Opening Statement of The Mediator

Firdosh Kassam

When the court refers a matter to a mediator, in the preliminary meeting, the mediator should make his opening statement as follows:

(i) he should welcome the parties to mediation

(ii) he should give brief introduction of himself as to his qualification as a mediator, and the number of cases he has been able to resolve. This builds the credibility and acceptability of the mediator by the advocates and parties.

(iii) Then the mediator explains the process of mediation as follows:

(a) the process is totally confidential and nothing shall be mentioned in the court of any proposals made, or any statements made. The mediator shall not be called as a witness if the mediation does not succeed. The mediator will tear of his notes in the presence of advocates and parties in case the matter is not resolved through mediation.

(b) The mediator shall emphasize that he will be totally fair and impartial to both the parties and there will be total transparency in the conduct of the mediation.

(c) The mediator will also mention that he has no vested interest in the matter, he is not related to any of the parties and has not acted as an advocates for any of the parties. In case if he has, any financial dealings or any relationship with the parties, he should make a full disclosure of the same to the advocate and parties and then let parties decide if they want to continue with the same mediator or want the court to appoint any other mediator.

(d) The mediator shall also ascertain if the parties have full authority to settle, if one of the parties is government or corporate entity.

(e) The mediator shall also tell the parties that at any time, they or the mediator will terminate the mediation if the matter is not progressing.

(f) The mediator will also tell the parties that he shall hold joint and private session with the parties and the respective advocates and sometimes with the parties alone, if necessary.

(g) The mediator will say that if the settlement is not arrived he will not report in detail to the court as to what happened in mediation but will only make a short report to the court containing details as to — the number of meetings held, and the number of hours spend and that settlement could not be arrived at between the parties without giving reasons for failure of settlement.

(iv) In private mediation, the mediator can also mention his costs, (that is which is not referred by the court).

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CO-RELATION BETWEEN MEDIATION AND CASE MANAGEMENT

By Niranjan J. Bhatt

HISTORICAL PERSPECTIVE

The traditional justice system has been the prime justice delivery system in India for last about two centuries since the advent of British rule in India. Even in England it was formed during a feudal era when agrarian economy was in vogue. While India remained a colony the system thrived, prospered and deepened its roots as a prestigious and the only justice symbol. It became a vital institution recognized and adored for its integrity and independence and has gained people's confidence. Even after India's independence in 1947 the Indian judiciary has been proclaimed world over as a pride of the nation. Till the commerce, industry and trade started expanding, the system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the constitution, consciousness for fundamental and individual rights, governmental participation in growth of the nation's business and commerce, establishment of State Legislatures, government corporations, financial institutions, fast growing international trade and commerce and public sector participation. State and governmental bodies became large litigants. Tremendous employment opportunities were created. Protracted multiparty complex civil litigation, expansion of business opportunities beyond local limits, voluminous records, population growth, new and more enactments creating new rights and remedies and greater popular reliance on courts to resolve community problems brought an explosion of litigation. The inadequate infrastructural facilities to meet the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. The clogged court houses have started becoming unpleasant compulsive forums instead of the temple of justice. Instead of waiting in queues for years and pass on the litigation by inheritance people are minded either to drop going to courts or have started resorting to extra judicial remedies in the form of violation of law and order. Commercial interests avoid doing business in places where access to efficient and cost effective justice is not readily available. Delays in quick disposal of cases have inspired ingenuity of lawyers into carving out interim remedial actions which have kept courts busy hearing pretrial motions. The society is on the verge of loosing confidence in law courts threatening their dignified existence. The filing in courts have started downward trend creating a vicious slow growth ratio under the apprehension that disposal of cases will take years.

This situation has been faced historically by most of the democratic countries world over. USA was the first to introduce drastic law reforms about 20 years back and UK has recently followed the suit. Handicapped by historical helplessness India has started late, though it has now circumstances to pick up introduction and implementation of law reforms faster than any other country of the world. This is because of the foresight, dynamism and independence of the Indian Judiciary and the respect the Indian legislature has in

the visionary interpretations made by Indian Judges in developing law and social wisdom by precedents set by judicial pronouncements.

Since the inception of the economic liberalization policies in India and acceptance of law reforms world over, the legal opinion leaders have concluded that the application of vigorous mediation mechanisms to commercial and civil litigation is a critical solution to the profound problem of arrears of cases in Civil Courts in India. The former Chief Justice of Indian Supreme Court, Mr. Justice

A.M. Ahmadi took a bold step forward by forming an Indo US study team which worked together, made a comprehensive study and made recommendations how reforms suitably adopted to Indian conditions can modernize the Indian justice system. The study team consisting of Indian scholars and experienced experts from United States sponsored by **ISDLS*** made three sets of recommendations for modernizing Indian Civil Justice System : Court Administration, Case Management and Alternative Dispute Resolution. The proposal included introduction of Order IX A to include formally the concept of the case management in the Code of Civil Procedure.

Though the provisions of the Case Management are yet not formally introduced in the Code, those judges who exercise judicial control in pretrial proceedings on their own initiatives by implementing provisions of Order X, XI, XII and XIII **[brief summary annexed at the end of this paper]** of the Code are more successful than others in the expeditious disposal of cases. City Civil Court Rules framed by Gujarat High Court provide for summons for directions immediately after the filing of written statement, which did help in the initial years of their introduction in providing for case management concepts without so naming them. However, they were not vigorously followed in later years and have remained on statute book without being followed. Indian Parliament has taken a very bold step forward (unmatched by any country other than US and UK) by introducing ADR in its legal system. Another bold step in introducing case management procedures as a mandate of law will help in utilization of ADR procedures more effectively.

THE AHMEDABAD INDO-US EXCHANGE PROGRAMME

In a world wave of global law reforms a group of Indian faculty attended "36 Countries ISDLS Rule of Law Conference" held at University of California, Berkeley, which considered innovation in dispute resolution methods. The author of this paper made a presentation on the need for taking initiative by individual lawyers and Bar Associations. Gaining by experience of attending the conference the lawyers of Ahmedabad Bar Association were motivated to organize a conference on "Delays and their Solutions". Some of the topics discussed at Ahmedabad Conference included "Global Objectives, problems and reform alternatives in the light of widely shared aims of democracy and economic development", "Managing the Unmanageable", "Basic concepts of theory and practice of case management and Alternative Dispute Resolution Methods", "The need for discipline in law and changing the attitudes". The conference brought awareness on the problem of delay and their solutions, and concluded that **mediation** and **case**

* Institute for Study and Development of Legal Systems (ISDLS) is a San Francisco based non profit non governmental organization promoting law reforms world over.

management would help improve the civil and commercial justice system in India. It was dawned on the participants that the ancient Indian legal culture of resolving disputes with the help of a mediator, which became extinct with the advent of British Rule, needed to be revived. The conference was attended by Mr. Stephen Mayo, Executive Director of ISDLS, USA and Professor Mr. Hiram Chodosh of Case Western Reserve University, Ohio, USA. They were impressed by the conference and recommended that the Agenda of the Conference could be adopted as a model agenda for South East Asia. Two senior lawyers of Ahmedabad settled a Public Charitable Trust by name Institute for Arbitration Mediation Legal Education and Development (AMLEAD), with the objects of promoting ADR and imparting continuing legal education to lawyers, litigants and judges. With the help of ISDLS three groups of US mediation trainers visited Ahmedabad in January, April and August 2001 and imparted mediation training to about 120 lawyers. The trainers from USA included ADR administrators of US Courts, Chief Mediators of 6th and 9th US Circuit Courts, teachers, lawyers and judges who are experienced in implementing the concepts of Mediation and Case Management in US Courts. Three Indian delegations visited California in November 2000, January 2001 and February 2001 and observed how combination of Mediation and Case Management worked effectively. A meeting with the Associate Justice Ms. Sandra Day O'Connor and Associate Justice Mr. Stephen Breyer of the US Supreme Court during their Ahmedabad visit on September 13, 2001 gave a unique opportunity to Ahmedabad lawyers to have a dialogue with them on the importance of starting a lawyer run Mediation Centre. The Ahmedabad Bar Association and AMLEAD opened the first lawyer run Mediation Centre at Ahmedabad. The Centre has published a brochure to provide guidance to litigants, lawyers and Judges. The Chief Justice of Indian Supreme Court Mr. Justice B.N. Kirpal with his dynamism, judicial activism and pragmatic leadership inaugurated the CENTRE on July 27, 2002 in presence of legal fraternity and leading citizens of Gujarat and recommended the opening of such centres at other places also. A course on Theory and Practice of Mediation is also now introduced in the Law School by AMLEAD and Gujarat Law Society. Now India is ready and prepared to supplement its conventional adversarial legal system with modern improvisation. Mediation and Case Management have now become a global phenomenon.

INDIAN LEGISLATURE'S BOLD STEP

Judicial Reforms in any country is a slow process. Compared to other countries of the world Indian Legislature, in the 53rd year of its birth, enacted the Civil Procedure Code (Amendment) Act, 1999 and introduced mandatory ADR procedures. Another amending Act was introduced and passed in 2002 which has been accepted and welcomed in the country and it has now been brought into force with effect from July 1, 2002. In the forthcoming meeting of the Chief Justices of all Indian High Courts summoned by Chief Justice of India the attention on the concept of Mediation and Case Management will be focused. Now India is on the threshold of implementing progressive law reforms – a big step forward towards modernization of its justice delivery system.

