 89 and Rules 1-A, 1-B, & 1-C in order X in the Code of Civil Procedure which provides for settlement of disputes by ADR and reads as under:

"89. Settlement of disputes outside the Court. - (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for -

(a) arbitration

(b) conciliation

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation .

(2) Where a dispute has been referred—

(a) for arbitration or conciliation, the provisions of he Arbitration and Conciliation Ac, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

ORDER 10

"1-A, Direction of the court to opt for any one mode of alternative dispute resolution. — After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1-B, Appearance before the conciliatory forum or authority. — Where a suit is referred under Rule 1-A, the parties shall appear before such forum on authority for conciliation of the suit.

1-C. Appearance before the court consequent to the failure of efforts of conciliation. Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

Section 89 of CPC is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the courts. Supreme Court of India[2] had observed that modalities have to be formulated for the manner in which section 89 of CPC and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. A Committee was constituted by Supreme Court so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

Section 89 of CPC has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of judges which are available, it has now become imperative that resort should be had to ADR mechanism with a view to bring to an end litigation between the parties at an early date. The ADR mechanism as contemplated by section 89 of CPC is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 of CPC refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2) (d) of CPC provides mat the parties shall follow the procedure as may be prescribed. Section 89 (2) (d) of CPC, therefore, contemplates appropriate rules being framed with regard to mediation. It must be borne in mind that the success of court-annexed mediation requires good implementation. Some important implementation steps include:

- Creating statutory or rule based authorities for the referrals;
- Creating any necessary procedures regarding the mediations;
- Creating a means to ensure minimal mediator competence (including mandatory training, certification requirements, ethics code and their enforcement);

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2 Salem Advocate Bar Association, T.N. Vs. Union of India, (2003) 1 SCC 49, para 11

- Securing adequate funding; and
- Determining who will coordinate the program.

In India, Section 89 provides the statutory authority for referrals. The court exercises this power. However, as this section maintains a distinction between mediation and conciliation (which are terms often used interchangeably), the provisions of the Arbitration and Conciliation Act, 1996 which relate to conciliation do not apply to mediation. Consequently there is no procedure regarding mediation.

Realising this, the Supreme Court, in Salem Bar Association v. Union of India,[3] requested a committee to draft model rules relating to ADR as well as to mediation. Although these rules have been drafted, they are pending consideration before the Supreme Court.

In Salem Advocate Bar Assn. v. Union of India (herein after referred to as Salem Advocate), the court stated that "The 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 CPC where the court asks the parties to choose arbitration as their option. Of course, the parties have to agree for arbitration.[4] The procedure for option to arbitration among four ADRs is not contemplated by the 1996 Act. Thus Section 82 and 84 (power of the High Court to make rules and Power to make Rules) has no application where parties agree to go for arbitration under Section 89 CPC. For the purpose of Section 89 and Order X Rules 1-A, 1-B, 1-C,[5] the relevant sections in Part X CPC enable the High Court to fame Rules. If reference is made to arbitration under Section 89 CPC, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the court and chosen by the parties. On the same analogy, the 1996 Act in relation to Conciliation would apply after the stage of reference to conciliation. Thus, there is no impediment in the ADR Rules being framed in relation to the Civil court as contemplated in Section 89 upto the stage of reference to ADR."

The court also emphasised that Section 89 (2)(d) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. It was also stated that the court must first record the settlement and pass a decree in case the parties come to a settlement upon a reference made by the court for mediation. It is however a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such eventuality, the court held that nothing prevents them the parties from informing the court that the suit may be dismissed as a dispute has been settled between the parties outside the court.

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3 (2003) 1 SCC 49

4 P.Anand Gajapati Raju v. P. V.G. Raju (2000) 4 SCC 539

5 Order 10 Rule 1-A: Direction of the Court to opt for any one mode of ADR
Order 10 Rule 1-B: Appearance before the conciliatory forum or authority
Order 10 Rule 1-C: Appearance before the Court consequent to the failure of efforts of conciliation.

In the above case, the question was also raised about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation or mediation. It was suggested that in the event of such compulsory reference to conciliation or mediation procedures, if the expenditure on those is borne by the government, it may encourage the parties to come forward, and make attempts at conciliation or mediation.

ARBITRATION

> *It is equitable to be willing that the difference shall be settled by a discussion rather than by force; to agree to arbitration rather than to go to court-far the arbitration looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail.*
>
> — Aristotle

The principal advantages of arbitration are:

- The process can be speedier than the court case
- There can be saving in costs
- Unwanted publicity can be avoided
- The convenience of the parties as to time and place has first consideration
- The arbitrator can view the subject in dispute at any reasonable time.

'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitrator and Conciliation Act, 1996 (26 of 1990), in so far as they refer to arbitration.

With the enactment of the Arbitration and Conciliation Act 1996, the law relating to arbitration and conciliation has at last come of age. In *Food Corporation of India v. Joginderpal Mohinderpal*[6] it had observed that: "We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the cannons of justice and fairplay and make the arbitrator to adhere to such processes and norms which will create confidence, not only by doing justice between the parties, but creating sense that justice appears to have been done."

The salient feature of the Act is that it gives freedom to the parties to agree as to the manner in which they would like the arbitration to be conducted. They have also been given the power to evolve procedures not only with regard to appointment of arbitrators but also as to the termination of their mandate. The grounds on which an arbitration award can be set aside have also been greatly reduced. There is hardly any role that the Courts could be called upon to play under the 1996 Act. In fact, the statement of Objects and Reasons given in the bill inter alia clearly states that the main objective of the bill is to minimize the supervisory role of Courts in arbitral process.

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6 AIR 1989 SC 1263

In *State of J&K. and another v. Dev Dutt Pandit*[7], the Supreme Court was compelled to observe as: "Arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process.

The brief ***procedure*** *as laid down in the 1996 Act is as follows:*

- The provision of arbitration can be made at the time of entering the contract itself, so that if any dispute arises in future, the dispute can be referred to arbitrator as per the agreement. It is also possible to refer a dispute to arbitration after the dispute has arisen. Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement must be in writing and must be signed by both parties, (section 7)
- If a party approaches court despite the arbitration agreement, the other party can raise objection. However, such objection must be raised ***before*** submitting his first statement on the substance of dispute. On such application the judicial authority *shall* refer the parties to arbitration. (Section 8)
- The parties can agree on a procedure for appointing the arbitrator or arbitrators. If they are unable to agree, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator -who will act as a presiding arbitrator. (Section 11(3)).
- In case of international commercial dispute, the application for appointment of arbitrator has to be made to Chief Justice of India. In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated. (Section 11(12))
- An arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. (Section 12(1)). Appointment of Arbitrator can be challenged only if (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality (b) He does not possess the qualifications agreed to by the parties. (Section 12(3)). In such case, application for setting aside arbitral award can be made to Court. If the court agrees to the challenge, the arbitral award can be set aside, (section 13(6)). Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.
- The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present his case. (Section 18).
- The Arbitral Tribunal is not bound by Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. (Section 19(1)). The parties to arbitration are free to agree on

7 (1999)7 SCC 339

the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal.

- The Arbitral Tribunal has powers to decide the procedure, determine the admissibility, relevance, materiality and weight of any evidence, (section 19(4)).
- After submission of documents and defence, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be oral hearing or proceedings can be conducted on the basis of documents and other materials. (Section 24)
- It is permissible for parties to arrive at mutual settlement even when arbitration is proceeding. In fact, even the Tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms. Such Arbitral Award shall have the same force as any other Arbitral Award, (section 30)
- Decision of Arbitral Tribunal is termed as 'Arbitral Award'. Arbitrator can decide the dispute *ex aequo et bono* (In justice and in good faith) if both the parties expressly authorise him to do so. [section 28(2)].
- The approach to court has been drastically curtailed. In some cases, if an objection is raised by the party, the decision on that objection can be given by Arbitral Tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach Court only after Arbitral Award is made. Appeal to court is now only on restricted grounds. Of course, Tribunal cannot be given unlimited and uncontrolled powers and supervision of Courts cannot be totally eliminated.

CONCILIATION

Part III of the 1996 Act makes provision for conciliation proceedings. In conciliation proceedings, there is no agreement for arbitration. In fact, conciliation can be done even if there is arbitration agreement. The conciliator only brings parties together and tries to solve the dispute using his good offices. The conciliator has no authority to give any award. He only helps parties in arriving at a mutually accepted settlement. After such agreement they may draw and sign a written settlement agreement. It will be signed by the conciliator. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award. Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator. The Draft Rules on mediation refer to the same procedure and powers of the mediator as laid down in the 1996 Act.

LOK ADALAT

The concept of the Lok Adalat implies resolution of peoples' disputes by discussion, counseling, persuasion and conciliation so that it gives speedy and cheap justice with the mutual and free consent of the parties. In short, the concept of Lok Adalat implies speedy and cheap justice to common man at his door-step. It is participatory justice in which people and judges participate and resolve their disputes by discussion and mutual consent.

- invite parties to disclose the emotional impact of the situation
- invite parties to express their feelings to one another
- suggest a recess

Using the private session (caucus)

Probably the most over used tool possessed by the facilitator or mediator is the private session. It is so over used that some facilitators/mediators always break the parties into private sessions at the conclusion of the opening statements. Over use of the private session can be counterproductive because communication is insulted.

When should you consider asking for a private session?

- to explore and share private matters and information you do not desire to share in general session
- to regain control when a party is getting out of hand
- when you believe you need to float risky trial balloons
- when you believe that the parties are near impasse.

When should you consider asking for a general session?

- when a party can be directly persuaded
- when a party can communicate a compelling position

Reactive devaluation

Reactive devaluation is a psychological phenomenon that occurs when a person reacts negatively to information based upon the source of information. Parties in a dispute react negatively to offers/counteroffers if they are suggested by the opposite party or his lawyer. A mediator may handle such situation by

- taking ownership of the information, with the consent of the party
- suggesting possible offer/counter-offer without attributing it to any particular person

Prissily a mediator must have the following qualities

- patience
- optimism
- detachment
- perseverance
- flexibility
- sense of humour

Therefore a person having all these qualities and who are well versed in the ADR mechanism can better facilitate the ADR process in the country and secure access to justice in time.

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Section 89 of the CPC, the ADR and Mediation Rules

Justice P. K. Balasubramanyan

It is not necessary at this stage to talk on general need for alternative dispute resolution and the purpose sought to be achieved by the introduction of such alternate methods. We have been hearing about it and reading about it.

We have had arbitration as an alternative dispute resolution mechanism for more than a century. Though, it was reasonably widely used, in a sense it did not achieve the purpose of quicker redressal of disputes. This led to further thought and the concept of lok adalats was conceived of backed by the Legal Services Authority Act. This was followed by a concept of reconciliation and mediation being introduced into our system.

From experience, I have found that the courts hardly used Order X of Code of Civil Procedure, 1908 and less frequently used than warranted, Order XI of the Code relating to discovery by interrogatories. Order X enables a court at the first hearing of the suit to ascertain from each party or his pleader whether he admitted or denied such allegations of fact as are made in the pleadings of the opposite party. The court is to record such admissions and denials. Rule 2 provides for examination of the party at the first hearing for the limited purpose to elucidating the matters in controversy. Under Order XI, interrogatories could be served on the opposite party and answers elicited. These provisions were really intended to narrow the areas of conflict and to make more precise the area pf dispute the court was called upon to resolve. Of course, the answers elicited under Order X of the Code had limited utility though an admission made by a party against his own interest might have had a vital role in the disposal of the suit itself. By the amendment of 1976, Rule 2 of Order X was made more elaborate and it can be seen that the Rule was in somewhat of a mandatory form in that the court at the first hearing shall with a view to elucidating matters and controversies in the suit examine orally such of the parties to the suit appearing in person or present in court as it deems fit. As I stated earlier, notwithstanding the mandatory nature of what was stated therein, the Order was seldom put to use by the Courts.

The amendment to the Code of Civil Procedure, 1908 in 1976 also introduced Order XXXIIA in the Code. Rules in that Order were applicable to suits or proceedings relating to matters concerning the family. Rule 3 imposes a duty on the Court to make efforts for settlement of disputes by providing that in a suit to which the Order applies, the court shall make an endeavour in the first instance where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit. It also provides for assistance of welfare experts to the court in resolving family disputes. Again, the Order was not put to wide use with the result that the position remained as it was, except that the Family Courts Act having intervened, some progress was made in the attempts at conciliation and so on under that Act.

With a view to lessen the pressure on the courts and render quicker and substantial

justice to the litigants, lok adalats were resorted to, in a way, reviving the idea of panchayats in ancient India. This was given legal sanction by the Legal Services Authority Act, 1987 and the implementation of that Act, to some extent, has reduced the pressure on the courts especially in compensation claims cases and other similar claims against public or quasi public authorities.