THE CONCEPT OF MEDIATION:

In the adversarial system the litigant becomes insignificant, almost a non entity. He

goes to the court "to fight the battle". Resolving disputes has become less important. Litigants have become partners in the problems rather than in the solutions. We always negotiate business deals, we negotiate property transactions, we discuss the terms of a job and in India we even negotiate a marriage. **Can we not negotiate the settlement of disputes?** Negotiating settlement of disputes is recognized as the best form of dispute resolution at the beginning of 21st Century because it gives maximum satisfaction to the parties who actively participate in the process.

It has also been now recognized that negotiated settlement becomes more effective if a neutral, skilled and trained mediator, helps the parties. Mediation or conciliation is thus a voluntary process of negotiating the resolution of a dispute with the assistance of a mediator. Conciliation and mediation are more or less synonyms, though mediation goes further than conciliation by allowing the neutral third party to suggest terms on which dispute might be resolved. The Mediation is faster than the conventional adversarial system of dispensing justice. It is flexible as there is no set formula of complicated procedure and leads to an imaginative, creative, cost efficient, convenient and lasting solution of a dispute bringing parties closure avoiding hostility and maintaining relationship.

In modern complex society mediation has acquired global acceptance and has become part and parcel of the conventional system of justice. With the growth of commerce, industry and international business, the adversarial system of justice needs to be aided by various other indigenous alternatives catering to the need and choice of the litigants. Just as different quicker transport systems have helped in reducing traffic jams, the variety of Alternative Dispute Resolution Methods have provided to the consumers of justice a choice of selecting alternatives for resolving their disputes. However, it is necessary that these alternatives are provided as a part of the same time tested system which has acquired the confidence of the people because of its integrity and impartiality. The court is like a parental institution for resolution of disputes and if ADR models are directed under the courts' supervision, at least in those cases which are referred to ADR procedures by the courts, the effort for dispensing justice can become more coordinated. ADR agencies can become part and parcel of court system which would provide more alternative channels under its own control and supervision. This would ensure complimentary systems of justice and not competitive procedures. It is also necessary to decide which case is suitable for which ADR procedure. Who will decide this? And when? This will require a judge to adopt a managerial role. Cases pending in the Court are within the control of a judge. Traditionally a judge hears two adversaries, weighs the evidence on record and gives the judgement. This judicial role is more or less passive and takes no initiative for the progress of the case. Till the trial begins the judge almost plays no role except passing interim orders on applications moved by either side. Even for such applications progress of the case depends upon the initiative taken by lawyers of the parties. In the words of Judge Robert F. Peckham , "Mis-management or non-management of the cases can cause considerable delay leading to uncertainty in business and personal affairs and often crushing expenses to one or more of the parties". Experience has revealed that in those cases where a judge exercises more pre-trial control, progress towards conclusion is faster. In the last decade due to the introduction of the concept of the case

management in the Federal District Courts in the United States, the disposal of the cases by trial has increased. It is also found that the courts became more efficient in dealing with the cases. This new role of a judge as a case manager promises to increase judicial productivity.

CASE MANAGEMENT

The case management is a judicial process which provides effective, efficient and purposeful judicial management of a case so as to achieve a timely and qualitative resolution of a dispute. It assists in early identification of disputed issues of facts and law, establishment of a procedural calendar for the life of the case and **exploration of a possibility of a resolution of disputes through methods other than court trial**. The case management requires the early assignment of a case to a judge who then exercises judicial control over the case immediately after it is filed and keeps its track at every stage. The judge applies judicial process to the rival contentions at the earliest stage after filing of the written statement and secures active participation and joint communication amongst the parties and the lawyers for the smooth progress of the case. It helps the parties and lawyers in identifying the real controversies and seeking early response from the other side on the questions of facts and law raised by the opponents minimizing or narrowing down the controversies. At this stage, it becomes necessary for the court to apply its mind to the facts of the case and reduce the scope of trial as far as possible by referring the case to Alternative Dispute Resolution Methods. This can be done by the judge by examining the facts of the case jointly with the lawyers of the parties. The Code of Civil Procedure, 1908 has made adequate provision in Order X to Order XIII for incorporating pretrial case management concepts. This provision requires the Judge to exercise control over the case at the first hearing. However, if the first hearing itself is delayed the judicial control will not help in expeditious conclusion of the case and therefore, it is necessary to require the judge to be seized of the matter immediately after filing of the written statement.

CASE MANAGEMENT AND MEDIATION ARE COMPLEMENTARY

With the global acceptance of the Alternative Dispute Resolution Methods, the Code of Civil Procedure, 1908 in India, as recently amended, introduced the ADR procedures which include arbitration, conciliation, mediation, judicial settlement and settlement through Lok Adalat. The arbitration is more or less adversarial and the arbitrator is required to give an award which is like a court giving a judgement. Judicial settlement has not been aggressively pursued because the judges are not left with enough time from the routine work. The Lok Adalat has proved to be successful in a few types of cases such as motor accident cases. The conciliation and mediation which are synonyms offer the maximum scope of acceptance by the litigants because they sound to be most realistic. It is therefore necessary for the courts in pending cases to refer the cases to mediation or conciliation. Now that law has made ADR methods a part of our legal system it is necessary that while exercising judicial control a judge at the earliest stage decides if a case is having an element of settlement which can be further explored by referring the case, inter alia, to mediation. Therefore before referring a case to mediation, a judicial mind must decide whether it is capable of being resolved through any of the ADR mechanisms. It is therefore

that managerial skill of a judge is a pre-requisite for referring the case to a mediator. This basic requirement is of foremost importance before the mediation process can begin. A reference of all the cases to mediation without application of mind may become an empty formality.

While referring a case to mediation after a judge sees an element of settlement in it, it is necessary to fix a time limit for completing the mediation procedures. In absence of such time limit cases are likely to be shelved. It is, therefore, necessary to exercise a further judicial control requiring to complete mediation process expeditiously. In appropriate cases the given time may not be sufficient and may be required to be extended further. If the judge is satisfied that the progress towards the settlement is not being made, he may find that the mediation is likely to fail and no further time is required to be wasted. A judge may find that the case deserves to be shuffled to any other form of ADR. A judge may even conclude that certain issues may be settled through mediation and others require a trial. Such an exercise of control by the judge will also bring the concept of the answerability by the parties and the mediator. Thus mediation process is complementary to the courts and actually furthers the court's own interest in reducing its case load to manageable levels. Rather than presenting a parallel system of justice that is competitive with courts, co-ordination between case management by a court and assisted negotiation through mediator selected by the parties, will provide additional tools by the same system which will inspire confidence and provide continuity of the process. When court considers it appropriate to refer the case to mediation and continues to have its managerial supervision, court will remain a central institution for the system. This will also establish a public-private partnership between the courts and the community. A popular feeling that court works hand-in-hand with mediation facility will produce lawful and enforceable settlements.

The Code of Civil Procedure, 1908 and the provisions for ADR mechanisms made therein can be effectively utilized only if the managerial skills of a judge are properly understood and effectively implemented. Unless both i.e. the case management techniques and ADR procedures are properly used as a part of the same system, none of them can be effective. 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 cases which require judicial determination.

A FEW SUGGESTIONS

India has now whole hearted legislative approval for beneficial law reforms contained in the Code of Civil Procedure, 1908,The Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987. It is therefore, necessary to provide guidelines and

promote the reforms extensively by utilizing the provisions made in the last mentioned Act.

- The provisions made in the Arbitration and Conciliation Act, 1996 regarding the process of conciliation are required to be made applicable to mediation also because there is no real difference between the two. The High Courts can frame rules under Section 89 (2) (d) read with Section 122 of the Code of Civil Procedure to make mediation procedures effective immediately.
- In order to establish mediation as a viable alternative, it is crucial to provide education about benefits of the process to the community, the members of the Bar and the Courts. It will be necessary to familiarize the potential consumers of mediation services with the nature of the process, the ways mediation can benefit them and ways it differs from arbitration and trial. Equally important is to promote and encourage the managerial qualities of a judge. Coordinated efforts will have to be promptly started to effectively use the ADR provisions incorporated in the Code of Civil Procedure, 1908.
- Brochures explaining availability of mediation and other ADR methods must be published and handed over to the plaintiffs at the time of filing of the suits and to the defendants along with the summons of the suit. Directions to the Principal Judges of all courts in any acceptable modes are required to be issued to all the courts in their jurisdictions to assign the cases to specific courts and keep the track thereof from the beginning and enforce the case management techniques.
- To achieve the success in reforms' implementation, pilot projects in some selected cities can be introduced so as to utilize the experience later in other courts. A few courts can be selected to follow mediation and case management procedures on experimental basis and judges who are allotted such work can be specially selected on the basis of their aptitude and they can be specially trained for the assignments.
- Cases for the reference to mediation can be categorised initially to include cases having minimum discovery requirements and maximum settlement elements, such as cases relating to money recovery, loan default, family disputes, etc.
- A panel of mediators should be immediately formed and for the purpose, programmes for imparting basic training and orientation to the intending mediators should be organised. Community leaders, experienced and respected businessmen, retired judges, experts in different fields, retired bureaucrats and lawyers can be persuaded to serve as mediators. Bar Councils, Bar Associations and Judicial Academies can join hands to organize workshops and conferences on the subjects.
- Retired judges, desiring to act as mediators can be persuaded to consciously address a general concern over the difference between mindset of a Judge and of a Mediator. Appointment of retired Judges as mediators can inspire great confidence in the mediation process amongst the participants with a familiarisation programme with mediation process to avoid any role confusion.

- International organizations like Asian Development Bank and World Bank, which have large funds for the developmental purposes, should be approached to provide and promote international training facilities, to set up pilot projects and specialized infrastructural facilities for exchange of knowledge and experience and also organize regional conferences and training the trainers programmes. Formation of joint Bench-Bar Committees to implement the reformative provisions of law may prove very useful.

- The courts in which the pilot projects are to work, are to be provided with computers and case tracking facilities and there shall be effective supervision of the pilot projects. Apart from that, in courts, there shall be intensive training imparted about the basic ideas to the persons who are going to be in-charge, so that the case management principles and the schedules and the ADR processes are well-administered.

- State, Municipal Corporations and Government Corporations, who are the largest litigants, should be drawn into the process of Mediation by framing appropriate schemes.

- Till Court annexed mediation programmes and proper infrastructural facilities are established it would be appropriate at least to provide mediation facilities through private reliable mediation centres run by the Bar Associations and/or non Governmental organizations and appropriate funds or grants can be provided to them. It is advisable to provide such mediation facilities at the doorsteps of the court houses.Last, but not the least, is the importance to identify the right persons for implementation and to inculcate the sense and feeling of responsibility and alleviate the feeling of extra burden on an existing judicial officer. It is being felt that quite many new ideas fail because of the unwillingness to go that extra mile by the person, who is within the settled pay scale and unfortunately thinks that he is not going to get any incentive for that extra mile he ploughs. The system as it works today evaluates a lower court judge's work on disposal and considers more merits of the man if "disposal" is greater and if "settlements" are more in his court, he may not be looked as one being that competent. That idea of evaluation of the performance of judges and also the incentive for going that extra mile further has to be evolved within the system.

- The world is becoming smaller with the faster communication facilities. International exchange of knowledge, experience and research have widened the horizons of the people of the world. The ties between democratic countries are becoming stronger. The world is progressing towards unity of thoughts. India and USA being two largest democracies of the world can join together on long term basis to utilize mutual wealth of knowledge to evolve a Research Foundation for providing continuing legal

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Niranjan J. Bhatt is a senior Advocate in Ahmedabad. He is the founder and the Managing Trustee of the Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and a Convener of the Ahmedabad Mediation Centre, the first lawyers run Mediation Centre of India. Mr. Bhatt received advance mediation training from Harvard Law School PIL Programme and was a member of Indo-US Central Study Team.This paper was presented by him at the fourth Indc-Us legal forum meet at Washington DC on october15,2002,as a member of Indian delegation led by Chief Justice of India Mr.Justice BNKirpal.

education, which will help in promoting the economic, commercial and social welfare of their people.

Annexure

BRIEF SUMMARY OF A FEW IMPORTANT PROVISIONS IN INDIAN CIVIL PROCEDURE CODE RE. CASE MANAGEMENT

Settlement of disputes outside the court:

Civil Procedure Code 1908 Inserted by Amendment Act 1999 Date of Implementation from 1-07-2002	S.89 (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 through Lok Adalat or (d) mediation

(2) Where a dispute has been referred –

(a) for arbitration or conciliation, the provisions of Arbitration and conciliation Act, 1926 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the Act;

(b) to Lok Adalat, the court shall refer the same to 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 disputes 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.

[Only description of rules. For full text, please see Civil Procedure Code, 1908]

ORDER X

EXAMINATION OF PARTIES BY THE COURT

Rules	Description
1	Ascertainment whether allegations in pleadings are admitted or denied
1A	Direction of the Court to opt for any one mode of alternative dispute resolution
IB	Appearance before the conciliatory forum or authority
1C	Appearance before the Court consequent to the failure of efforts of conciliation
2	Oral examination of party, or companion of party
3	Substance of examination to be written
4	Consequence of refusal or inability of pleader to answer

ORDER XI

DISCOVERY AND INSPECTION

Rules	Description
1	Discovery by interrogatories
2	Particular interrogatories to be submitted
3	Costs of interrogatories
4	Form of interrogatories
5	Corporations
6	Objections to interrogatories by answer
7	Setting aside and striking out interrogatories
8	Affidavit in answer, filing
9	Form of affidavit in answer
10	No exception to be taken
11	Order to answer or answer further
12	Application for discovery of documents
13	Affidavit of documents
14	Production of documents
15	Inspection of documents referred to in pleadings or affidavits
16	Notice of produce
17	Time for inspection when notice given
18	Order for inspection
19	Verified copies

20	Premature discovery
21	Non-compliance with order for discovery
22	Using answers to interrogatories at trial
23	Order to apply to minors

ORDER XII
ADMISSIONS

Rules	Description
1	Notice of admission of case
2	Notice to admit documents
2A	Documents to be deemed to admitted if not denied after service of notice to admit documents
3	Form of notice
3A	Power of Court to record admission
4	Notice to admit facts
5	Form of admissions
6	Judgement on admissions
7	Affidavit of signature
8	Notice to produce documents
9	Costs

ORDER XIII
PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

Rules	Description
1	Original documents to be produced at or before the settlement of issues
2	[Omitted]
3	Rejection of irrelevant or inadmissible documents
4	Endorsements on documents admitted in evidence
5	Endorsements on copies of admitted entries in books, accounts and records
6	Endorsements on documents rejected as inadmissible in evidence
7	Recording of admitted and return of rejected documents
8	Court may order any document to be impounded
9	Return of admitted documents

10	Court may send for papers from its own records or from other Courts
11	Provisions as to documents applied to material objects

Relevant provisions of the Arbitration and Conciliation Act, 1986, which should be made applicable to the mediation proceedings]

S. 61. Application and scope –

(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

(2) This part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

S.62. Commencement of conciliation proceedings:-

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

S.63 Number of Conciliators:-

(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

S.64 Appointment of conciliators:-

(1) Subject to sub-section (2),-

(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular, -

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

S. 65 Submission of statements of conciliator:-

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation – In this section and all the following sections of this Part, the term "Conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

S. 66. Conciliator not bound by certain enactments:- The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

S.67. Role of conciliator :-

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not

be accompanied by a statement of the reasons therefor.

S. 68. Administrative assistance:-

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

S.69. Communication between conciliator and parties:-

(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where the meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

S.70. Disclosure of Information:-

When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

S. 71. Co-operation of parties with conciliator:-

The parties shall in good faith co-operate with the conciliator and in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

S. 72. Suggestions by parties for settlement of dispute:-

Each party may, on his own initiate or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

S.73. Settlement:-

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them separately.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

S. 74. Status and effect of settlement agreement:-

The settlement agreement shall have the same status and effect as if it is an arbitral award on the agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

S. 75. Confidentiality :-

Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

S. 76. Termination of conciliation proceedings:-

The conciliation proceedings shall be terminated –

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

S. 77. Resort to arbitral or judicial proceedings:-

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

S.78. Costs:-

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1) "costs" means reasonable costs relating to

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

(b) any expert advice requested by the conciliator with the consent of the parties;

(c) any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and

section 68;

(d) any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The cost shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by the parties shall be borne by the party.

S. 79 Deposits:-

(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-sections (1) and (2) are not paid in full by both the parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

S. 80. Role of conciliator in other proceedings:-

Unless otherwise agreed by the parties.-

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

S. 81. Admissibility of evidence in other proceedings:-

The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or any such proceedings relate to the dispute that is the subject of the conciliation proceedings,-

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

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ROLE OF A REFERRAL JUDGE IN MEDIATION

Dr. Sudhir Kumar Jain,
Additional District Judge,
Delhi.

1. Introduction

Our country is a democratic country governed by rule of law under the aegis of written Constitution. The Constitution has guaranteed certain basic rights to every citizen enforceable in the courts either by constitutional remedies or statutory remedies. An efficient and efficacious justice delivery system is mandatory to protect the rule of law and to secure and protect rights of each and every citizen in a democratic society. The ultimate object of the justice delivery system is to provide fair and impartial justice within reasonable time with minimum cost. The good legal system should not only produces just solutions to the problems but also with speed, efficiency. To get the speedy justice is the legitimate expectation of every citizen of this country.

In recent times, urbanization, increased governmental activities and waning of traditionally engaged non-judicial institutions in dispute resolution resulted in unprecedented explosion of litigation. The citizens have become more conscious about their legal rights and in case of infringement they frequently seek redressal of their grievances through traditional litigative system. The available human and material resources are inadequate to meet these ever-growing demands resulting in backlogs of cases and delays in the disposal of cases. Our justice delivery system although known for its efficiency, competency, impartiality is losing its credibility due to mounting arrears and delays. The long delay in the disposal of cases and mounting of arrears have shocked the conscience of both law persons as well as lay persons. The backlog and inordinate delays in the administration of justice are causing difficulties in securing ready access to justice. It is the duty of everyone who is concerned with the administration of justice to articulate ways and means so that speedy justice without compromising the quality can be provided to the citizens of this country. Thus, it has become necessary to resort to effective methods of dispute resolution between potential litigants other than traditional judicial system.