In the year 1996, the Arbitration Act, 1940 was replaced by the Arbitration and Conciliation Act, 1996 on the basis of the UNCITRAL Model and with a view to simplify the mechanism of Arbitration and reducing the scope for judicial intervention. But to invoke the Act, to have the dispute settled by arbitration, one had to have an arbitration agreement between the parties as defined in that Act. It had to. be in writing though it could be culled out from the correspondence between the parties even if not directly set down in the contract itself. This again did not attain the object of reducing the pressure on the hierarchy of courts groaning under docket explosion, lack of adequate man-power and infrastructural facilities.

Part III of that Act dealt with conciliation. Here again, one of the parties to the dispute had to initiate the conciliation proceedings and the conciliation proceedings would commence when the other party accepts in writing the invitation to conciliate. But section 62 of the Act provides that if the other party rejects the invitation, there will be no conciliation proceedings. In the background of the Indian Litigative mind, this could not be said to be a step forward since no conciliation could be had if the other party was not willing. The effect was that the somewhat elaborate provisions made in the Arbitration and Conciliation Act, 1996 remained dormant and this led to the enactment of section 89 of the Code of Civil Procedure by amending Act 46 of 1999. Consistent with the general reluctance, to go in for alternate modes of resolution of disputes, the provisions could be notified only with effect from 1.7.2002. Simultaneously, Order X of the Code was also amended and Rules 1A, IB and IC were introduced. Section 89 was introduced in the context of the suggestion of the Malimath Committee, that the alternate redressal mechanism should be made mandatory in any suit filed in the civil court. Section 89 was introduced by clause (7) of the Code of Civil Procedure Amendment Bill 1999. the notes to the said clause indicated that the provisions for settlement of disputes outside the court are based on recommendations made by the Law Commission and the Malimath Committee. Law Commission suggested that the court may require attendance of any party to appear in person with a view to arrive at an amicable settlement of the dispute between the parties and to enable the court to make an attempt to settle the dispute between the parties amicably.

The Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalats. If the parties fail to get their dispute settled through any of the alternate dispute resolution methods then the suit could proceed further. This was the context in which the section was introduced. It was not intended to have any retrospective effect. The special provisions made for settlement of disputes has been introduced with a view to help the litigant to settle his dispute outside the court instead of going through the long procedure to sort out the litigation. The object or aim of the provision is thus laudable and the essential aspect to be considered is how we could

put the said provisions to optimum use.

By judicial intervention, a Committee was constituted to frame rules to govern the alternate dispute resolution. The committee suggested Model Rules as Alternate Dispute Resolution and Mediation Rules with the suggestion that the Rules could be adopted by the various High Courts in terms of the rule making power conferred by Part X of the Code of Civil Procedure, and Section 89 (2) (d) itself. In Part I of the Rules alternate dispute resolution was dealt with and Part II set out the mediation rules subject to adoption by the various

High Courts. We have now these Rules as model. In the Second Salem Bar Association Case, the Supreme Court has stated:

"Now, it is for the respective High Courts to take appropriate steps for making rules in exercise of rule making power subject to modifications, if any, which may be considered relevant."

I am not sure how many High Courts have in fact adopted the Rules with or without modification.

To effectively implement the scheme of section 89, the court has to apply its mind to the case of the parties before it so as to understand the scope of the dispute. In a case where it appears to the court that there exists elements of settlement which may be acceptable to the parties, the court has to formulate the terms of settlement and give them to the parties for their comments or observations and after receiving their reactions, reformulate the terms of a possible settlement if it is necessary and then refer the dispute for alternate resolution. Section 89 contemplates four modes of alternate dispute resolution, namely, arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation. If method of arbitration or conciliation is being adopted and the dispute is referred for arbitration or conciliation, it is provided in sub-section (2), that the Arbitration and Conciliation Act, 1996 shall apply to such proceeding. If parties opt for judicial settlement, the court shall refer the parties to the Lok Adalat and then the provisions of the Legal Services Authority Act, 1987 would apply to that proceeding; if it is through judicial settlement other than through the Lok Adalat, again the Legal Services Authority Act would be applied by the suitable institution or persom to whom the dispute is referred. For mediation, the court shall effect a compromise between the parties and follow such procedure as may be prescribed.

Can the court on its own refer the dispute in terms of section 89 of the Code? If it is a case of conciliation or mediation, the court possibly can refer the parties to a conciliator or mediator notwithstanding that the parties are not willing to have the dispute resolved through such a mode. But here, on the conciliator or the mediator failing to bring about a conciliation or settlement, the matter comes back to court and the litigant can have his innings in the court. Therefore, it may be said that volition of the parties to the litigation is not a must for referring a dispute for conciliation or mediation. Of course, the chances of success therein would not be bright if the parties do not cooperate before the conciliator or the mediator. But the position could be different if the court were to resort to arbitration or judicial settlement, say through Lok Adalat. In such cases, if the arbitrator proceeds to give an award, it would be binding on the party even if he is not willing for arbitration and

resort to the procedure if any available under the Arbitration and conciliation Act to ventilate his grievance against the award.

The position as regards the dispute being settled under the Legal Services Authority Act, would also be the same. Therefore, one aspect that arises is whether the court which is expected or obliged to explore the possibility of a settlement of the dispute, can refer the matter for arbitration or to the lok adalat without the consent of the litigating party or parties. In the report of Malimath Committee, it is suggested that the reference could be made at the instance of the court and the same should be made mandatory. But, the language of section 89 does not appear to justify a conclusion that the court can refer a dispute either for arbitration or to the lok adalat without the volition of the parties. In fact, in the second Salem Bar Association Case, after referring to the decision in P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Dead) & Ors., the Supreme Court stated:

"1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in section 89 of the Code where the Court asks the parties to choose one or other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for arbitration. Section 82 of 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among four ADRs is not contemplated by the 1996 Act and, therefore, Section 82 or 84 has no applicability where parties agree to go for arbitration under section 89 of the Code."

This appears to be consistent with the concept of Arbitration. After all, arbitration is a method of resolution of disputes extra cursum curiae and a decision by such a constituted authority can be had only when the parties agree to constitute that authority to resolve their disputes. The reference to lok adalats also, it appears to me, stands on the same footing and the court may not be able to compel a party to go before the lok adalat to have his dispute settled unless he is willing to have it settled in terms of the Legal Services Authority Act. We must keep in our mind the background that any person who believes that he has got a cause of action for a suit, is entitled to approach the court and the court is bound to pronounce on his cause of action so long as there is nothing in terms of section 9 of the Code interdicting its exercise of jurisdiction. Of course, it is a different thing to say that the court could reject the plaint in terms of Order VII on the ground that it does not disclose a cause of action or that the suit is seen to be barred by any law, or on a preliminary issue in terms of Order XIV of the Code. It cannot refuse to resolve a cause, on the ground that the dispute should be resolved only through arbitration or judicial settlement outside the court.

At the same time, there appears to be no reason to deny the court the power, even without the consent of parties, to direct that a dispute be attempted to be settled by conciliation or mediation. It is therefore my view that what is required is to strengthen the mechanism for conciliation and mediation. Competent persons with unimpeachable integrity and sound reputation must be chosen as conciliators or mediators. If that is done, the parties would be tempted to have their dispute resolved through conciliation or mediation even though

they might have been initially reluctant to adopt any method of alternate redressal of their disputes. After all, if it fails, they can come back to court unlike in tiie case of an arbitration or resolution through Lok Adalat.

What has then been achieved by section 89? Section 89 has formulated the ADR mechanism by giving the power to the court to refer the disputes in appropriate cases for resolution by way of arbitration, by way of conciliation, by way of lok adalats or other forms of judicial settlement of by mediation. I have already suggested that though sending a dispute for arbitration or to the lok adalt would require the consent of parties, the adoption of the methods of conciliation and mediation, can be resorted to by the court notwithstanding the failure of the party to agree to the adoption of such a course. This is because if either the conciliation or the mediation fails, the matter comes back to the court and there is no possibility of a unilateral decision being rendered by the conciliator or the mediator. Though the second Salem Bar Association case has indicated that the power to make rules under section 82 of the Arbitration and Conciliation Act may not be available to the High Court when proceedings under section 89 of the Code, the fact remains that the proceedings of Part III of the Arbitration and Conciliation Act could be applied in resolution of disputes by conciliation. The appointment of conciliator or conciliators, the commencement of composition of the conciliation mechanism, the procedure for submission of statements to the conciliator, the non application of the strict rules of procedure of the Code and the Evidence Act, the role of conciliator, the administrative assistance to the conciliator and the other related functions including confidentiality, could be applied without any difficulty in the matter of conciliation. These provisions are sought to be supplemented by ADR Rules 2003 approved by the Supreme Court. We have already noted Rules 1A, IB and 1C introduced in Order X of the Code. Rule 1A enables the court to direct the parties to opt for one of the modes of settlement outside the court as specified in sub-section(l) of section 89 and on option of the parties, to fix a date of appearance before such forum or authority. Rule IB obliges the parties to appear before such forum or authority and Rule 1C enables the conciliator or the mediator to refer the matter back to court on the failure of the efforts to conciliate or mediate. The Model Rules prescribe the procedure for directing parties to opt for alternative modes of settlement by calling upon the court to formulate the terms of settlement and give them to the parties as contemplated by section 89(1) of the Code within 15 days of the first hearing and within 15 days thereof to reformulate the terms if the parties indicate their mind in that regard. The aspect highlighted by me earlier is emphasized by the proviso to Rule 2 which says that the court in exercise of the power under section 89(1) shall not refer any dispute to arbitration or to settlement through lok adalat or judicial settlement, under the Legal Services Authority Act, as envisaged under clauses (a) and (c) of sub-section (1) of section 89, without the written consent of all the parties to the suit. In effect, what happens is that even though there may not be an arbitration agreement between the parties, the court can still persuade or enable the parties in a pending litigation to go in for arbitration. This is a position which is somewhat akin to what was available under section 21 of the Arbitration Act, 1940 wherein, in any pending suit if the parties interested agree that the matter in difference between them in the suit shall be referred to arbitration, they could, at any time before the judgment was pronounced, apply to the court in writing for an order of reference. The scheme of section

89(1) of the Act understood in the context of the proviso to Rule 2 of the ADR Rules in the background of section 21 of the Arbitration Act, 1940 thus demonstrates that there could be no attempt to settle the dispute by arbitration or by judicial settlement without volition of the parties. Rule 3 of the Model Rules indicates who is the person authorized to take decision in cases in which the Union of India, State Governments, Union Territories and other public sector undertakings are involved in a dispute. Rule 4 enables the court to give guidance to the party while giving direction to opt by drawing their attention to the relevant factors which the parties will have to take into account, before they exercise their opinion as to the particular mode of settlement. The court can, for example, indicate that it will be more advantageous to opt for a particular mode of settlement than to proceed with the litigation. It can persuade the parties to see, for example, that in a particular case resort to arbitration would be a more fruitful method for resolution of the dispute or that it was a fit case for conciliation or mediation. Rule 3 also seems to explain what is meant by arbitration, conciliation, mediation and settlement including that in a lok adalat. Rule 5 indicates the procedure for reference by the court for the different modes of settlement. Rule 6 provides for appearances of the parties before the court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation and provides that the court will proceed with the suit in accordance with law in such a case. Rule 7 contemplates the training of conciliators, mediators and so on and rule 8 provides for applicability of the Rules to other proceedings before the courts, including Family Courts.