II. Why Alternative Dispute Resolution Mechanism (ADR)

It is the need of the hour that the judiciary as well as other institutions concern with the administration of justice to device new methods and innovate new strategies for the purpose of providing speedy justice to the common man. The present justice delivery system has failed to administer justice in timely manner. The adversarial model of justice delivery system has proved to be inadequately designed to meet the needs of a common man for quality justice within reasonable time with minimum cost. The importance of Alternative Dispute Resolution Mechanism (ADR) has to be understood in the background that it is not enough to articulate the ideals of justice but there must be a pragmatic approach towards the realization of justice. In recent times, Alternative Dispute Resolution Mechanisms have developed as a complementary mechanisms to shed off the workload

or pressure on the courts. The alternative dispute resolution is one of the mechanisms to mitigate the deficiencies of the traditional judicial system. The need to develop the alternative dispute resolution mechanism as supplement to the ordinary court system is real and urgent. The alternative mechanisms are not intended to supplant or to substitute court adjudication. There are many reasons which justify the utility of alternative dispute resolution. The courts due to overload are not responding quickly and timely for the redressal of the grievances of the litigants; many times courts lack required expertise to handle particular type of cases and the alternative methods are more effective to deal with the entire area of conflict rather than a particular legal infraction as in case of traditional judicial system. The alternative dispute resolution provides an opportunity to resolve differences, conflicts or disputes creatively, efficiently, rapidly, effectively and amiably by choosing a process which is more convenient and suitable for resolution of the disputes. Many advantages are attached to the alternative dispute resolution such as informality, quickness, resolution of dispute rather than mere decision of cases, confidentiality, less or no cost, harmony etc. There are various types of alternative dispute resolution mechanisms such as **Mediation/Conciliation/Arbitration / Lok Adalat / Early Neutral Evaluation** etc.

III. Mediation

The mediation is a voluntary process to resolve a dispute between the disputants by settlement with the assistance of the mediator who is a neutral third party. A mediator assists the parties by appropriate communication and negotiation to reach at an amicable solution. He facilitates the parties in reaching mutual acceptable agreement. The Mediation can be defined as a voluntary, non-binding process in which an impartial and neutral mediator assists the parties in reaching an agreement. Unlike a judge or an arbitrator, the mediator does not impose the ultimate and final solution on the parties. The parties must agree to any acceptable solution. A mediator creates the conducive atmosphere under which the parties can reach an acceptable solution by mutual consent. The mediator is just responsible for the conduct of proceedings while ultimate outcome remains with the parties. A mediator is non-judgmental.

The mediation is developing as an alternative mode of dispute resolution. The important advantages or benefits of mediation are that the parties are directly engaged in the settlement; the mediator, as a neutral third party, can review the dispute objectively and can assist the parties in exploring alternatives not considered by them; a settlement can be reached much more quickly than in litigation: the parties generally save their money through low (or no) legal cost; parties enhance the possibility of continuing personal or business relationship with each other.

In mediation, a judicial officer/Advocate acts as a mediator to bring the two contesting parties together to reach a mutually acceptable settlement. The courts are overburdened by too many cases and judicial mediation is one way to reduce their backlog of cases. The courts by encouraging and helping to facilitate settlement can reduce the number of trials and the backlog of cases. A settlement reached by the parties through mediation is often a better solution than the judicial determination.

In Delhi District Courts, 30 Judicial Officers have received a specialized 40 hours training on the **"Judicial Mediation Techniques"** by Expert Trainers from **Institute for the Study and Development of Legal Systems (iSDLS), USA.** Thereafter two Mediation Cells have started to function one at Tis Hazari Courts and another at Karkardooma Courts. Thereafter Judicial Officers and Advocates were trained in the Techniques of Mediation by the trainers of Mediation Centres who are now functioning as Mediators.

In the Mediation Cell functioning at Tis Hazari Courts, 5826 cases are referred for mediation during the period w.e.f. 01.08.2005 to 18.02.2008, out of which 62.75% cases are settled. Similarly in the Mediation Cell functioning at Karkardooma courts, 78.61% of cases are settled during the period w.e.f. 01.12.2005 to 18.02.2008. The rate of success at both Mediation Cells is quite encouraging.

IV. Referral Judge

In Judicial Mediation, the key to success depends upon the judicial officers who refer the cases for settlement through the mediation and commonly known as **Referral Judge.** If the Referral Judges refer appropriate cases for mediation than the rate of success of settled cases may be high. The role of a Referral Judge in a successful mediation cannot be under estimated and is of great significance. In the Mediation Cell functioning at Tis Hazari Courts during the period w.e.f. 01.08.2005 to 18.02.2008, 5826 cases from different jurisdictions are referred for mediation out of which 828 cases i.e.about 14.21% of cases are found not fit for mediation. Similarly in the Mediation Cell functioning at Karkardooma Courts, during the period w.e.f.01.12.2005 to 18.02.2008, out of 2994 cases referred for mediation, 273 i.e.about 9.12% are found not fit for mediation. These are high percentage and adversely affect the proper functioning of the Mediation Cells. In this background, we may say that selection of appropriate cases by referral judges which can be settled through mediation is very important. This can be illustrated by persuing Table-1.

Table - I

Details of cases referred for mediation, case settled, not settled and time spent on one case.

Mediation Cell	Period	No. of referred cases	No. of cases not fit for mediation	No. of balance cases	No. of cases pending for settlement	No. of disposal cases	No. of settled cases	No. of unsettled cases	No. of settled conn-ected cases	Average time spent on one case (minutes)
Tis Hazari Courts	1.8.05 to 18.2.08	5826	828 (14.21%)	4998	227	4771	2994 (62.75%)	1777 (37.25%)	1251	142
Karkar-dooma Courts	1.12.05 to 18.02.08	2994	273 (3.12%)	2721	65	2656	2088 (78.61%)	568 (21.39%)	538	145

V. Role of a Referral Judge

It is important for a referral judge to identify the appropriate cases which are fit for mediation. The role of a referral judge can be identified at following two stages:-

A. Pre-Mediation; and

B. Post-Mediation.

A. Pre-Mediation

A referral judge should make objective assessment before referring a particular case for mediation as to whether case is fit for mediation. This exercise is required to be done before initiation of mediation process i.e.at Pre-Mediation stage.

This is an important exercise and should not be done in casual manner. The failure of a referral judge in referring an appropriate case for mediation may result in full trial of the case. The Referral Judge should know when and at what stage, a case should be considered for being referred to for mediation. Many judges make the assessment on a case-by-case basis. Some judges send specified types of civil cases for settlement through mediation. A referral judge should weigh the various factors that go into a decision to refer a case to ADR, including mediation.

1. Power of A Referral Judge

The Code of Civil Procedure, 1908 is amended by the Code of Civil Procedure (Amendment) Act, 1999 and Code of Civil Procedure (Amendment) Act 2002. The amendments came into operation with effect from 01.07.2002. The important amendments for the introduction of ADR for settlement of civil disputes are brought by incorporating section 89 and Order X Rule 1A, 1B, 1C in Code of Civil Procedure, 1908.

Section 89 of the Code of Civil Procedure, 1908 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 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 the 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 X Rules 1A, 1B and 1C of Code of Civil Procedure,1908 read as under:—

1A. 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.

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

1C. Appearance before the court consequent to the failure of efforts of conciliation—Where a suit is referred under rule 1A 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.

The mandate of section 89 is that where it appears to the court that there exist element of settlement which may oe acceptable to the parties, the court is duty bound to formulate the terms of settlement and give them to the parties for observations and thereafter to reformulate the terms of a possible settlement. A referral judge may refer the case to the following forms :—

i. **Arbitration;**

ii. **Conciliation;**

iii. **Judicial Settlement including settlement through Lok Adalat; and**

iv. **Mediation.**

Section 89 cast two fold duties upon a Referral Judge, i.e. **i.to explore possibility of settlement between the parties; and ii. whether the parties have consented for resolution of their disputes through ADR.** If it is so, then court is duty bound to formulate the terms of settlement for reference. The section 89 is the statutory source for a Referral Judge at pre-mediation stage for referring suitable cases for mediation.

2. Stage of Reference

It is critical for a Referral Judge to ascertain whether there is an element of settlement. It lays the foundation for successful reference and ultimately leads to a successful

Mediation. The section 89 does not prescribe any particular stage of the trial when a case can be referred for settlement through Mediation. If section 89 is read with Order X rule 1A, a referral judge after recording the admission/denial is empowered to direct the parties to the suit to opt any of the modes of the settlement outside the court as specified in section 89. If the said two provisions are read together, the appropriate stage for referring a case for settlement is after the recording of admission / denial. It may be due to the reason that at this stage Referral Judge may have some factual background about the dispute between the parties necessary to ascertain whether the dispute can be settled through Mediation or not.

If a referral judge decides to refer a case for mediation, then he should know about relevant facts of the case before making the decision to refer the case. It does not mean that case pending at any other stage of trial cannot be referred for mediation. The only important consideration for referral judge is to ascertain whether there exist element of settlement. If in the opinion of a Referral Judge there is no possibility of settlement then, the case should not be referred for mediation by the referral judge.

3. Consent

As per section 89, it is important for a Referral Judge to ascertain whether the parties have expressed their willingness to settle their dispute through mediation and have consented to mediation. It is important for a Referral Judge to ascertain the element of consent from the parties before referring a case. A Referral Judge should not refer the case for Mediation where there is no intention of contesting parties to settle through Mediation, or they are intended to delay the proceedings. The mediation process is not a device to delay the proceedings.

The reference may be appropriate when one party has agreed to Mediation and other party is willing to go to Mediation, if not necessarily committed to settlement. The reference to mediation may be appropriate even when neither parties have agreed to settle but they are honestly willing to explore the possibility of settlement through mediation and the Referral Judge believes that it can be settled if is referred to Mediation. The Referral Judge may refer the case for settlement where neither of the party has expressed desire to settle a dispute but the Referral Judge believes that the settlement may be possible under given facts and circumstances of the case. In such cases, the Referral Judge is required to exercise its discretion carefully. If the parties are totally revert for settlement through Mediation and not ready to give consent for settlement of disputes through Mediation in that case, the Referral Judge should make efforts to persuade the contesting parties to settle disputes through Mediation. It may need some talking to the parties for a few minutes about the benefits of Mediation. These kind of discussions, some times go a long way in resolving the disputes.

The consent should be free, voluntary and without any pressure, force and coercion and should be given after understanding the benefits of settlement of case through Mediation.

4. Conference with the Parties

A referral judge may help the parties to think about the benefits of settlement through mediation. The parties should be made understand that as per section 89, it is the duty of the court to ascertain the possibility of settlement. The contesting parties should be made aware about the options available to them for settling the case through different ADR modes and their effectiveness. A Referral Judge should ascertain whether the party has made the decision about use of ADR and if the parties have decided to use ADR then what process they should prefer. The parties may name one mediator/ADR neutral to the Judge. The Referral Judge should ascertain, if the parties have decided against ADR, what has led to that decision. The Referral Judge should also ascertain if entire case is not fit for settlement through ADR then some of the issues involve in the dispute may be fit for settlement. It is also important for a Referral Judge to ascertain whether the parties on earlier occasion have already tried to settle the case. The Referral Judge may ask the parties to exchange relevant informations necessary for the effective settlement The Referral Judge may request the Attorneys/Advocates of the parties to make them understand about the benefits of resolution of disputes through ADR including mediation.

5. Interference with trial schedule

If a referral judge has decided to refer a case for the mediation, then overall schedule set for trial should not be disturbed. The objective is to complete the trial of the case without undue delay or cost. The party should be made understand that if a case is referred for settlement to the Mediation then the schedule set for trial shall not be disturbed at any circumstance. It will prevent the parties to delay the proceedings of the case in the name of settlement through mediation.

6. Categories of Cases

It is noticed that certain categories of cases are more appropriate for settlement through mediation in comparison to other categories. It is important for a good referral judge to identify the categories of cases which are suitable for being referred to mediation. If a particular type of cases is not fit for mediation then it should not be referred for mediation. It will result into the sheer wastage of mediator's time particularly when the judicial officers are appointed as mediators, as in case of Delhi District Courts. From the statistics available at Mediation Cells, we can identify categories of cases which are suitable for settlement through mediation.

i. Civil Cases

All categories of civil suits are not suitable for settlement through mediation. Some categories of civil suits can be referred for settlement as there are more chances for settlement, in comparison to other categories. **(Refer Table-11).**

a. Suits for Recovery

It is noticed that Suits for Recovery are suitable for mediation. During the period w.e.f. 01.08.2005 to 18.02.2008,1033 cases of recovery of money are referred to Mediation Cell, Tis Hazari Courts, out of which 817 cases are settled. The success rate is about 79%.

The average time consumed for settlement of one case is about 64 minutes. In Mediation Cell, Karkardooma Courts Complex, 236 suits for recovery of money are referred for mediation during period w.e.f.01.12.2005 to 1&'.02.2008 and out of which, 202 cases are settled. The success rate is 86%.

b. Suits for Mandatory/Permanent Injunction

This is another category of civil cases where the settlement through mediation is effective. In Mediation Cell, Tis Hazari Courts 753 cases are referred for mediation, out of which 448 cases are settled. The success rate is 59% and the average time consumed on one settlement is 95 minutes.

c. Suits for Possession/Damages

The success rate of settlement through mediation in Suits for Possession is also encouraging. Out of 216 cases being referred to Mediation Cell, 115 cases are settled. It means about 53% of suits for possession are settled through mediation. The average time consumed in one settlement is about 106 minutes.

d. Suits for Partition

The success rate of settlement through mediation in Suits for Partition is not very encouraging. It is noticed that out of 178 cases referred for mediation, only 104 cases could be settled. The success rate is only 42%. The Suits for Partition may not be suitable for mediation. There may be variety of reasons such as large number of parties, complex issues and failure to strike a balance between the conflicting interests of the parties.

e. Probate Cases

The success rate of settlement in Probate Cases is also not encouraging. The 31 cases are referred for settlement out of which only 14 case could be settled. The success rate is about 45%.

Table - II

Details of civil cases referred at Mediation Cell, Tis Hazari Courts during the period w.e.f.01.08.2005 to 17.03.2005.

Types of cases	No. of cases referred	No. of settled cases	No. of cases not sttled	Average Time (minutes)	Mediation Sessions	Average Settlement rate
1. Suits for Recovery	1033	817	216	64	2	79%
2. Suits for Injuction	763	448	315	95	3	59%
3. Suits for Possession/Damages	216	115	101	106	3	40%
4. Suits for Partition	178	74	126	126	3	42%
5. Probate Cases	31	14	17	106	3	45%

ii. Motor Accident Claims Cases

The success rate of settlement through mediation in Motor Accident Claims cases is quite encouraging. It is noticed that out of total 138 cases referred for settlement, 119 cases are settled. Each case consumed average time of 66 minutes for settlement in 2 mediation sessions. The success rate is about 86%. In Mediation Cell, Karkardooma Courts Complex, 102 cases are referred for settlement and out of which 68 are settled. The success rate is 87%. **(Refer Table-III).**

Table III

Details of Motor Accident Claims Cases referred at Mediation Cell, Tis Hazari & Karkardooma Courts.

Mediation Cell	No. of referred cases	No. of settled cases	No. of cases not settled	Average time (minutes)	Mediation Sessions	Average Settlement Rate
Tis Hazari Courts	138	119	19	66	2	86%
Karkardooma Courts	102	89	13	68	4	87%

iii. Labour Cases

In Delhi, the Labour courts and Industrial Tribunals are situated at Karkardooma Courts Complex. The success rate of settlement in Labour Cases is high. Out of 883 cases which are referred for settlement, 693 cases are settled. The success rate is 78%. I have also dealt with number of labour cases in mediation and by my own experience I can say that the labour-management disputes are more suitable for settlement.**(Refer Table-IV)**

Table - IV

Details of Labour—Management Disputes referred to Mediation Cell, Karkardooma Courts during the period w.e.f.01.12.2005 to 18.02.2008

No. of referred cases	No. of settled cases	No. of cases not settled	Average time (minutes)	Mediation Sessions	Average Settlement Rate
883	693	190	62	2	78%

iv. Landlord/Tenant Disputes

The disputes between the landlord and tenant can also be settled through the mediation. It depends upon the proper selection of the cases. It is noticed that the disputes involving the restoration of essential services and supply can easily be settled through the mediation as none of the parties wants full trial in such cases.

v. Matrimonial Disputes

The matrimonial cases are much more likely to settle if the parties are educated, marriage is shorter one with no children, the litigants are from urban area.(Refer Table-V)

a. Divorce

The success rate of settlement in divorce petition is also encouraging. In Mediation Cell, Tis Hazari Courts, 244 cases are referred for mediation out of which 123 cases are settled. The success rate is 50%. In Mediation Cell, Karkardooma Courts 58 cases out of 104 cases are settled. The success rate is 56%.

b. Custody/ Guardianship Cases

In custody/guardianship cases, the success rate is around 44%. The 85 cases being referred for mediation out of which 37 cases are settled.

c. Cases u/s. 125, Code of Criminal Procedure, 1973

The rate of success of settlement in maintenance cases u/s 125 Cr.P.C. is also encouraging. Out of 241 cases, 136 cases are settled through mediation. The success rate is about 56%.

d. Cases u/s.406/498A, Indian Penal Code, 1860

The cases u/s 406/498A IPC are not compoundable but the efforts can be made to settle the disputes between the parties. If one case u/s.406/498A, IPC is settled, it may result into the settlement of 4-5 cases. In Mediation Cell, Tis Hazari Courts, 476 cases are referred for settlement, out of which 228 cases are settled. The success rate of settlement in such cases is 48%.

Table - V

Details of Matrimonial Disputes referred to Mediation Cells, Tis Hazari Courts and Karkardooma Courts.

Types of cases	Mediation Cell	No. of cases referred	No. of settled cases	No. of cases not sttled	Average Time (minutes)	Mediation Sessions	Average Settlement rate
1 Divorce	Tis Hazari	244	123	121	127	3	50%
	KKD	104	58	46	129	4	56%
2 Custody /Guardian ship	Tis Hazari	85	37	48	152	3	44%
3 Mainten ance	Tis Hazari	241	136	105	110	3	56%
Case (u/s 125 Cr.PC	KKD	113	82	31	115	4	73%
4 Cases u/ s 406/498 A IPC	Tis Hazari	476	228	248	139	3	48%
	KKD	92	69	23	103	8	75%

vi. Criminal Cases

Section 89 does not govern the aspect of mediation in criminal cases. It is noticed that there are certain categories of criminal cases which are compoundabje are suitable through mediation.(Refer **Table-VI**).

a. Complaints u/s.138, Negotiable Instruments Act, 1881

The offences u/s 138 of the Negotiable Instruments Act, 1881 are compoundable. The success rate of settlement through mediation in complaints u/s.138 of the Negotiable Instruments Act is higher. At Mediation Cell, Tis Hazari Courts, out of 407 cases, 356 cases are settled. The success rate is about 87%. Even in terms of average time consumed, only 58 minutes are spent on settlement of one case.