Part II contains Mediation Rules. Rule 2 deals with the appointment of mediator. Initially, it is for the parties to agree on the name of a sole mediator. If they are not able to agree, the parties are given the right to nominate a mediator each. The Rule also provides that in case the parties choose a mediator, it is not necessary that he should be a person from the panel of mediators prepared and published by the court. Rule 3 provides that a panel of mediators has to be prepared and published. A mediator should be included in the panel only after obtaining his or her consent and the panel of names should contain a detailed annexure giving details of the qualifications of each of the mediators and their profession or technical experience in different fields. Rule 4 to me is very important. It refers to the qualifications of persons to be empanelled as mediators. The rule has provided that retired judges of the Supreme Court, retired judges of the High Court, retired District and Sessions Judges and other retired judicial officers who have worked as Senior Civil Judges, legal practitioners with at least 15 years standing at the Bar, experts or other professionals with at least 15 years standing, retired senior bureaucrats or retired senior executives and institutions which are themselves experts in mediation and which are recognized as such by the High Court could be empannelled as mediators. To make the method of mediation as alternate resolution mechanism more acceptable, more attractive, it is necessary to ensure that the panel constituted consists of persons of repute, integrity and commitment. Once such persons are included as mediators, the chances are that the parties would be willing to make an attempt to have a mediation of the dispute before him before insisting that their case must be decided by the court itself. Thus, I would suggest that it will be more fruitful to concentrate on mediation, in cases where the parties are not willing to have arbitration or a resolution before a lok adalat by ensuring that the panel of mediators selected, inspire confidence in the litigant to have his problems sorted out at

the mediation table. Rule 5 provides the disqualifications for a person to be a mediator. Rule 6 directs the court to give precedence to those from the panel of mediators who have proven record of successful mediation while selecting mediators. Rules 7 and 8 dealt with the mediator having some disqualification regarding a particular litigation and the cancellation of his appointment on that score. Rule 9 gives the power to the court to remove or delete any name from the panel of mediators. Rule 10 prescribes the procedure for mediation. It gives the parties that right to agree on the procedure being followed by the mediator. If the parties do not agree, sub-rule (b) indicates what are the aspects to be covered by the mediator while proceeding with the mediation. Sub-rule(c) provides that where there is more than one mediator, the respective mediator shall first discuss the matter with the party which have nominated him as mediator and thereafter only they should interact with each other with a view to resolving the disputes. Rule 11, as can be expected, provides that a mediator is not bound by the procedure of Code or the Evidence Act, but he shall be guided by the principles of fairness and justice. Obviously, if a mediator is a judicial officer as provided in the Rule 4, normally, he would be expected to act with fairness and justice in mind. Rule 12 covers the case of non-attendance of parties at meetings on due dates and gives the power to the court to take action against an absentee party by imposition of costs or by taking action for contempt. As regards the parties not resident in India, the rule provides that they may be represented by their counsel or power of attorney holders at the meetings. Rule 13 contemplates administrative assistance by a suitable institution or person in order to facilitate the conduct of mediation. Rule 14 enables a party to the mediation to make an offer of settlement without prejudice. Rule 15 defines the role of the mediator and his attempt has to be to facilitate voluntary settlement of the disputes by the parties. Rule 16 clarifies that the parties are alone responsible for taking a decision. It provides that a mediator shall not impose any decision on the parties. But it appears to me that an active intervention by a mediator trying to get the parties to agree to a particular form of settlement is not ruled out by this Rule. In the conditions prevailing in our country, a prestigious mediator can guide the parties to a proper settlement and mere observatory role by the mediator may not be conducive to bring about settlements by mediation. Rule 17 enables the parties to be present before the mediator either personally or through their counsel or through a constituted power of attorney. Rule 18 sets the time limit on the attempted mediation and provides that a mediation should be completed within 60 days subject to the right in the court to extend the time for a further period not exceeding 30 days in case there are chances of settlement. Rule 19 clearly provides that no one can be compelled to settle his case in advance of mediation. The parties have to participate in the proceedings in good faith with the intention to settle the disputes, if possible. Rule 20 provides for confidentiality of any information that might have been conveyed to the mediator during the course of the mediation, and if it is factual information, the mediator shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate. The records and other materials received are to be confidential and the views expressed, offers made and so on during the course of the mediation are also confidential. It is specifically provided in sub-rule(4) that there shall be no stenographic or audio or video recording of the mediation proceedings. Rule 21 says that the mediation

session and meetings are private and only the concerned parties or their counsel or power of attorney holders can attend. But with the permission of the parties and with the consent of the mediator, other persons may also be present. Rule 22 provides immunity to the mediator. Rule 23 deals with the communication between mediator and the court and provides that there shall be no communication between them, unless it is necessary. In such a case, it shall be in writing and copies of the writing shall be given to the parties or their counsel. Communication between the mediator and the court shall be limited to communication about the failure of a party to attend, regarding the assessment of the mediator that the case is not suited for settlement through mediation or that the parties have settled the disputes. The mediator can also communicate or what he considers relevant, but with the consent of parties. Rule 24 provides that where a settlement has been arrived at, an arrangement reached shall be reduced to writing and signed by the parties and if they are represented by counsel, the counsel shall attest the signature of their respective clients. The agreement so signed and attested is to be submitted to the mediator who has to forward the same to the court with a covering letter signed by him. A mediator is also free to report failure in case there is no chance of a mediation succeeding. Under Rule 25, the court which sent the matter for mediation and which has reviewed the report of the mediator has to fix a date for recording the settlement and passing a decree. It also provides that if the settlement disposes of only certain issues arising in the suit, the court shall record the settlement to the extent it has been come to and proceed to decide the other issues and incorporate the terms of the settlement in the judgment, while deciding the other issues. Rule 26 provides for the fees of the mediator and the costs. It provides for the parties to bear the costs equally. It also gives the mediator the power to approach the court for recovery of his fees. It also gives the power to recover the amount in case it is not paid by the parties or anyone of them. Rule 27 lays down the ethics to be followed by the mediator. Rule 28 gives the power to appoint any mediator who is otherwise qualified and is not disqualified before the creation of the panel of mediators by the court.

Thus, the rules have made an attempt to carry forward the implementation of section 89 of the Code and has made elaborate provisions for mediation. As I see it, the success of the process to a great extent depend on the Presiding Officer. His approach would be important. If he applies his mind to the nature of the dispute that has come up before him and finds out what are the issues of difference and which according to him can be resolved through the alternate redressal fora, he would be in a position to make appropriate suggestions to the parties and also to guide them on the more advantageous method of resolution out of the four methods available and thereby advancing the process of getting the problem solved through the alternate redressal method. The selection of suitable persons as conciliators and mediators would also go a long way in making this process successful and in reducing the pressure on the courts.

I have not considered whether there are any deficiencies or ambiguities in the Model Rules. If there are any they would emerge after we adopt them and as we go along.

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Conciliation and Mediation

Justice Dr. M. K. Sharma,
Judge,
Supreme Court of India

Conciliation and mediation are recognised as two important and effective modes of alternative dispute resolution system. These are considered as effective and meaningful alternatives to litigation through courts for resolution of disputes through the guidance and assistance of a neutral and impartial third party.

This method of resolving dispute through mediation and negotiation is, however, not foreign in our country. Village Panchayats and Nyaya Panchayats have been functioning in the villages and many disputes at the village level have been settled through conciliation and mediation in these Panchayats for a very long time. But such remedy through Panchayat was sought for more as convenience as they are more easily approachable than the Courts which are located far away from the villages.

However, with the passage of time there has been overcrowding in numbers of litigation. There has also been delay in disposal of litigation for various reasons like shortage of judges and judicial officers, shortage of infrastructure and increase in population.

Better understanding and awareness of their rights by the general public has also led to filing of more cases in the courts. Accordingly, it was thought that as there is a heavy traffic in the main thoroughfare, a bye pass is to be opened to ease the pressure in the main thoroughfare and consequently the device of alternative dispute resolution system like conciliation and mediation has been carved out. This form or process is settlement geared and is also definitely cost saving. It also helps the parties to adopt a problem solving approach to find out a "win win" outcome. When a dispute is resolved through this process, there is no winner or loser for the parties agree to the solution whereas in a litigation there is always a loser and even the winner of the litigation goes back home at times feeling fully exhausted physically, mentally and also financially.

Under the Code of Civil Procedure, 1908 express provisions are contained in the form of Order XXXII A, Rule 3 whereunder a duty is cast upon the courts to make efforts for settlement in suits relating to matters concerning a family. Similarly, under Order XXXVII Rule 5B, a duty is cast upon the court in a suit against the government or a public officer to assist in arriving at a settlement.

However, an elaborate codified recognition has been given to the two concepts only with the enactment of the Arbitration and Conciliation Act, 1996. In the said Act, a separate chapter is devoted to the concept of conciliation. Of late, even in civil litigation provisions have been made for getting the disputes resolved through the process of arbitration, mediation, conciliation or Lok Adalats, if the court is of the opinion that the case could be settled through one of the said modes. The said procedure is generally adopted after completion of the process of admission/denial of the documents as at that stage when issues are framed in the suit, the court becomes aware of the actual issues involved in the

suit. It is, however, interesting to note that under the provisions of section 89 Code of Civil Procedure, 1908 the court is given the power and jurisdiction to refer the dispute/litigation to an arbitrator without even existence of an arbitration clause. Therefore, there is probably a grey area which is required to be settled through an appropriate pronouncement as to whether or not consent of the parties would be necessary for such reference, which would probably give rise to an arbitration agreement.

However, it is not my intention to probe indepth to the concept of arbitration and user of the same as a tool of alternative dispute resolution system, as the same was discussed at length in the morning session. I would, therefore, restrict myself to the topic kept aside for the afternoon session, that is, the concept and idea of conciliation and mediation pitted against litigation. The concept of conciliation has now been given a statutory recognition under the Arbitration and Conciliation Act, 1996. But it is not very clear as to whether the two concepts of conciliation and mediation would have different connotation or they would refer to the same mode. According to most of the authorities they are overlapping. But the expression conciliation is not defined in the Act. It only states that conciliation could take place not only in contractual and commercial disputes but also in all disputes arising out of legal relationship. This expression 'conciliation' is defined by the International Labour Organisation which is adopted by the Advisory, Conciliation and Arbitration Service which reads as follows:-

"The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their difference and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator."

The difference between conciliation and mediation has also been outlined by the same authority as follows:-

"Mediation may be regarded as a half way house between conciliation and arbitration.

The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of conciliation but in addition is prepared and expected to make his own formal proposals or recommendations which may be accepted."

In India, however, mediation does not have any statutory recognition and existence and, therefore, would not be bound and restricted to any rules and statutory restrictions and limitations, unless it is accepted that both the expressions are overlapping.

A conciliation proceeding could be initiated in India when one of the parties to the dispute arising out of legal relationship invites the other parties to get the dispute resolved through conciliation and the said request is accepted by the other party. If, however, the other party rejects the invitation for settlement through conciliation, no such proceeding would get initiated. Even if no response is sent within thirty days to the invitation, it would be deemed that the said request is rejected.

The number of conciliator generally appointed for a conciliation proceeding is one unless the parties agree and give mutual consent to have more conciliators than one. A

statement of their respective cases is to be submitted by the parties to the conciliator in order to enable the conciliator to understand the case of the parties and to form an opinion. He can call for additional statement of facts and informations in order to enable him to give his suggestion to the parties. Parties are also entitled to suggest terms of settlement which would be discussed by the parties wherein suggestions could be given by the conciliator on such terms for their observations but the conciliator cannot impose a settlement as conceived by him on the parties. In case the parties arrive at a settlement during the discussion and the proceeding, a settlement agreement is drawn up which would have the same effect and status as an arbitral award on agreed terms as envisaged under section 30 of the Act. The same thereafter could be enforced as a decree.

Conciliation proceeding could be of two types - **facilitative conciliation and evaluative conciliation.** In facilitative conciliation, the conciliator avoids opinion and judgments and he merely assists the parties to clarify their communications, interest and priorities. On the other hand, in evaluative conciliation, the conciliator expresses his opinion on the merit of the issues so as to enable the parties to approach settlement. His opinion is a third party view on the merit but such opinion would not be conclusive and binding.

A conciliator must be seen as an independent and impartial person and he must enjoy confidence of both the parties. The parties should be able to repose trust and confidence on him so as to enable them to share their secrets and their thinking process with the conciliator with the belief that the same should not be divulged to other party without specific instructions in that regard. Therefore, a conciliator is bound by rules of confidentiality and not by the strict rules of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

A party desiring to avail of the remedy could take resort to the said procedure during pre-litigation and even during the pendency of litigation. If the effort fails, the parties can always come back to litigation. However, during the pendency of a conciliation proceeding a party is not entitled to pursue a litigation.

A large number of disputes arise in the commercial areas, matrimonial matters and labour and employment areas. These disputes are being resolved by resorting to litigation. However, in these areas conciliation and mediation could play an effective role in bringing about a solution as they involve emotional angle and strong feelings in the disputing parties, which are best settled by conciliation.

I have dealt with the provisions and the procedure of conciliation at length in order to pinpoint that there is no conflict between a litigation and a conciliation and mediation proceeding. They are complimentary to each other, like a bye pass. Choice is of the parties to choose one but one has a choice to come back to the main thoroughfare also, when so intended. Besides, when a reference is made by the court under section 89 Code of Civil Procedure,1908 to a conciliator or a mediator, not only the court retains the supervisory jurisdiction over the matter but the lawyers and the litigants continue to be participants therein. It is with the active support of all the three participants along with an additional player, namely, the mediator or conciliator, that a negotiated mutual settlement is arrived at. Therefore, the system of alternative dispute resolution through mediation

and conciliation may not and should not be seen as competitive to litigation in court.

I would wish to end up my speech by quoting Mr. Fali S. Nariman, who has said in a message that was published in the Handbook on Arbitration, as follows :-

"A mediator or conciliator must lead parties into the gray shaded areas of a problem where a variable range of outcomes becomes available to achieve a mediated consensual resolution. It is the skill with which this "grey area" is negotiated that the success of Part III of the Act will depend.

Lawyers must advise their clients to use Part III more often - they must educate and explain clients on the benefits of conciliation."

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MEDIATION

Justice M.Y. Eqbal*

Today, the age old dictum of India लोकाः समस्ताः सुखिनो भवन्तु is qualified by the expression "Let The Entire Humanity Be Happy Through Mediation".