Table - VI

Details of cases u/s 138, Negotiable Instruments Act, 1881 referred at Mediation Cell, Tis Hazari Courts/Karkardooma Courts

	No. of referred cases	No. of settled cases	No. of cases not settled	Average time (minutes)	Mediation Sessions	Average Settlement Rate
Tis Hazari	407	356	51	58	2	87%
Karkardooma Courts	617	564	53	56	4	91%

7. Selection of Mediator

In the Mediation Cells running at Tis Hazari Courts and Karkardooma Courts, 30 trained Judicial Officers are functioning as,Mediators. The said judicial officers have received the specialized training from the trainers from ISDLS on **'Judicial Mediation Training'**.

The Mediation and Conciliation Rules,2004 enacted by the High Court of Delhi and published in Delhi Gazette Dated 11.08.2005 (Annexure-A) authorize the High Court and the District and Session Judge with the approval of the High Court for the purpose of appointing Mediator between the parties in the suits or proceedings to prepare a panel of Mediators(Rule 3)[1].

1. Rule 3 of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 3: Panel of mediators/conciliators.

(a) The High Court shall, for the purpose of appointing the mediator/conciliator between the parties in suits or proceedings, prepare a panel of the mediators/conciliators and put the same on the Notice Board within thirty days of coming into force of these Rules, with copy to the High Court Bar Association.

(b)(i) The District & Sessions Judge shall, for the purpose of appointing the mediator/conciliator to mediate between the parties, in the suits or proceedings prepare a panel of the mediators/conciliators within a period of thirty days of the commencement of these rules and shall submit the same io the High Court for approval. On approval of the said panel by the High Court, with or without modification, which shall be done within thirty

Rule 4[2] provides persons who are qualified to be empanelled as Mediators. The Retired judges of the Supreme Court and the High Courts, Retired District and Session Judge and Retired Officers of Delhi Higher Judicial Service, the District and Session Judge or the officers of the Delhi Higher Judicial Service, Legal Practitioners with at least 10 years standing at the Bar, Experts or other professionals with at least 15 years standing and Experts Mediators may be enlisted in the panel of mediators. **Rule 5**[3] prescribes the disqualifications of the Mediators.

It is important that a referral judge should ensure the quality of mediator so selected before referring a case. The quality of the Mediator is one of the most important factor which influences the effectiveness of the mediation. A referral judge should inform the parties how a mediator is appointed and what are qualifications required to be attached

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days to the submission of the panel by " the District & Session? Judge, the same shall be put on the Notice Board.

(ii) Copies of the said panel referred in clause (i) shall be forwarded to all the Subordinate Courts by the District & Sessions Judge and to the District Bar Associations.

(c) The consent of the persons whose names are included in the panel shall be obtained before empanelling them.

(d) The panel shall contain Annexure giving details o[1] the qualifications of the mediators/conciliators and their professional or technical experience in different fields.

(e) The panel of mediators/conciliators appointed under Clause (a) and clause (b) (i) shall normally be for a period of three years from the date of appointment and further extension of the panel of mediators/conciliators or any mediator/conciliator shall be at the discretion of the High Court or the District & Sessions Judge with the prior approval of the High Court, as the case may be.

2. Rule 4 of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 4 : Qualifications of persons to be empanelled under Rule 3.

The following persons may be enlisted in the panel of mediator/conciliators under Rule 3, namely:

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Courts;

(iii) Retired District & Sessions Judges or retired Officers of Delhi Higher Judicial Service;

(iv) District & Sessions Judge or Officers of Delhi Higher Judicial Service.

(b) Legal practitioners with at least ten years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts.

(c) Experts or other professionals with at least fifteen years standing.

(d) Persons who are themselves experts in the mediation/conciliation.

3. Rule 5 of the Mediation and Conciliation Rules, 2004 reads as under: Rule 5: Disqualifications of persons.

The following persons shall be deemed to be disqualified for being empanelled as mediators/ conciliators:

(a) any person who has been adjudged as insolvent or persons

(i) against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;or
(ii) persons who have been convicted by a criminal court for any offence involving moral turpitude.

(b) any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment,

(c) any person who is interested or connected with the subject-matter of dispute(s) or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.

(d) Any legal practitioner who has or is appearing for any of the parties in the suit or in other proceeding(s).

(e) Such other categories of persons as may be notified by the High Court.

with a mediator. There are some key attributes, which should be considered before appointing a mediator :—

i. ADR Training and Experience

A mediator should have received training on techniques of mediation such as generating creative solutions and how to improve communication between the parties.

ii. Reputation and Personal Characteristics

A mediator should be acceptable to the parties. A mediator should enjoy excellent reputation and should possess characteristics such as integrity, impartiality, honesty etc.to make him more effective and acceptable to the parties.

iii. Subject Matter Expertise

Sometimes expertise of a mediator in particular type of cases is very important.

iv. Legal Training and Experience

There may be many advantages if a mediator is having legal experience. It does not mean that a legal man can only be a good mediator. There may be persons who are exceptionally skilled in mediations. These persons may be helpful in cases where legal issues are not at the core of the disputes.

8. Selection of Cases

A referral judge should select appropriate cases for mediation. Success of the mediation lies with the selection of appropriate cases for mediation. A referral judge before selecting the cases appropriate for the mediation should consider various factors such as **party characteristics, case characteristics, types of cases, whether a case involves a complex question of law which requires judicial determination etc.** It has been noticed that in the Mediation Cell, Tis Hazari Courts during the period w.e.f. 01.08.2005 to 17.03.2006, 818 cases are referred for mediation by the referral judges out of which 132 cases are found not to be fit for mediation. It constitutes about 16.14% which is a high percentage and affects proper functioning of the Mediation Cell. It is necessary for a referral judge before reference, to assess the cases on its merits and then refer appropriate cases for mediation.

i. Party Characteristics a. Parties Benefits

A referral judge should make neutral evaluation of the case about the legal issues, rights, positions and interests of the parties so that a viable and satisfactory solution of the dispute can be find out. A referral judge should evaluate whether the settlement through mediation is likely to lead to a better outcome for the parties. One would not want to refer

a case to mediation unless the parties costs for settlement and the time spent in the said process promise to be not more than the costs and time spent in litigation of the case. It is noticed that in the **Mediation Cell functioning at Tis Hazari Courts, the average time spent per case is about 139 minutes and mediation does not involve any cost such as Mediator's fee or other miscellaneous expenses.** A referral judge should also ascertain from the litigating parties that whether they wish to maintain a personal or business relationship in future. In many cases, there may be more at stake than the monetary value of the claim. The use of ADR/mediation rather than traditional litigation may reduce hostility between the parties, and help them to find a resolution that benefits both sides and thus help them in maintaining their business relationship.

b. Parties and their Attorneys/Advocates

A referral judge before referring a case for mediation should assess the attitudes and capabilities of the parties as well as their advocates. If they are uncooperative then they may try to subvert the mediation. The attitudes of the parties or their advocates if lacking cooperation, should not necessarily make a case ineligible for mediation. If a party is requesting for settlement through mediation, the judge might be more inclined to make a referral, but one should not assume that such willingness is always well motivated. A party may use mediation as a delay mechanism or a defendant who sees an unfavourable judgment coming may propose mediation to delay the judgment or to achieve a settlement more favourable than the ruling expected from the court.

c. Government Party

A referral judge should make systematic analysis of the case, if government or its any agency is one of the party, to judge whether the case is fit for mediation. Some judges have found it productive to refer cases involving the government to mediation whereas other judges have not. In one case, which was being referred to me for mediation the government agency was one of the party and that case was involving the interpretation of Statutory Rules and Regulations. These types of cases are not fit for mediation. Many times, it is noticed that the representatives of the government pleaded that they are not competent or authorised to take appropriate decision in the matter which resulted in the mere wastage of valuable time of the mediator. Before referring a case to mediation, the referral judge should assess whether there is any authorized officer to take decision on behalf of the government agency or the case does not require interpretation of any statute rules or regulations.

d. Sensitive Information

It is sometimes noticed that a case may need disclosure of sensitive or secret information. A referral judge should assess a case before referring to mediation whether such case involves the disclosure of sensitive information. In such cases, parties may often feel that they can speak candidly to a mediator because their secret or sensitive information will not be recorded by the trial judge. The mediation may be appropriate where the case involves trade secrets or persons intimated by a formal, public court proceedings.

ii. Case Characteristics a. Legal Issues

The primary function of the courts is to give rulings that declare and apply the law. This function is important with respect to constitutional and some statutory claims. If a case, involves complex legal issues, ambiguous precedent, constitutional issues, or public policy which require judicial determination or the judgment may contribute to the development of the law, should not be referred to for mediation. In such case, the benefits of the mediation are outweighed by need to address the scope of constitutional rights or the need to set legal precedent in a particular area of law.

b. Public Information

A referral judge should consider before referring a case whether the settlement will limit public dissemination of critical facts or issues, such as the safety of certain products or devices. The mediation is usually a confidential process and may place the public decision-making function of the courts in the hands of individuals who act outside the public's direct purview.

c. More Issues

A referral judge should judge whether instant case involves few issues or more legal or technical issues. A case involving few issues may be suitable to mediation. But sometimes settlement is possible when a case involves more issues as it increases the settlement options and bargaining possibilities available to the parties. The mediator can bring bargaining positions from outside the case at hand such as other pending cases between the parties, other unresolved issues or new business arrangements between the parties.

d. Multiple Parties

The mediation proceedings are totally voluntary. If a case involves multiple parties then it may be difficult to get all the parties agree at final settlement. If a case is involving multiple parties, the case may not be fit for mediation. In the Mediation Cell, Tis Hazari Courts during t-he period w.e.f. 01.08.2005 to 17.03.2006, 15 cases for partition are sent

for mediation, out of which 3 could be settled. One of the-reason is that in such cases, number of parties are more in comparison to any other ordinary civil suit. However, it does not mean that a case involving multiple parties is not fit for mediation. Many times group settlements are generally less expensive than individual case e.g.labour disputes. Whether a case, involving multiple parties, is fit for mediation depends upon the careful selection of the case by a referral judge.

e. Previous Attempt for Settlement

A referral judge should ascertain from contesting parties that whether any previous efforts are made for the amicable settlement of the dispute and if efforts were not succeeded, the reasons for that. It helps the referral judge to identify the cases fit for mediation. Many times, litigants as well as advocates indulges into adversary roles and in that case the assistance of a mediator may bring them to negotiations for a successful settlement.

iii. Complex Cases

The mediation can be used to settle the complex cases involving class actions, employment discrimination class actions, and mass tort cases. A referral judge before

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4. Rule 20 of the Mediation and Conciliation Rules,2004 reads as under:-Rule 20 : Confidentiality, disclosure and inadmissibility of information.