The concept of Mediation is the part of our rich heritage. Mediation is not a new concept in our Country and our entire system of Resolution of Disputes was in fact based on amicable settlement (Mediation) from the time immemorial and the present adversarial system precipitated during the British period and got deep rooted with the passage of time in Indian Judicial System. Our *Dharmashastras* and even Holy epics are the testimony of this fact.

Some of the attributes of Mediation were indicated as far back as five thousand years ago in

Mahabharata Shantiparva 60-7-8 (SC. Ch. II).

1.	We must treat others as we wish others to treat us	: atmavat sarvabhutanam
2.	We consider humankind our family	: Vasudhaiva Kutumbakam
3.	We should serve others	: Paropakarartham idam shareeram
4. (a)	We must commit to a culture of non-violence	: Ahimsa satyamasteyam
(b)	We must speak and act truthfully - we must not steal	: Shoucham indriyanigraha,
(c)	We must move beyond the dominance of greed for power, money, prestige, consumption	: Etam samastikam dharmam
(d)	We must not commit any sexual immorality	: Parityajedartha Kamou Yau Syatam

Dharma Varjitau

In *Mahabharata, Lord* Krishna's efforts to resolve the differences through negotiation & persuation but went in vain and the classic example of rigid conflict between Pandava and Kauravas ended with total destruction.

* Judge, Jharkhand High Court, Ranchi

The **Holy *Quran*** is the last Divine scripture revealed on His last chosen messenger, the profhet Mohammad blessing peace be upon him. And excellent plan for setting family disputes, without too much publicity and mud throwing, or resort to chicaneries of law is ordained in the Holy BooK: sura al-nisa verse 35 (iv-35)

"If ye fear a breach between them twain (the man & wife) appoint (two) arbiters one from his family, and the other from hers; if they seek to set things aright, Allah will cause their reconciliation: For Allah hath full knowledge and is acquainted with all things."

The fundamental directive principle in Holy Quran (Chapter IV, Verse 128) regarding reconciliation in the Devine language is prescribed as "an amicable settlement is best. (iv- 128)

Further it is Prophet's (PBH) Saying: ***"One who turned to amicable Settlement, he became prosperous."***

Recalling anecdotes from the great epic ***Ramayana*** one can not forget the role of many emissaries like *Hanumana, Angad* and others approached to the demon king *Ravana* to impress to set free Goddess *Sita*, who was in his captivity, lest it would entail a lot of destruction and miseries and would be detrimental to the interest of humanity.

Thus Mediation, Conciliation and Arbitration are historically more ancient than Anglo-Saxon adversarial system of law. Mediation was very popular amongst businessmen during pre-British rule in India. The Mahajans - the impartial and respected businessmen used to resolve disputes between members of the business associations by the end of the day. This informal procedure, once in vogue in the province of Gujarat, was a combination of mediation and arbitration, now known in the western world as *med-arb*. This type of mediation had no legal sanction in spite of its common acceptance in the business world.

The concept of mediation got legislative recognition for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are *"charged with the duty of mediating in and promoting the settlement of industrial disputes"*. A complete machinery for conciliation proceedings is provided under the Act. The conciliators appointed under the Act and the services provided by them are part and parcel of the same administrative machinery provided under the Act.

Arbitration, as a dispute resolution procedure was recognized as early as in 1879 and found its place in the Codes of Civil Procedure Code 1879, 1882 and 1908. When the Arbitration Act was enacted in the year 1940, the provision for arbitration made in Section 89 of the Code of Civil Procedure, 1908 was repealed.

The Indian Legislature came with another legislature, namely, the Legal Services Authority Act, 1987 by constituting Legal Services Authority at the National, State and District level for the purpose of encouraging the settlement of the disputes by way of negotiation, arbitration and conciliation.

Arbitration and Conciliation Act, 1996 has made elaborate provisions for conciliation of disputes arising out of legal relationship whether contractual or not and to all proceedings relating thereto. It provides for commencement of conciliation proceedings, appointment of Conciliators and the assistance of a suitable institution for the purpose of recommending the name(s) of the conciliator(s) or even appointment of the conciliator(s) by such an institution and submission of statements to the conciliator. It also provides that conciliator is not bound by the Code of Civil procedure or the Evidence Act. It defines the role of the conciliator in assisting the parties in negotiating the settlement of their disputes.

Finally the introduction of ADR mechanisms in the Code of Civil Procedure, 1908 is one more radical step taken in recent times by Indian legislature by enacting Section 89 and Order X Rules 1A, IB and 1C providing for ADR machinery even in cases pending before the civil courts and has further authorized the High Courts to frame rules for the purpose. Thus, now the Indian legislature has made sufficient provisions in law to facilitate introduction of court annexed mediation.

A well contested litigation never concludes with the satisfactory result. The losers go on fighting and fighting in appeals after appeals through generations to generations. The ADR mechanism particularly Mediation helps in the mindset of the litigants to resolve the dispute amicably once and for all.

The nature of cases which are filed now-a-days relates to partition of joint family property, eviction suit, suit for recovery of bank loan, matrimonial suits and suits for specific performance of

contract. In those cases, if the Judge concerned applies the provision of Section 89 C.P.C., then disputes in those cases can be resolved by conciliation and mediation. For this purpose, Judges have to be given training as to how and in what manner they shall be able to convince the parties that dispute could be amicably settled through mediation. A Judge has to apply his mind and skill and he should be fully prepared with the case.

The success of the process to a great extent depends on the Presiding Officer. His approach would be very important. If he applies his mind to the nature of dispute that has come up before him and find out what are the issues of difference which can be resolved through Mediation, he would be in a position to make appropriate suggestion to the parties, guide them and convince them that best mode of resolution for their dispute is mediation.

It is, therefore, necessary that while exercising judicial control, a Judge, at an early stage, decides if a case is having an element of settlement which can be further explored by referring the case to mediation. The managerial skill of a Judge is a pre-requisite for referring the case to a mediator. While referring a case to mediation after the Judge sees an element of settlement in it, it is necessary to fix a time-limit for completing the mediating procedure. In absence of such time limit, cases are likely to be shelved. It is, therefore, necessary to exercise further judicial control requiring a complete mediation process expeditiously.

The Code of Civil Procedure and the Mediation can, therefore, be effectively utilized only if the managerial skill of a Judge is properly exposed and effectively implemented. Unless the Judges are properly trained as a Mediator and the techniques of mediation are not effectively and convincingly applied in a particular case we cannot get the desired result.

Whether the mediator makes the progress, parties co-operate, exchange of information takes place or whether the negotiations are likely to fail, are the questions which require judicial supervision. Again, briefing the parties and their advocates in a proper manner by a Judge will prepare them for accepting the procedures positively and secure their willing participation. Court will benefit administratively from resolution of many civil disputes through mediation while simultaneously retaining its vital role as the final arbiter. The Judge will appreciate that mediation is a part of the same judicial system and reference of cases to mediation will spare the Judge more time for the case, which require judicial determination.

Hon'ble the Chief Justice of India has constituted a Committee with the aims and objects to identify causes of arrears, trends of Litigation and to work out solutions for Court Management and Case flow management. **Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India** is the Chairperson of the committee. The Committee decided to initiate pilot project on judicial mediation. His Lordship Justice Sinha is the pioneer of exploring the mechanism of resolution of disputes through Mediation. The other day a meeting of the Mediation and Conciliation Project Committee was held on 15.11.07 by Hon'ble Mr. Justice S.B. Sinha and it was presided over by Hon'ble the Chief Justice of India. The Committee, inter alia discussed all the aspects for imparting training to the mediators and resolved that training on mediation is absolutely necessary for mediators and it has been decided that duration of training will be forty (40) hours plus ten (10) actual mediations. It was also decided that Mediation Centre must have a Full time Coordiantor who is trained in Mediation. It was further decided that steps be further taken to impart training to Judicial Officers in regard to their functions as Referral Judges.

I have had an opportunity to participate in the workshop on mediation in Karkardooma Courts, New Delhi. I was amazed to see the way the two Mediation Centres were functioning in Delhi District Courts - one at Tis Hazari and second at Karkardooma Courts. 30 senior Judicial Officers who have received specialized training in mediation from expert trainers from U.S.A. are functioning as mediators. 13 Judicial Officers out of 30 are working as mediators at Tis Hazari, whereas 5 at Karkardooma Courts.

The cases to these centres are not only being referred by the District Courts, but by Delhi High Court and the Supreme Court of India for settlement through mediation. There has been overwhelming success of mediation training programme in Delhi.

Jharkhand State Legal Services Authority (JHALSA) has taken keen interest in opening mediation centres in all the districts of State of Jharkhand. In the first phase, we have opened Mediation Centres in Jharkhand High Court and in the District Courts at Ranchi, Jamshedpur, Hazaribagh and Dhanbad. In a very short span of period we have got unexpected response and very soon we are going to open Mediation Centres in five more Districts namely Palamau at Daltonganj, Chaibasa, Bokaro, Giridih, Deoghar and Dumka.

Mediation Centres	Cases Referred for Mediation	Cases Disposed of	Cases Pending	Cases Returned Unsettled
Jharkhand High Court	162	157	5	0
District Court, Jamshedpur	197	70	55	72
District Court, Hazaribag	252	93	31	128
District Court, Dhanbad	66	17	21	28
District Court, Ranchi	51	12	01	39
TOTAL	728	349	113	267

Mediation is the demand of the day. The credibility of Justice Delivery System of this country shall erode away if we do not strive to adopt mediation as far as possible in resolving the dispute outside the court without holding the proper trial and traditional system. Mob-Justice, attitude of self-justice, street justice as reported in the newspaper frequently are the extra legal approach of the people at large showing the frustration of justice seekers in the system. It is the indication that our Justice Delivery System is at the threshold of

disappointment and it needs immediate attention by adopting new techniques, new methods, new tools to keep the faith of the people in the system intact. Mediation is one of the most powerful tools and highly effective weapon to combat the menace of the system and will prove a milestone to keep it alive and vibrant.

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Mediation: Uniting Parties Riven Asunder

*Justice Madan B. Lokur**

The question agitating the minds of most judicial reformers and policy makers in India is not what is mediation or why it is necessary — we have gone well past that stage - but how it can be institutionalized to supplement the existing justice delivery system. This presentation dwells on the experiences gained (both on the theory of mediation and its practice) during the running of a unique and very successful judicial mediation programme in the District Courts of Delhi, India.

Several programmes have been conducted and projects implemented in various regions of India with the sole purpose of bringing mediation to the forefront. Some of these mediation programmes have been carried out under the auspices of activist lawyers as in Ahmedabad (Gujarat), under the auspices of the High Court as in the State of Maharashtra (Bombay High Court) and in Chennai and Madurai (Madras High Court). Even in Delhi, two independent initiatives have been launched, one of them being under the auspices of the Delhi High Court. The judicial mediation programme, now being managed by the Delhi Mediation Centre, was initiated as a pilot project in the beginning of August, 2005 under the guidance of the Supreme Court of India, assisted by the National Legal Services Authority (NALSA). This programme is the most remarkable and successful of all mediation programmes in the country and a better appreciation of mediation can be gained by understanding why this programme is successful. But, there are two caveats that need to be entered here: firstly, there is no intention to comment upon, let alone criticize any other mediation programme in any other part of the country including Delhi, and secondly it may not be the most ideal mediation programme for replication, since each such programme has to develop its own distinctive style depending upon and after considering local assessments, requirements and needs. However, I would assume that some basic guiding principles would be common and applicable to all mediation programmes and it is for the reader to decide what aspects of the judicial mediation programme running in the District Courts of Delhi can be adopted or adapted for implementation elsewhere.

As a historical background, it needs to be mentioned here that the Delhi Mediation Centre manages two centres, one in the Tees Hazari Courts (THC) complex, which was inaugurated on 24th October, 2005 by Hon'ble Mr. Justice Y.K. Sabharwal, presently the Chief Justice of India and the other in the Karkardooma Courts (KKD) complex, which was inaugurated on 5th May, 2006 by Hon'ble Mr. Justice S.B. Sinha, a judge of our Supreme Court.

Selecting the Mediators

There has been considerable debate in India (and this is still continuing) on the category of persons who should be mediators. One group of reformers believe that mediation

* Judge, Delhi High Court

cannot succeed without lawyers. This is correct, but the immediate question is what should be the role of lawyers. Should they participate in the mediation process as lawyers? If so, then that is already happening with lawyers daily attending (and being encouraged to attend) the mediation centres along with their clients. If the view is that lawyers should be appointed as mediators as in America, then the question is, should the American model be implemented in India as it is, or is it more appropriate to develop an Indian model as has been done by the Delhi Mediation Centre and begin with judicial officers as mediators? The view that I hold is that any mediation programme should take into consideration the local situation and conditions, and in the Indian context, the programme should commence with judicial officers as mediators and only after it stabilizes that lawyer-mediators should be introduced into the programme. Judges and judicial officers are synonymous with impartiality and for this reason they command an enormous amount of respect in society in India (and I suppose elsewhere as well). Obviously, this is not intended to cast any aspersions on the fraternity of lawyers - all that is sought to be conveyed is that a lawyer is more easily identified as a spokesman for a litigating party, rather than as an impartial facilitator, while a judicial officer is more easily identified by her impartiality and a more developed sense of justice. Under these circumstances, it is much easier in India for a litigant to accept the word of a judicial officer rather than that of a lawyer.

Fortunately, a Mediation and Conciliation Project Committee set up by the Chief Justice of India on 9th April, 2005 debated and later accepted the point of view that judicial officers should be appointed as mediators and a judicial mediation pilot project should be launched in the District Courts in Delhi[1].

Experience suggests that one of the unarticulated advantages of having judicial officers as mediators is that they belong to the justice delivery system and feel duty boungd to effectively facilitate the disposal of cases. They have, therefore, an implicit commitment to ensure that any programme related to disposal of cases, particularly a judicial mediation programme is a success. Judicial officers also realize that a successful mediation programme would result in a huge relief in their workload, since successfully mediated cases would not, of course, need to go for trial thereby obviating a large number of hearings. An additional benefit, one that largely goes unnoticed, is that further proceedings in the nature of appeals and revisions are avoided. While this may really benefit appellate judicial officers and judges, it would also have some impact on trial judges who may be faced with interlocutory injunctions granted by superior courts or directions issued requiring them to dispose of a case in accordance with a prescribed procedure.

There has also been some debate on the utility of having judicial officers as mediators, *de hors* the debate concerning advantages of having lawyer-mediators. One of the main arguments advanced for not having judicial officers as mediators is that judge-time is

1. The first members of the Committee were Justice N. Santosh Hegde, Executive Chairman, NALSA (ex-officio), Justice D.M. Dharmadhikari, Justice S.B. Sinha, Justice B.N. Srikrishna (Judges of the Supreme Court of India), Justice A.M. Ahmadi (former Chief Justice of India), Justice Madan B. Lokur (Judge, Delhi High Court), Dr. Abhishek M. Singhvi, Mr. P.P. Rao, Mr. R.F. Nariman, Mr. Raju Ramachandran (all Senior Advocates), Mr. Stephen Mayo (of ISDLS) and Mr. Kamlesh Kumar (Member-Secretary, NALSA).

wasted. At first blush, this appears to be correct, but experience with the Delhi Mediation Centre shows that this may not necessarily be correct.

A judicial officer is required to mediate on one fixed day in a week and she does not list any case in her court on that day. Consequently, she is not wasting any judicial time in so far as that day is concerned. Of course, for the remaining five days of the week, her work would increase, but in practice this has not hampered or caused any inconvenience either to the judicial officer in terms of the workload or any inconvenience to the lawyers and litigants in terms of delays. In other words, a system of management has evolved over a period of time ensuring that judicial work does not suffer as a result of a judicial officer making herself available for mediation one day in a week. Opponents of this system further argue that if judicial officers can squeeze in six days of work into five days, then surely they can, instead, use that one mediation day for additional judicial work. Perhaps yes, but ask yourself this question — is it really practicable in the long run? Arguments and counter-arguments in this vein can go on endlessly.

The fact however remains that our Supreme Court has accepted the idea of judicial officers as mediators, and the decision of the Supreme Court has so far proved to be correct and does not need any reconsideration. Consequently, this debate really must not be carried much further, particularly in the Indian context. In this regard, it is worth mentioning that Section 89 of our Code of Civil Procedure[2] requires that when a dispute is referred for mediation, "the Court shall effect a compromise between the parties" and with this Parliamentary imprimatur (its constitutional validity having been upheld by the Supreme Court) there can be little scope for argument in this regard.

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2 **89. Settlement of disputes outside the Court.** - (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred -

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the saem to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 39 of 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

3 Salem Advocate Bar Association v. Union of India, (2003) 1 SCC 614

One of the issues that arises with having lawyers as mediators is the payment of fees for their services. It would be unfair to require a litigant to pay these lawyer-mediators a fee in addition to the expenses that they have already incurred during the course of their litigation. It puts an avoidable financial burden on litigants which they can ill afford, and in fact runs contrary to the spirit of Section 16 of the Court Fees Act, 1870 which entitles a plaintiff to a refund of court fee in the event of a successful termination of the mediation process[4]. In a mediation centre in Maharashtra, a small financial burden (to be equally shared by both parties) has virtually crippled the mediation programme. The Supreme Court, in a decision delivered last year, suggested the setting up of a fund for this purpose and had in fact given the Central Government four months time to set it up, but a year has gone by and there has been absolutely no response from the Central Government in this regard[5].

On the other hand, a significant factor weighing in favour of judicial officers as mediators, in so far as litigants are concerned, is that the mediation process is absolutely free, there being no requirement to make any payment to the judge-mediator. The absence of any additional financial burden, coupled with a possible finality to the litigation makes the judicial mediation process an attractive alternative to most litigants.

Resolving a dispute amicably gives greater satisfaction than adjudicating a dispute and most mediators subscribe to the feeling expressed by Mahatma Gandhi in his autobiography, in which he says,

> "The lawyer's fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime, mutual ill will was steadily increasing. I became disgusted with the profession. [Despite succeeding in arbitration, Gandhiji's client agreed to accept the awarded amount in installments over a long period of time.] . . .[B]oth [parties] were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul."[6]

Selecting the Trainers

The Delhi Mediation Centre has been rather fortunate in having the assistance of the Institute for the Study and Development of Legal Systems (ISDLS) based in California,

4 Refund of fee. - Where the Court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the Code of Civil Procedure, 1908 (5 of 1908), the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

5 Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344

6 The Story of My Experiments with Truth, Part 2 Chapter 14

USA who provided the services of professionals for training judicial officers to become mediators. ISDLS, through its own resources, arranged for three professional trainers to visit Delhi and train judicial officers in the art and technique of mediation. It went a step further and established a camp office which ran for six months (from early August 2005 till end January. 2006) and which observed and guided the judicial mediation programme on a daily basis.

After ISDLS left, there were no resource persons available for training more mediators, whether judicial officers or lawyers, while the volume of cases referred for mediation kept increasing in the Delhi Mediation Centre because of the success of its programme. Therefore, a time came when it became absolutely necessary to take a bold decision and utilize in-house resources to train some judicial officers as mediators otherwise the mediation centres, already swamped with cases, would become a victim of the endemic problem faced by the traditional court system of delays and backlog. An action plan involving three of the more experienced and confident mediators from the Delhi Mediation Centre were persuaded to try their hand at training some judicial officers to become mediators. These three mediators took up the challenge and conducted an intensive training programme in June this year in the THC complex as well as the KKD complex. While they and their trainees were quite satisfied with the outcome, the proof of the pudding eventually lies in its eating and it is only when the newly trained judicial officers start mediating that one will know whether their training has been effective or not. However, initial trends do show that the intensive training programme has achieved its purpose but it is still too early in the day to hazard any final assessment.

At this point, it is necessary to note that the Delhi Mediation Centre has gained the confidence and expertise of being able to train mediators, something that could not have been imagined a few months ago. Obviously, this is a very positive development, which suggests that except in the initial stages, it is not necessary for any mediation programme to be dependent on outside support if the foundation that is laid is strong enough to take on additional pressures. But, as mentioned earlier, it is still too early to make a final comment on the intensive training programme and my fingers remain crossed!

Training Curriculum

There is a view expressed (particularly by those advocating the cause of lawyer-mediators) that there is no real necessity of training anybody, including lawyers, to become a mediator. The proponents of this view, I would imagine, are obviously keen to get the mediation programme off the ground as fast as possible and base their opinion on the assumption that lawyers are inherently equipped to facilitate litigating parties to settle a dispute and therefore need little or no formal training. The validity of such a proposition is doubtful for several reasons, but it is not necessary to debate this issue beyond a point. But, it is worth mentioning, though in a slightly different context, that the concept of clinical education is gaining considerable importance in India and even judges of the Supreme Court have undergone a training programme (not concerning mediation) in our National Judicial Academy. Judges of the High Courts (which are constitutional courts) routinely undergo training programmes in the National Judicial Academy on different subjects. Each such

programme lasts for a couple of days and if judges of superior constitutional courts in India need training, even though they have vast experience and knowledge in their field, it would perhaps be a little short-sighted to assume that no one requires systematic and methodical training to become a successful mediator. All of us are learners in life, in some aspect or another, and for this reason, I think it is inevitable for anybody who would like to become a mediator to undergo some professional training.

The question that immediately arises on this hypothesis is the nature, curriculum and length of training that would be adequate. ISDLS advocates a training module of 40 hours which is the amount of time that experts engaged by it took to train judicial officers in Delhi. Another view is that may be a weekend course would be adequate training. It appears to me that a weekend course would only bring about a heightened awareness of some of the nuances of mediation but it cannot be a substitute for a more detailed training programme. In fact, experience has now shown that to become more successful, mediators may need to have some exposure to certain other disciplines such as psychology to enable them to understand the attitudes of litigating parties so that they can better facilitate them to come to an amicable settlement. If this broad concept of training is taken into consideration, perhaps even 40 hours of training may not be adequate, a view expressed by a former Director of the National Judicial Academy. But I suppose that in the present context, this would be valid only if a lawyer is willing to give up her practice to become a full-time professional mediator or if a judicial officer is given a sabbatical.

That training is necessary cannot be doubted *per se* and selecting appropriate trainers also cannot be doubted. The debate is on the length of time for the training and this is an issue that I suppose each coordinator of a mediation programme would have to decide.

The nature and curriculum of any mediation training programme ought not to be confined only to the art and science of mediation - it ought to include training in professional ethics, more particularly on issues directly concerning mediation sessions such as the need to maintain confidentiality, the need to ensure that the mediator is only a facilitator and not a decision maker, etc. It is imperative for a mediator to appreciate that mediation is interest-based unlike litigation, which is rights-based. Local rules that are framed for the conduct of mediation would also need to be carefully understood by mediators. The Supreme Court of India has accepted a set of rules that were framed by a Committee constituted by it. These rules have been notified by several High Courts, including the Delhi High Court[7] and they need to be debated, discussed and understood by the mediators and, if necessary, modified on the basis of practical experience gained over a period of time and the kind of cases that are referred for mediation.

Experience gained during the intensive training programme conducted in June this year has made the decision-makers in the Delhi Mediation Centre appreciate the need to incorporate role-plays as a part of training. Dramatization of a point to be conveyed is a far more effective learning tool particularly with adult trainees. Adapting modules prepared by professional trainers from USA to the local context makes comprehension that much easier and invigorates what would otherwise end up as a dull lecture class.

7 Mediation and Conciliation Rules, 2004 gazetted on IIth August, 2005

Setting up a Mediation Centre

While it may seem that the location of the mediation centre is not an important issue, I am of the opinion that it is quite to the contrary. Access to justice or justice at the doorstep cannot be overemphasized, particularly when one is concerned with an average, and not well-to-do litigant. A view has been expressed that a mediation centre or for that matter, any centre that facilitates amicable resolution of disputes should always be away from a court complex so that litigants do not get the feeling that they are within the precincts of a court of law. This suggestion may have some merit with reference to disputes that are sought to be settled at a pre-litigation stage but given the requirement of an average litigant, I am not sure whether this view would merit any serious consideration at the initial stages of a mediation programme, particularly a judicial mediation programme. By and large, litigants in India are not very well off and several of them need to take legal aid from the State. For them, it is more convenient to go to a court complex where a legal aid centre is situated and where a lawyer usually has her chamber rather than to go to a third place, requiring the lawyer to also go to that.third place. Moreover, public transport systems are conveniently and usually geared to serve a large mass of people visiting a court complex. For most litigants, perhaps the aura that surrounds a court complex may also be an added incentive to participate in the mediation process in a more meaningful manner.

These are, of course, hypotheses but the general response, particularly in Delhi, is that the mediation centre should be located in the court complex so that it is convenient for a litigant to attend the mediation centre.

Having a mediation centre away from the court complex has a very real and practical problem inasmuch as a mediator is often required to look into the records of the case (we still do not have the system of presenting written briefs to the mediator) and it would not be convenient for the court staff to have case files being taken out, day in and day out, sent to the mediation centre and brought back. Firstly, there is a problem of safety of the original records and secondly there is a problem of inconvenience caused to the court staff by these frequent movements, and finally it unnecessarily adds to logistical problems. A recent live example will best illustrate this point. One of the amendments that has recently been brought to our Code of Civil Procedure enables the recording of evidence by Court Commissioners who are lawyers. There have been frequent complaints from several of these Court Commissioners that they have to adjourn recording evidence because of the non-availability of the case file from the concerned court. In fact, the practice of appointing Court Commissioners for recording evidence has been discontinued in several places for this very reason, as for example in the Delhi High Court, where judicial officers are now being brought on deputation for (amongst other things) recording evidence. In the Delhi District Courts, this practice of appointing Court Commissioners has never really taken off for this reason.