(a) When a mediator/conciliator receives factual information concerning the dispute(s) from any party, he 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.

Provided that when a party gives information to the mediator/cqnciliator subject to a specific condition that it be kept confidential, the mediator/conciliator shall not disclose that information to the other party.

(b) Receipt or perusal, or preparation of records, reports or other documents by the mediator/ conciliator, while serving in that capacity shall be confidential and the - mediator/conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation/conciliation before any court of tribunal or any other authority or any person or group of persons,

(c) Parties shall maintain confidentiality in respect of events that transpired during the mediation/conciliation and shall not rely on or introduce the said information in other proceedings as to:

(i) views expressed by a party in the course of the mediation/conciliation proceedings;

(ii) documents obtained during the mediation/conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator/conciliator;

(iii) Proposals made or views expressed by the mediator/conciliator;

(iv) Admission made by a party in the course of mediation/conciliation proceedings;

(v) The fact that a party had or had not indicated willingness to accept a proposal;

(d) There shall be no audio or video recording of the mediator/conciliation proceedings.

(e) No statement of parties or the witnesses shall be recorded by the mediator/conciliator.

referring a complex case to mediation has to consider either to refer all the issues or only some of the issues to mediation. Even if the case is not settled, the mediation process can help the parties and the court to identify possible resolution of some of the important issues. It is generally noticed that if the referred case is a complex then there is a less possibility of settlement.

9. Confidentiality

The confidentiality is a fundamental requirement for most of the ADR procedures including mediation. The confidentiality is the essence of successful mediation so that the party should be able to reveal all important and relevant informations to the mediator without an apprehension that the disclosure may subsequently be used against them. The mediation process cannot be allowed to be used as free discovery process by unscrupulous parties. The confidentiality must be assured by a referral judge at the outset of the process that all the disclosure of the information and communications during mediation shall be kept confidential. The Mediation and Conciliation Rules, 2004 also deal with the confidentiality. **Rule 20**[4] provides that when a mediator receives factual information then such information shall be kept confidential if it is so desired by the party. It further provides that the receipt or perusal or preparation of records, reports or other documents by the mediator shall be kept confidential and a mediator cannot be compelled to divulge such information before any court or tribunal or any other authority or person. A duty is also cast upon the parties to maintain the confidentiality in respect of the events that transpire during the mediation. Rule 20 further prohibits audio or video recording of the mediation proceedings. It also prohibits the recording of statements of parties or witnesses by the mediator.

10. Referral Order

A referral order is an important document which initiates the mediation, explains ground rules and structures the process and also removes or prevents the future problems in mediation. A referral judge should understand and realize the importance of a referral order in the mediation. It should not be passed with a casual approach. It forms the foundation of mediation. A good referral order should include sufficient details about process to be undertaken by the mediator, ensure clarity to parties on fundamentals such as consent of parties, confidentiality, impartiality, compensation to the mediation etc. The degree of details may vary depending upon the facts of the particular case. In Delhi, in judicial mediation, a judge refers the case to mediation cell after passing appropriate referral order. (The copy of referral order is attached as Annexure-B). A detailed referral order is always appropriate particularly when the court itself refers the case for mediation

or if the contesting parties are not cooperating with each other. A detailed referral order also minimizes the chances of future challenge. A referral order should contain the fallowings—

a. Referral Authorization

A referral order should state relevant statute or rule which authorizes a referral judge to refer parties to mediation. It is necessary when the referral judge decides to refer the case for mediation without the consent of concerned parties. S.89 of the Code of Civil Procedure, 1908 authorises a referral judge to refer a case for mediation. The Mediation and Conciliation Rules, 2004 also regulate the mediation process in Delhi.

b. Identification of ADR

S.89 of the Code of Civil Procedure, 1908 provides mediation, arbitration, conciliation and judicial settlement as different forums of ADR. A referral order should state about the ADR process being selected by a referral judge. Some referral orders contain the details of ADR process explaining the goals and methods of ADR to the concerned parties while other orders simply identify the relevant and suitable ADR process.

c. Identification of Mediators

If a referral judge selects a particular mediator then his name should be mentioned in the referral order. If the referral judge prefers not to mention name of mediator, then

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5. Rule 26 of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 26: Fee of mediator/conciliator and costs.

(a) At the time of referring the dispute(s), 10 the mediation/conciliation, the Court may, fix the fee of the mediator/conciliator.

(b) As far as possible, a consolidated sum may be fixed rather than for each session or meeting,

(c) Where there are two mediators/conciliators as in clause (b) of Rule 2, the Court shall fix the fee payable to the mediators/conciliators, which shall be shared equally by the two sets of parties.

(d) The expense of the mediation/conciliation including the fee of the mediator/conciliator.costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

(e) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(f) The mediator/conciliator may, before the commencement of the mediation/conciliation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation/conciliation, as referred to in clause (d), including his fee. The remaining 60% shall be deposited with the mediator/conciliator, after the conclusion of the mediation/conciliation. The amount deposited towards costs shall be expended by the mediator/conciliator by obtaining receipts and a settlement of account shall be filed, by the mediator/conciliator in the Court.

(g) If any party or parties do not pay the amount referred to Clause (e), the Court shall, on the application of the mediator/conciliator, or any party, issue appropriate directions to the concerned parties.

(h) The expense of the mediation/conciliation including fee, if not paid by the parties, the Court shall, on the application of the mediator/conciliator or the parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

referral order should spell out about the selection of the appropriate mediator. In Mediation Cells, functioning in Delhi District Courts, a referral judge directs the parties to report to the mediation csll where concerned incharge assigns the case to a qualified mediator for settlement. The Mediation & Conciliation Rules, 2004 provide that the High Court and the District & Sessions Judge with the approval of High Court shall for the purpose of appointing the mediator between the parties in suits or proceedings prepare a panel of the mediators [**Rule 3(a) & (b)**]. The Retired Judges of the Supreme Court and High Courts, Retired District & Sessions Judge or Retired Officers of Delhi Higher Judicial Service; District & Sessions Judge or Officers of Delhi Higher Judicial Service, Legal Practitioners with at least ten years of standing at Bar, experts or other professionals with at least fifteen years standing or expert mediators may be enlisted in the panel of mediators.

d. Mediator's Authorities & Responsibilities

A referral order should outline proposed duties and responsibilities of the mediator. A referral order should state about the mediator's authority to require attendance of contesting parties, their advocates or any other person during mediation proceedings. A referral order should state whether advocates are permitted or allowed to participate in mediation proceedings. A referral order should clearly state that whether a mediator is authorized to extend the time limit of mediation proceedings.

e. Compensation Fee

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6. Rule 10(b) (iv) of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 10 : Procedure of mediation/conciliation.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator/conciliator, the mediator/conciliator shall follow the procedure hereinafter mentioned, namely:

(i)

(ii) -----

(iii) -----

(iv) each party shall, ten days before a session, provide to the mediator/conciliator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator/conciliator to understand the issue; such memoranda shall also be mutually exchanged between the parties. However, in suitable/appropriate cases, the period of ten days may be curtailed in the discretion of the mediator/conciliator;

7. Rule 12 of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 12: Representation of parties.

The parties shall ordinarily be present personally or through constituted attorney at the sessions or meetings notified by the mediator/conciliator. However, they may be represented by the counsel with permission of the mediator/conciliator in such sessions or meetings.

The party not residing in India, may be represented by the constituted attorney at the sessions or meetings. However, it may be represented by the counsel with permission of the mediator/conciliator in such sessions or meetings.

8. Rule 19: Parties to act in good faith.

All the parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute (s), if possible.

A referral order should state whether the parties are required to pay fee or compensation to the mediator. The quantum of fee if payable should ordinarily be mentioned. In Mediation Cells, functioning at District Courts, the parties are not required to pay fee to mediator or for other miscellaneous expenses.