Apart from its location, a mediation centre has necessarily to suggest an air of informality because that is what the entire mediation process is all about. In tune with this, the Delhi Mediation Centre has planned its mediation facilities with the intention of making the litigants at ease and without giving them the impression that they are participating in a

very formal or rigid justice delivery process. For achieving this informality, the mediation centres are designed to look quite different from anything in the court complex. They are decorated with a couple of classy wall-hangings; newspapers and magazines are available for the litigants and lawyers to while away their time in case they are required to wait for their case to be taken up for mediation. Just outside, a tea/coffee vending machine has been installed and litigants and their lawyers are encouraged to make use of the facility. On occasions, when a mediation session gets prolonged or becomes a little strenuous, the mediator is encouraged to have a short break and share a cup of tea with the litigants and their lawyers. The cost of this informality is marginal and the District Judge in Delhi estimates it to be less than Rs. 1,000/- per month, an amount that can very easily be spared from the annual budget of the court.

Generating this informal atmosphere has evoked a very positive response from several litigants and lawyers who have not only praised the idea but have also expressed a view in their feedback forms that the informality gives them the confidence that they will not be rushed into taking any decision for want of time but will be given a patient hearing and their problems discussed fully.

Referral Judges

What are the kind of cases that ought to be referred for mediation? This is rather a tricky question and to be able to answer it, the Delhi Mediation Centre has kept a close watch on, rather monitored on a day-to-day basis, the kind of cases being referred for mediation. In addition, it has been found necessary to keep a track of the kind of cases that are getting resolved and those that are not getting resolved. Statistics about a category called 'not fit for mediation' is being maintained because it was found that referral judges sometimes send a case only with a view to get it out of their docket for the time being. This dumping of cases was noticed when some rather impossible matters were referred for mediation, including one involving a murder!

A large number of cases 'not fit for mediation' only means that referral judges also need to be trained to send only those cases for mediation in which there is an element of a settlement. This is, in fact, the requirement of Section 89 of the Code of Civil Procedure. Obviously, every case does not have an element of settlement - a referral judge needs to develop a special knack to determine whether a particular case can or cannot be settled. It is only those cases that have a likelihood of being settled that ought to be sent for mediation. Keeping this in mind, discussions are periodically held with referral judges to ascertain what factors weigh in their mind while sending a case for mediation. These discussions have led to the formulation of a set of guidelines suggesting the kind of cases that ought to be referred for mediation. Notwithstanding wide circulation of these guidelines amongst referral judges, there are still some cases referred for mediation which really ought not to have been sent in the first place. And so, the process of discussion goes on.

Initially, such discussions were held with referral judges in large groups of about 20 or more judicial officers but it seems a far better proposition, and perhaps more fruitful, if smaller groups of say 4 or 5 referral judges are invited for a discussion. Since the number of judicial officers who have to be reached out to is considerably large, it is necessary to

set up a small team of mediators to have these discussions. If one reflects on this issue, it is quite clear that this is an area that needs concentration because if the wrong kind of cases are sent for mediation, it will adversely impact on the success of any mediation programme.

Referral judges need to be encouraged to send appropriate cases for mediation and be reminded that as far as litigants are concerned,

> "It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonizingly slow and exquisitely designed to avoid any resemblance to fairness or justice, Yet, in strange and devious ways, it does settle disputes - to everyone's dissatisfaction."[8]

Coordination and Management

Running a successful mediation programme requires proper coordination amongst the key players, mediators, staff of the mediation centre, referral judges, lawyers and litigants. In the absence of a professional manager, the Delhi Mediation Centre has one judicial officer who functions as a full time Coordinator. This judicial officer is exempt from judicial work and is generally an all-purpose person who spends the entire day coordinating the receipt of cases for mediation, their distribution amongst various mediators, follow-up procedures including arranging to send back the cases to court after the mediation process is over, whether it is successful or not, maintaining a master calendar and of course in mediating cases.

This full-time assignment is rather onerous, but vital for the mediation centre. The Coordinator has to ensure that there is adequate time available to a mediator to resolve a case and yet the litigants and lawyers in other cases ought not to be required to spend their day waiting for their case to be taken up by the mediator. As a streamlining procedure, the Coordinator is required to maintain a master calendar in which she slots a particular case with a particular mediator at a particular time, such that no mediator is unoccupied and no lawyer or litigant is required to wait. The result of effective streamlining is that lawyers and litigants arrive at a fixed time for their mediation and return at a fixed time unless, of course, the case is likely to settle soon, in which event there is a spillover of time. This is only to be expected and to cater to such eventualities it is advisable to make available some reading material by way of a diversion, such as magazines and newspapers which, it is believed, has an unintended benefit of soothing the nerves of litigants.

The process of effective coordination and management is a movement towards case management. The steps taken by the Delhi Mediation Centre towards meaningful coordination and management are only very initial and tentative, but as the judicial mediation programme gains strength, it would be possible for the Coordinator to fix dates of trial in consultation with the referral judges so that in a failed mediation, no party can take advantage by delaying the disposal of a case on merits.

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8 J.S. Auerbach, "Welcome to Litigation", in New Republic, 17th January, 1981.

How long should a case remain pending mediation? Certainly, it cannot be indefinite. The Delhi High Court has adopted the rules approved by the Supreme Court. These rules, called the Mediation and Conciliation Rules, 2004 provide a maximum of 90 days for a case to remain in the mediation centre. To ensure that this period of 90 days is not exceeded, the Coordinator is required to track and monitor each case on a regular basis. In a small programme or at the initial stages of a mediation programme, this may not prove to be a burden. But, the Coordinator at the Delhi Mediation Centre, which has dealt with about 2000 cases till now, finds it a chore and cannot function effectively without the aid of a computer. It is for this reason that the assignment of a Coordinator has to be carefully thought of and only a good administrator should be appointed as such.

To ensure that any mediation centre is working efficiently, weekly brainstorming sessions with the mediators or monitoring by the Coordinator is absolutely necessary. Meetings of this kind are of enormous help in ironing out any creases that may be found in the working of the mediation centre. Since it is humanly not possible to imagine all the problems that can arise in any mediation project, it is only through mutual discussions that the unexpected can be attended to and resolved. The task of a Coordinator of a mediation centre certainly cannot be over emphasized.

Awareness Campaign

Awareness of mediation among the litigating public and lawyers is of crucial importance. In India, this started off as a rather slow process a few years back but today, by and large, the theory behind mediation and the possibility that it may become a viable alternative dispute resolution mechanism is quite well known. However, awareness and interest in mediation still needs to be generated amongst large sections of the population particularly in rural areas and even in urban areas such as Delhi. To make litigants and lawyers aware of mediation, pamphlets have been designed both by NALSA as well as the Delhi Mediation Centre and these are distributed freely as hand-outs in the various court complexes. Facilitation Centres in the District Court complexes are encouraged and advised to display these pamphlets and make them available to anybody wanting to utilize the services of the mediation centre so that she can get a fair idea of what the mediation process is all about.

Of course, distribution of pamphlets is only a small step in bringing about public awareness and can only reach a small fraction of the populace. To increase the number of persons who should know about mediation, the Delhi Mediation Centre has prepared a documentary film which is intended to be widely distributed amongst the State Judicial Academies, State and District Legal Services Authorities all over the country and also shown on cable television and wherever else possible. This outreach programme is expected to cover a sizable population in Delhi through the use of limited time slots on the television network. Simultaneously, other methods of publicity are being contemplated such as advertisements in newspapers and legal literacy camps. There is no doubt that the existence of mediation as an alternative, though supplementary, process will become known to a large number of people over the next year or so but this heightened awareness will also mean that a greater volume of cases will be referred for mediation, requiring a

further strengthening of the mediation programme and training a larger number of persons to become full time mediators. The effort will be huge and one has to plan accordingly.

Feedback Forms

Learning is a continuous process and there is always scope for improvement in any programme, more so in a pilot project. Realizing this, the Delhi Mediation Centre has devised feedback forms which are handed over to all lawyers and litigants who participate in the mediation process. Many of the participants have given their views; while most of them are laudatory and positive, some have given suggestions for improvement, without being critical of the project. An analysis of all these feedback forms, which have been received from a cross-section of society, has led to improvements being made in the judicial mediation programme as well as streamlining some of the administrative processes. As an example, one may mention that litigants are usually informed on telephone well in advance of their date of hearing (rather than being sent a summons) to be present in the mediation centre so that an unnecessary adjournment is avoided. Similarly, if the litigating parties have settled their dispute, they are immediately supplied a typed copy of the settlement rather than to take their own notes in this regard, which may cause some confusion at a later stage.

For making improvements, it may not be wise to depend only upon responses to the questionnaire given to lawyers and litigants - there is also a need for an internal analysis. The Delhi Mediation Centre carries out such an exercise every Friday and statistical information is generated through an in-house programme prepared by its own software engineers. Detailed data is available on the nature of cases that have been referred for judicial mediation, the success rate of each mediator with reference to each category of cases, etc. An analysis of this data has shown that some cases are rather difficult to mediate, such as those involving partition of property where a large number of parties are involved; matrimonial disputes do get resolved but they require a considerable amount of time for resolution; some mediators are more skillful at resolving commercial disputes, while others are more adept at resolving non-commercial disputes. Over a period of time, it may be possible to have a mediator specialize in a particular branch of the law, although the theory behind mediation is that a mediator need not necessarily have expertise in the subject matter of the dispute. But. it cannot be denied that experience in a particular category of cases makes it that much easier for a mediator to facilitate parties to arrive at a speedy settlement.

Needless to say, the entire objective of a mediation programme is to ensure that justice is delivered to the litigants efficiently and inexpensively. If both these objectives are met, it can confidently be said that the mediation programme is a success.

Case Management

A successful mediation programme inevitably leads to a case management procedure. This has several elements which touch upon both judicial as well as administrative processes.

In so far as judicial processes are concerned, as already mentioned, a statistical analysis

gives a fair indication of the nature of cases that are more prone to an out of court settlement. Identification of a few category of such cases can eventually lead to a compulsory mediation programme in respect of such cases. It is possible, in the long run, to divert many of these cases out of the traditional court system leaving only a few of the difficult ones for trial. Discussions with judges and court administrators in California, USA suggest that almost 95% of cases do not go to trial because they are diverted into some form of ADR or the other and eventually terminate in an amicable settlement. Of course, the cost of litigation in USA may be a factor that cannot be ignored, but the fact of the matter is that the settlement rate is unusually high. A well-planned judicial mediation programme can achieve more or less similar results although it may take a considerable amount of time.

One of the banes of the justice delivery system in India is the large pendency of cases and the relatively slow outflow of decisions. The result is that cases keep piling up and some unfortunate litigants do not get justice in time. Any mediation programme will have to concentrate on ensuring that that there is no backlog of cases pending in the mediation centre. This is one of the more important tasks of a Coordinator, and luckily enough, the Coordinator in the Delhi Mediation Centre is achieving this objective through a constant process of monitoring and taking remedial steps wherever necessary. For example, when the number of cases in the mediation centre in the THC complex began mounting, the Coordinator consulted with the mediators who voluntarily agreed to put in one and a half days of mediation per week instead of the one day assigned to them. These mediators also volunteered to spend some time in mediating disputes during the summer vacations. Fortunately, it did not become necessary for them to attend the mediation centre during the vacation period because the additional efforts earlier put in by them achieved the desired results.

Coordinated planning and management can ensure that there is no loss of judicial time when judicial officers perform mediation duties one day in a week. This is possible by ensuring that the judicial officers do not list any cases in their court on the day when they are not available but are busy in the mediation centre. Of course, this will initially put a strain on them but over a period of time, they can adjust their affairs in such a manner as not to put lawyers and litigants to any inconvenience. Experience gained at the Delhi Mediation Centre suggests that because of such an arrangement, cases are taken up for hearing about a week or ten days later than they normally would, but that is hardly of any consequence in the long run. Even this delay of a week or two is most likely to become a thing of the past if more and more cases are successfully mediated thereby bringing down the number of appearances that lawyers and litigants have to make in a case, thereby giving more time for disposal of cases to the judicial officers.

In so far as the administrative processes are concerned, a mediation programme would do well to think about time management, a concept that has not yet taken root in the traditional court system. By and large, lawyers and litigants in the traditional court system are given a date when their case is likely to be taken up for hearing - importantly, they are not given any time when the case is likely to be taken up. The result is that lawyers and litigants are sometimes required to wait almost for the entire day for the case to be called

out resulting in a huge waste of time. As a result, busy lawyers take up several briefs in a day so that they can at least attend to some of them, and consequently other cases are necessarily adjourned.

The Delhi Mediation Centre gives a fixed time slot for a case to be taken up for settlement. Usually, the parties to a case and the mediator are encouraged not to devote more than the time fixed per session, unless the dispute is very close to a settlement. By avoiding time spillovers, lawyers and litigants are able to effectively manage their schedule for the day which is, in any case, made known to them well in advance. Punctuality and strict adherence to time schedules inculcates a discipline which is as yet unknown to the traditional court system in India. Hopefully, institutionalization of time management will result in better and timely control of judicial proceedings.

Another long-term objective of a mediation programme is to introduce case management for the trial of a case. The purpose behind this is that in cases where a litigant does not want to settle a dispute for some ulterior reason, then he should not take advantage of his superior position by delaying the final disposal of the suit. Once the number of cases that go to trial get reduced and their volume becomes manageable through successful judicial mediation, then the mediation centre can, in consultation with the referral judge fix definite dates for a continuous trial so that an obdurate litigant cannot unduly prolong disposal of the proceedings. Of course, this will need a far greater interaction and coordination between the mediation centre and the referral judges. The methodology of achieving this is at the initial planning stages in Delhi and it may perhaps be possible to implement the case management proposals sometime next year.

Statistical Information

All the plans and schemes implemented by the Delhi Mediation Centre have so far had their utility. There is other hard evidence of the success of the judicial mediation programme in the Delhi District Courts in the form of statistics that are available. Over the last one year, about 2000 cases have been referred for mediation. This is not a particularly large number in the overall context, but it is still the highest number of cases that have been referred for mediation in any part of India. Cases have been referred for mediation by various judicial officers in the Delhi District Courts, references have been made by the Delhi High Court and interestingly, a large number cases have also been referred by the Supreme Court of India. The overall success rate is more than 60%, not including cases that are found 'not fit for mediation'. The success rate does not include the large number of connected matters that are settled, though not referred for judicial mediation.

The available statistical data has been compiled in the form of a chart and given in the table attached. The figures are as on 31st July, 2006.

Conclusion

Judicial mediation as an alternative dispute resolution mechanism has come to stay in the Delhi District Courts. There is no doubt that an effective judicial mediation programme can reduce backlogs and delays and relieve judicial officers of a large part their burden by creating a win-win situation for both the disputing litigants who are really the decision

makers in the mediation process, the mediator being only a facilitator. The Delhi Mediation Centre has shown that this is one of the several advantages of judicial mediation.

Among the other advantages of judicial mediation is that it is inexpensive being certainly less costlier than the trial process. It is also speedy, the process of mediation being normally completed in a couple of hours through a series of joint and private sessions. Some disputes are settled in the very first session while others may require more than one session. In any event, as per the rules, the maximum time that a dispute remains in the mediation centre is 90 days although experience has shown that most cases are out of the mediation centre in less than two months. Therefore, the judicial mediation process is certainly a far more efficient and speedier process than most evidentiary processes.

Additionally, the litigating parties are offered a wide range of settlement options that are limited only by the creativity of the parties and the mediator. This enables the litigating parties to create outcomes that are custom-designed for their particular situation and their particular needs and interests. Needless to say, the mediation process does not preclude the use of further or more formal dispute resolution mechanisms such as arbitration or continuing the litigation in a court of law. Since the parties control the outcome of the mediation process, they do not create the risk of an outright loss which is usually associated with a trial. The parties do not transfer the power to decide their dispute to someone else but decide it amongst themselves in a peaceful and harmonious manner. At the end of most successful mediations, the litigating parties go out shaking hands with the intention of continuing their relationship, something that seldom happens in a litigation that is decided through the traditional justice delivery system.

I am optimistic that for all these reasons, mediation will eventually succeed and establish its place in India as a viable alternative dispute resolution mechanism thereby achieving Mahatma Gandhi's desire of uniting parties riven asunder by litigation.

Attachment A

(31st July, 2006)

	TEES HAZARI	*KARKARDOOMA*	*TOTAL*
Total # of cases referred for mediation:	1459	514	1973
# of cases not fit for mediation (%):	298 (20.42%)	116 (22.57%)	414(20.98%)
# of Balance Cases:	1161	398	1559
# of cases pending for mediation:	131	28	159
# of Balance Cases (Disposed of):	1030	370	1400
# of cases settled (%):	630 (61.17%)	282 (76.22%)	912 (65.14%)
# of cases not settled (%):	400 (38.83%)	88 (23.78%)	488 (34.85%)
# of connected cases settled:	205	76	283

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Successful Mediation in Matrimonial Disputes

Approaches, Resources, Strategies & Management*

Justice Manju Goel,
Judge,
High Court of Delhi

Part – I
Introduction

Family and matrimonial mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by bringing the participant's to voluntary agreement. Mediation is the very basis of every society to maintain harmony in the social fabric. In the context of matrimonial dispute the mediators are often performing the role of counsellors and conciliators and in this paper the terms are used as interchangeable terms. Even before mediation was talked about for solution of disputes in courts for reducing the pendency of cases in courts, mediation for matrimonial disputes were in existence. Initially such counsellors were benevolent elders and were available to the parties right in the families. Elders or others who commanded respect from disputing parties became the mediators. It may be mentioned that the project of the Tata Institute of Social Sciences to run a counselling centre at Bombay was infact a fore-runner of the family courts in Bombay. The counselling centre has merged into the family court system and is looked upon as a model system for a family court. Section 9 of the Family Courts Act, 1984, Section 89 and Order XXXII-A of the Code of Civil Procedure, 1908 make it obligatory for the court to give a fair chance to a conciliated or negotiated settlement before adjudication is embarked upon. Section 23 of the Hindu Marriage Act, 1955 focuses on judge's role in attempting a reconciliation.

Peculiarity of matrimonial mediation

Mediation in the context of matrimonial dispute is different in its form and content from that in the context of commercial and property disputes. The matrimonial disputes are distinct from other types of disputes on account of presence of certain factors which are not obtained in other disputes. These factors are motivation, sentiments, social compulsions, personal liabilities and responsibilities of the parties, the views of the two parties regarding life in general and to the institution of marriage in particular, the security for the future life, so on and so forth. Talking in terms of the mediation for matrimonial disputes one must remember that the factors that weigh the decisions of the parties are not controlled simply by rational factors. Very often irrational and emotional factors also have dominant roles in creation of the dispute as well as in their settlement. In the context of matrimonial disputes the mediator cannot merely concentrate on the monetary or mundane aspects and overlook the emotional aspect. In fact he is concerned with happiness of the parties which is more a matter of sentiment than of reason. Further his/her objective is to discover a solution with no damage or minimum damage to the parties. He cannot simply go in between the two sides telling him how the other party may take suggestions

for a solution. The mediator has to prepare the two parties to look for a solution. Very often the parties more than looking for a solution look for their ways and means to wreck vengeance on the other party. The mediator here has to mould himself or herself into a counsellor and a conciliator to lead the parties for an amicably acceptable solution that brings about lasting peace. The mediator may have to give advice to the two parties and may also have to coax them in order to make them see acceptability of a proposed solution. The proposal for the solution may come from either party or the mediator himself. The job of the mediator would be to continuously bridge the gaps in the proposals to arrive at consensus.

Mediation can be done simultaneously with exploring possibilities of a legal action on the civil or the criminal jurisdiction. It is a voluntary process and most people are attracted to the option of mediation because

(1) it promotes the interest of the entire family including those of the children

(2) it reduces economic and emotional cost associated with the resolution of the family disputes.

Since it is a voluntary process sometimes the mediator may face a situation where one of the two parties or may be even both parties show disinclination to approach a mediator. Such inhibition has to be won over by the mediator by assuring the parties that the process apart from being voluntary provides for a participatory settlement of dispute and the parties stand more to gain than to loose by allowing mediation in their dispute. A common experience of family court judges and others who mediate or counsel the disputing couple is that even though the parties formally express their willingness to accept a mediator or counsellor, in fact, keep their reservations. The mediator's duty is to motivate the parties to open up and bring their latent grievances to the fore. One of the skills of the mediator is to increase the ability of the participants to communicate.

In one case as a family court judge when the author invited the parties for an effort for reconciliation as provided by Section 23 of the Hindu Marriage Act 1955, she was faced with an open retaliation by the husband who said that he would be a fool if he participated in any such process which intended to send the wife back to his house by obliterating all her sins which she had committed in the last many years. Under the authority of law, she could tell him that this was a requirement of the law and that she could not bypass the same. Under her command he participated in the process. However, once the parties came face to face in her room counselling started in right earnest and to her great satisfaction the couple ended up reconciling with each other after six years of separation.

The professional mediator not attached to court does not enjoy the power of commanding a party to his presence. Here he must secure the cooperation of the parties by assuring the party that the parties have the freedom to join the mediation but also to terminate it at any time if they feel that the same is not likely to produce any result. Both parties should have the confidence that the mediator did not impose a decision of his own on the couple. Both parties must understand that the mediator was neutral and did not

have any kind of interest in any of the two sides. As the proceedings develop from stage to stage the parties must gain the faith that the aim of the mediator or counsellor is not to pass a judgment on the behaviour of one side or the other but to correct a situation which is crying for a solution. The approach of the mediator, in the Indian context, should be weighed heavily towards reconciliation but both parties should know that the option of divorce was always open.

Resources

The two questions that immediately pose themselves whenever mediation for matrimonial cases come up for discussion are :

(1) where is the mediator or counsellor ?

(2) what is the cost of counselling ?

These questions are important because matrimonial mediation/counselling is necessarily different from mediation or counselling for a business dispute. As mentioned above, a matrimonial dispute involves several factors which are not available in an ordinary commercial dispute. The mediator, therefore, has to be fully equipped to meet the situations. The inputs that a matrimonial counsellor is required to have includes the knowledge of social customs, knowledge of religious sentiments, an insight into the psychology of the estranged people, the rights and liabilities of the parties in the socio-economic context, so on and on forth. The counsellor, therefore, has to have knowledge as well as sensitivity. It may well have to debated as to whether a true marriage counsellor is born or made. Undoubtedly one who has traits of maturity, wit, humour, creative intelligence and diffusibility (ability to diffuse tension) can be more successful than others in matrimonial mediation. It can be definitely said that although much depends upon the inherent mental make-up of the counsellor there is scope to train a counsellor to learn how to deal the problem with balanced consideration and how to improve his or her skills in this field. Speaking in absolute terms it may not be difficult to find or develop a team of counsellors who can be attached to a matrimonial court or a family court although the country is yet to focus on developing such a cadre in large scale to meet the colossal need of the country. But on relative terms the availability of mediation will depend upon the cost of mediation and on the factor as to who bears the cost and how much the state or the parties are willing to pay. The availability of the counsellor will depend on how many counsellors can be produced at the given resources available for the purpose. In fact, quality service will not be available unless the mediators choose mediation as a career and for that the career needs to be attractive.

The marriage counsellor should not be expected to work without any aid or assistance. It goes without saying that a proper working atmosphere has to be created for the counselling. The counselling cannot be expected to be done in uncomfortable surroundings. Healthy, Hygienic and peaceful surroundings are an absolute necessity for such counselling. Therefore, appropriate infrastructure, staff and other perks have to be provided to the counsellors. Also this is necessary to enhance the credibility of the institution in the eyes of the beneficiaries. Secondly, the marriage counsellors may very

often need the facility of a social investigator or may himself or herself be required to visit the parties to the disputes. A visit to the house of a party and meeting the members of the family in their house may give a clearer picture of the socio–economic conditions of the parties. The counsellor by visiting the family in its own surroundings may also get to know the equations between different members of the family. Very often, the dispute and the solution lies not so much in the relationship between the husband and the wife as in the relationship between the couple and the other members of the family. Thus, the facilities of this nature have to be necessarily provided.

The marriage counsellor may also require the facility or power to seek expert opinion of a physician or a psychologist or even a psychiatrist. Therefore, by legislation, practice or otherwise these facilities will have to be made available to the counsellor.

For mediation to be meaningful the state or the parties must be ready to bear the cost of the facilities required by the mediator. As against these costs what is saved by the parties is the cost of a prolonged trial, including the lawyers' fee,expenses for production of witnesses and other similar factors. Saving for the state will be in terms of judge-jour and in terms of reduction of pendency of cases at all levels.

Strategies and Management

The matrimonial counselling yields better results when attempted before litigation. Pre–litigation counselling is a stage where polarization has yet not taken place. Very often at this stage the allegations against each other are vague. At this stage, the parties are more likely to forgive and forget. At this stage, they are perhaps more hopeful of a solution and, therefore, ready for more sacrifices and adjustments. When the litigation starts the need to be sharp and focused makes the parties to be acute in their allegation and very often these allegations are exaggerated. In order to sound more convincing false stories are woven into the pleadings giving rise to heightened animosity. The exchange of pleadings very often takes the parties to the point of no return. Therefore, by way of strategy every effort should be made before the litigation actually commences. At all the entry points a check, therefore, has to be exercised to prevent more litigation because post–litigation ones. The first signs of matrimonial dispute are litigations for maintenance and complaints to the police. The police has to handle the subject with sensitivity, wisdom and patience. The handling of the matrimonial disputes in the form of offence under Section 498 A of the Indian Penal Code, 1860 have necessarily to be handled differently. The accused in these cases cannot be dealt with like accused in the other offences like theft or decoity or cheating. The accused are not criminals in the traditional sense of the term. If the investigating officer is able to decipher how much of the complaint is true and how much is exaggeration he may play an important role in preventing increase in the litigation. On the other hand, if he wields the same rod, that is given to him for handling other criminals, on the parties to a matrimonial dispute, he may create a tremendous mess. It is here when the parties should be told to be more patient with pursuing their cases without, however, undermining their respective claims. The counselling centre attached to the Crime Against Women Cell in Delhi Police are doing their bit. Although much improvement is possible and much is said about their efficiency their contribution should not be entirely undermined.

Court attached conciliation should become a mandate for all litigations whether under section 125 of the Code of Criminal Procedure, 1973 for maintenance or for divorce. As for present, Magistrates make their own efforts to bring about a settlement in the limited sphere of maintenance. The courts handling criminal cases under Section 498 A make their own efforts for a consolidated settlement. So do the matrimonial courts. In view of the shortage of time in the hands of the judicial officer, a need is always felt that the work of counselling/mediation at different levels be taken over by a professional counsellor or mediator. The basic difference among the police, the judge and the mediator is that the police is trained to frame or prove a charge, a judge is to focus his attention on right or wrong doing but a mediator/ counsellor is to focus on restoration of equilibrium and remain non-judgmental all through. The mediator remains on guard against his temptation to belittle or give lift to one or other party.

Coming to the strategies to be adopted by the counsellor, the following stages can be suggested :-

i. Probing of facts;

ii. Identifying the real cause of dispute;

iii. Exploration of possibilities of reconciliation or divorce;

iv. Bring the parties to an agreed solution; and

v. Shaping the solution in the legal formats.

Probing of facts and identification of issue in a matrimonial dispute call for enormous patience. Very often, the pleadings or the first narration of the parties will conceal more than they reveal. Very often the counsellor finds that the parties themselves have not been able to decipher what really is the cause of disharmony. It is only after some active listening by counsellor for long sessions that the real problems actually surface. One example which the author can give from her experience is that of a couple who come to the counsellor narrating all kinds of allegations against each other despite the fact that in the assessment of the counsellor they did not really hate each other. After a couple of sittings it surfaced that the problem was regarding the inhibition of the wife in going to bed with the husband. Still later it turned out that the wife's inhibition was caused by body odour of the husband who worked all day in a factory producing paints. Before marriage as lovers the wife never felt the odour as repulsive but as she came to closer proximity to the man she found it offensive. This realization came only during the counselling sessions and when the fact surfaced the solution became easy. Very often during these interviews when parties are allowed catharsis they themselves come to the terms with themselves and perhaps find it easier to bear with the situation they live in or to understand the approach of the other party. As discussed in the later part of the paper the counsellor may find various reasons for a matrimonial discord. In some event third parties may be involved. There are disputes arising out of too little money or too little accomodation, so on and so forth. Once the counsellor has identified the real issue, i.e., what ails the relationship, the counsellor has to proceed to examine the possible solutions. Is a reconciliation possible ? For arriving at the reconciliation the counsellor has to see if

the cause of dispute can be removed. Suppose the discord is because of violent nature of the husband or the wife, the counsellor has to examine whether and how the behaviour of the violent person can be modified. If it is shortage of accomodation causing the problem, can the same be solved ? Or can the third party like, mother–in–law, be separated or made to see her role in correcting the situation. The possibility of the reconciliation has to be fully explored. Sometimes the suggestions for improvement need to be put to trial by actual practice.

If the reconciliation is not possible the counsellor has to explore the possibility of a peaceful separation. Even for separating the couple, counselling has a very major role to play and a discerning counsellor has to notice which disputes are likely to end in a reconciliation and which have to end in a divorce. In case of the latter, the parties have to be prepared for accepting the fate of divorce which is not always easy for till date the parties look at divorce only as the last resort. Very often the disputing parties are looking more on punishing the other side than seeking the relief for themselves. Here comes the role of the counsellor who must then see the real issues and make them understand that it is only in peaceful parting that the solution to the problem lies. Here it is tempting to mention a case of a fellow counsellor who after failing to reconcile the parties settled the matter in favour of divorce. Later on accidentally one day he met the parties walking together as if nothing had happened to their relationship. When asked "Have you turned to be friends ?" the woman smiled and the man replied "We are always friends". Here lies the success of counselling, that is, divorce with minimum or no emotional break down or damage.

The mediator at the same time should inform the parties of all the legal options open. Similarly the mediator must tell the rights and obligations of each party towards the other. If the husband looks for a divorce he should be educated about his responsibility to maintain the wife and the child. The wife can also be similarly informed as to how much she can expect by way of maintenance and that even if she retains the custody of the child the husband may have rights of visitation. The parties can also be educated about the benefits of entering into a negotiated settlement rather than an adjudication by the court.

By this stage the mediator must have trained the parties focus on reasonableness. The purpose at this stage is to see that the parties remain as comfortable as possible in their future life. The terms of separation must be worked out without any ambiguity. If necessary, reasonable time may be allowed to give proper thought on the terms of separation. During this period they may consult their well wishers to finalise the terms. This step, of course, is the job of a legal counsel who puts the terms in legal format to obtain the legal seal.

It is important to keep in mind the fact that while mediation is being encouraged for early disposal of civil litigation, in the matrimonial context mediation has to be preferred not because it offers a faster solution but because it may produce a qualitatively superior solution – a wholesome one or times when a solution in law is not available.

Part - II

Types of Matrimonial Problems - Diagnosis And Management

From the narrations of the parties an assessment of the nature of the dispute between the parties can be gauged. However a mediator or a counsellor has to go deeper into the problem to diagnose the real factor which ails the relationship. He is likely to find that the real factor or the cause is one or the other of the types mentioned below.

Type – i

Very often which is looked upon as an act of cruelty may be a perception of an egoist person. When the ego or the sense of respect is hurt, the reaction of different people may be different. The reaction may be in the form of physical violence. At certain other times it may take the form of criticism or looking for faults where none exists. Criticizing the marriage gifts may sometime be a reaction to some behaviour offending the ego of the husband or his mother. The marriage counsellor, therefore, after some sittings has to decipher whether the real questions is actually a greed for more dowry, a critical behaviour of a man or woman, or a reaction to the ego or pride of a person being hurt. The commonest problems arises out of conflicts of such ego where for every small thing each of the two partners to a marriage finds faults with the other partner. There are no real issues yet a constant threat to peace. It may not be proper to categorise the parties as victimizer & victimized. The mediator must develop a clear picture of notional profiles of the parties which will help him involve the parties into a dialogue which will lead to discovery of a common ground.

Type – ii

Behavioural discover like violence or addiction or abusive language or total lack of care displayed by one party is also a cause of matrimonial discord. These are character traits and are deeply embedded in a person. Since these traits have become the nature of a person, these will have their impact in the relationship between the husband and wife. Once these traits cross a particular level of severity a problem in the peace in the matrimonial home may arise. In such cases the addictive persons may be treated for behaviour modification either by the mediator or by some professional.

Type – iii

Very closely related are certain psychological problems. Common examples are suspicious nature, a desire to protect or guide in smallest of situations or in minutest details. Some people have the tendency of correcting the other partner all the time giving rise to constant frictions. Suspicious may be genuine or may be pathological. Pathological suspicious do not have rational basis but the suspecter presents the stories in so cogent a manner that it becomes difficult to disbelieve. If the suspicious are of pathological nature the cases can be referred to specialists. Generally suspicious nature is the symptom of paranoia/paranoid schizophrenia.

Type – iv

Next group of cases can be said to be situational in which rather than behaviour or

nature or the ego of the person being involved, it is the situation in which the parties find themselves which give rise to conflict. For example, financial situation in which the needs far exceed income. Often with the limited means the husband or the wife is trying to maintain a person outside the marriage which causes resentment to the other partner. Similarly matrimonial problems can arise on account of severe shortage of accommodation, which in the present day cities is a very scarce commodity. Lack of accommodation creates lack of privacy as well as lack of freedom. This lack of privacy and lack of freedom also can get translated into reaction which may look like a cruel behaviour or other behavioural abnormality. Financial difficulties may lead to very serious problems. Wife may frequently boast about her parentage targeting the incapability of the husband. Husband and/or wife may be forced to adopt illegal means to earn more. Husband may force wife to bring cash or kind from her parental home. On the other hand, wife's parent may also have financial difficulty and wife may send money to them stealthily or by ignoring the objections of the husband. Here how to help the disputants depends greatly on the creative intelligence of the mediator.

Type – v

There are situations in which sacrifice and adjustment demanded of the other partner is higher than in normal circumstances. For example, one party may have to perform night duties or longer hours of work which calls for acceptance of the situation by the other party. Even in military and paramilitary forces husbands may be away for months. In such circumstances unless there is loyalty in each other and total manifest support the conjugal life may fall into jeopardy. The family and work have to co–exist and both must have their due share of attention. If the balance tilts in favour of work or one partner views it as too much attention to work a matrimonial conflict may arise. The classical example is of Napoleon. Even being the most faithful husband both of his marriages failed.

Type – vi

There are situations where marriage is arranged by two families like a business deal. The two neighbouring land owners settle a deal on land as part of a marriage deal between daughter of one party to the son of the other party. The parties to the marriage are really pawns. How long the marriage will subsist will depend upon how long the treaty or deal between the two land owners will survive. Similar situations arise when two sisters of a family are marries to two brothers or brother and sister of a family are married to sister and brother of another family. If one marriage runs into difficulty for some reason, the other automatically collapses. In these situations, the counsellor may have to look beyond the couple and may have to try to make peace between the others.

Type – vii

The next type is conflict caused by medical reasons like problems caused by mental disorder or mental disease in one of the two parties. Sexual dysfunction is also a common cause of the disorder. Talking of sex being a taboo in this country it is not always easy to find out if the conflict between the husband and wife is caused by sexual dysfunction.

Similarly, one of the two partners may have deviant sexual behaviour. To others the problem may appear to be something different because the parties are nor prepared to express their conflict with reference to sex. In such matters people have strange ideas and strange remedies which most often worsen the situation rather than repair it. It is necessary that in such situations cases are referred to specialists. But the tragedy is that the ailing party normally does not admit his shortcoming and his feeling of inferiority manifests in some other ways particularly in dominant aggressive behaviour. Here the skill of the mediator would be great asset in putting the ailing partner in right track.

Type – viii

It will not be improper to mention some typical cases where from the day one the marriage was a mistake. These are cases of total mis-match caused by large intellectual gap between the partners. For example, where a girl research scholar in Anthropology was married to an semi-illiterate truck driver or lady school teacher was married to a police constable. These may appear to be strange marriages but every judicial officer who has handled matrimonial matters have come across such couples.

Conclusion

The first task of the marriage counsellor, as stated above, is to diagnose the problem. Having diagnosed the next step is to decide whether the counsellor or mediator should endeavour to bring about a reconciliation or to attempt a separation. Some of the aforesaid problems pose an immediate solution of separation. However, for the parties, at times, separation may not look to be very easy. Although, the society is increasingly accepting the fact of failure in marriage consequences attached to a divorce call for a lot of attention and cannot be left to themselves. The first thing the counsellor has to do in such situations is to help the parties to arrive at a decision to break the marriage. Sometimes, it may be easy and sometimes it may not be so easy. Having doné so, the mediator then has to look to the terms and conditions of the divorce which may include the question of maintenance, custody of children, arrangement regarding property, etc.

Some of the problems may call for intervention of medical experts, namely, the psychologist or a psychiatrist, a sexologist or a physician. These experts may not only help in diagnosing the problem but also in their correction. Similarly, the problems that arise out of situations call for correction of situations. For such corrections the resources have to be provided by the parties themselves. The mediator then has to assist the parties in looking at the real problem and to work out the solutions. Behavioural disorders call for behaviour modifications and are not unknown to have been achieved by an able counsellor. Same is the case with the problems of constant conflicts on account of egos of one party or the other being hurt or one or the other being too sensitive or touchy.

Since law as well as social obligation of the Judge calls for an earnest attempt being made for reconciliation, initial part of the mediation proceedings must necessarily be devoted to the effort for reconciliation. This calls for patience not only on the part of the mediator but also on the part of the couple. One cannot but accept the fact that the family mediator or a family counsellor cannot be totally unattached as in the case of business

mediation. Although, the parties have to arrive at a decision, the mediator cannot be debarred from suggesting a particular solution and even insisting upon it. A sincere mediator should have some degree of freedom to coax the parties, for this kind of assertive approach by a mediator has often been found to succeed. What techniques will be used in each case will depend upon the situation in each individual case and no cut and dried method can be suggested, However, once the problem is diagnosed it may not be difficult to arrive at a solution. Once the diagnosis is made the treatment will automatically follow. May be for the same type of problem two different cases call for two different approaches altogether. The strategy that the marriage counsellor will adopt will be entirely his own depending upon his perception of the problem and his choice of the treatment.

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