However, **Rule 26**[5] of the Mediation and Conciliation Rules, 2004 provides that a referral judge may fix the fee of the mediator at the time of referring the disputes. It further provides that a consolidated sum may be fixed rather than for each session or meeting.

f. Submission of Materials

A referral judge in its discretion may direct/advice the parties to file documents or any other relevant materials before the mediator prior to initiation of mediation proceedings to clarify the relevant issues and facts. It will help the Mediator to resolve the outstanding disputes more objectively and will prevent unnecessary delays. A referral order may mention when the party should file their briefs/documents and whether the parties should exchange material with each other or provide them exparte to the Mediator. **Rule 10(b)(iv)**[6] of the Mediation & Conciliation Rules, 2004 provides that each party shall ten days before a session, provide to the mediator a brief memorandum setting forth the issues need to be resolved. It further provides that such memorandum shall also be mutually exchanged between the parties.

g. Attendance and settlement authority

A referral order should state who is authorized to appear before a mediator. It may be the parties themselves or someone else.

Rule 12[7] of the Mediation & Conciliation Rules, 2004 provides that the parties shall ordinarily be present personally or through constituted attorney during mediation. The parties may be represented by the counsel with the permission of the mediator.

h. Good faith participation

A referral judge should state in its order that the parties are required to participate in mediation in good faith. **Rule 19**[8] **of** the Mediation and Conciliation Rules, 2004 prescribes that all the parties shall commit to participate in the proceedings in good faith

9. Rule 18 of the Mediation and Conciliation Rules, 2004 reads as under:-Rule 18: Time Limit for completion of mediation/conciliation.

On the expiry of ninety days from the date fixed for the first appearance of the parties before the mediator/ conciliator, the mediation/conciliation shall stand terminated, unless the Court, which referred the matter, either suo moto, or upon request by any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

with the intention to settle the dispute(s) if possible.

i. Deadlines/ time limit

A referral judge should spell out a definite time frame for conduction and conclusion of mediation proceedings. It will minimize the unnecessary delay under the garb of settlement. If there is a possibility of settlement between the partis in that case a referral judge may in its discretion extend the time period of mediation proceedings.

The Rule 18[9] of the Mediation and Conciliation Rules, 2004 prescribes the time limit of 90 days for mediation proceedings from date fixed for the first appearance of the parties which may be extended upto a period of 30 days.

j. Confidentiality

The confidentiality is the essence of Mediation proceedings. A referral order should spell out in unambiguous terms that entire mediation proceedings shall be kept confidential and shall not be disclosed to the trial judge/referral judge by the mediator. The Mediation and Conciliation Rules, 2004 cast a duty on the mediator that when a party divulge secret information to the mediator subject to confidentiality, the mediator is duty bound not to disclose confidential information to the other party. The parties are also obliged to maintain confidentiality in respect of events transpired during the mediation.

11. The communication between the referral judge and the Mediator

A referral Judge while referring a case for mediation does not transfer the control of the case either to the parties or Mediator. The case management still remains with the referral judge.

The referral judge should not initiate any exparte communication on the merits or procedure with the Mediator. The mediator should only communicate to the referral judge about the final outcome of the case or whether the case is not fit for mediation. The Mediation and Conciliation Rules, 2004 also do not provide any direct communication between a referral judge or mediator.

B. Post Mediation

When a case is referred to Mediation, it may culminate either in a settlement or failure of Mediation. The role of a Referral Judge is not confined to the pre mediation stage. A Referral Judge has to play an important role even after the conclusion of the mediation proceedings. At Post Mediation, a Referral Judge has two fold duties/functions which are as under:—

1. **Execution of the settlement**

During a successful mediation, the terms and conditions of the settlement as agreed upon between the parties are reduced into a written documents. In the Court Referred Mediation, after the settlement, the case has to be referred back to the Referral Judge for passing an appropriate order. Section 89 of the Code of Civil Procedure, 1908 does not authorize a mediator to dispose of the case which is pending before the court. It is the utmost duty of the Referral Judge to ensure the proper execution of the terms and conditions of the settlement agreed upon between the parties. If the settlement prescribes a time bound schedule, then the Referral Judge has to ensure the execution of settlement within such time schedule.

2. A case which is not successfully settled in the mediation has to refer back to the court for trial in accordance with law. While acting as Mediator, it has been noticed by me the cases which could not be settled through mediation, are settled in the court during trial due to the efforts made by the Referral Judge. A Referral Judge should make further efforts for settlement even the case could not be settled during mediation.

vii. Training

A system even if perfectly structured may not yield desired result if the persons who are manning it do not have requisite operational skills. A person who is selected to perform a particular job may commit errors if not properly trained before performance. The untrained person may result into the minimum efficiency of the system or the output may not match with the desired results. The training thus, seeks to identify the gaps in the expertise available with a person for performance of job and filling these gaps to raise the level of expertise to equip him to perform perfectly. The training is indispensable at the threshold before a person starts performing. The success of entire mediation process lies on the selection of appropriate cases which are fit for mediation. In this background, the importance of training to be imparted to referral judges lies. It is important that the referral judges should be imparted suitable training. In Delhi, Short Training Programmes have been organized for the referral judges by the mediation trainers from ISDLS.

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Suitability of Mediation

*Geeta Oberoi**

In this note, I will analyze the response by judiciary in India and elsewhere on various facets related to mediation as well as its suitability to disputes.

Right after its statutory recognition in the form of section 89 of the Code of Civil Procedure in 2002, the technique and use of mediation was challenged in the Supreme Court of India in *Salem Advocate Bar Association, Tamil Nadu v. Union of India (UOI)*[1] wherein the Court was called upon to decide on the validity of insertion of section 89 which mandated courts to encourage use of mediation by the parties. Dismissing the arguments against striking down of section 89 of the Code of Civil Procedure, the Supreme Court gave go ahead to legislative intention asking courts to encourage parties to use mediation and observed that

> *"A fine distinction is to be maintained between conciliation and mediation, accepting the views expressed by British author Mr. Brown in his work on India that in 'conciliation' there is little more latitude and conciliator can suggest some terms of settlements too."*

Can matter be compulsorily be referred to mediation?

Does the law, even after the introduction of amended section 89 into the Code of Civil Procedure permit, tolerate or enable the court to compulsorily refer the parties to arbitration even without their consent and against their volition? This question was mooted for consideration in *Afcons Infrastructure limited v. Cherian Varkey Construction Company*[2]. Justice Basant traced back the backdrop and the scenario which obliged the Parliament to bring in Section 89 into the Statute book. He observed that:

> *"The heavy and scandalous pendency of civil litigations in India and the possible remedial measures were drawing the attention and concern of the right thinking members of the polity. The Executive, the Legislature and Judiciary as also the academia have been involved in anxious efforts to identify methods as to how this colossal pendency of litigations can be liquidated. ..*

It will only be apposite briefly to refer to the circumstances under which the alternative dispute resolution mechanism has been pressed into service by the legislature under Section 89. The purpose of all laws is the attainment of harmony among the polity. To attain harmony rights and liabilities as also the dispute resolution process must be specified. Social Scientists opine that the system of dispute resolution prevalent in any community reflects basically the culture of the system. It is an indicia of the culture and civilisation of the polity. Humankind has been engaged in several experiments to identity the ideal method of dispute resolution. The establishment of courts - the concept of a higher and sublime Judge assisted by sublime

* Assistant Professor, National Judicial Academy, Bhopal

1 AIR 2005 SC 3353

2 2007(1)KLT196

counsel resolving the dispute is the process now accepted generally as the best available method of dispute resolution by the Anglo Saxon jurisprudence. This system which is accepted by the Indian system of jurisprudence has several advantages and has certainly inspired faith of the members of the polity in the system of dispute resolution. But that is tar from saying that we have reached the ideal dispute resolution mechanism. Alternative dispute resolution methods are experiments in this journey to identity the ideal system of dispute resolution.

41. The present system of dispute resolution certainly suffers from four major inadequacies Ideficiencies. Of all the inadequacies the worst and the most objectionable is the law's delays. "Expeditious justice remains only a dream. Even a child in India today knows and repeats the adage "justice delayed is justice denied". So gross is the first inadequacy deficiency. The second inadequacy is the huge expenses involved in the dispute resolution process. If justice is my birth right I should not have to pay a price for the same, laments the enlivened polity. The third can be identified to be the complexity and technical nature of dispute resolution which become alien to the common sense of the community. If law is the quintessence of the common sense of the community, it cannot be complex or technical. The dispute resolution mechanism cannot be complex or technical. It will have to rhyme well with the trained common sense of the community. Easily and finally the dispute resolution as we now have, it is not really contributing to harmony in as much as the end of first round of litigation is inevitably the commencement of the second round of litigation and harmony remains a distant dream. The mindset of the victor and vanquished after long drawn out legal battle is not conducive to the ideal of harmony at all.

42. Alternative dispute resolution modes have been stipulated and identified to get over these four inadequacies in our present system. The search for the ideal dispute resolution methodology continues. But Section 89 certainly emphasises and addresses the first of these four inadequacies, namely elimination of delay. An anxious consideration of all the relevant inputs which led to the enactment of Section 89 must convey unmistakably that emphasis was made on the ability of ADR mechanisms to render expeditious justice and thus help to take away the burden on the over burdened system. Though the three other inadequacies may also in the process get remedied, it would not be correct according to me, to assume that Section 89 was introduced into the statute book with emphasis on any one of the three other objectives inadequacies of the present system of dispute resolution. The problem was very specific. Increasing the number of Judges and improving infrastructure remain a theoretical method of alleviation of the problem but not a practical immediate solution. Confronted with that problem the legislature has prescribed the four methods of dispute resolution under Section 89 and the purpose is clear and evident - taking away the burden on the system and eliminating laws delays."

Justice Basant, did not accept the contention that the language of the section does not permit identical treatment of the four dispute resolution mechanisms. He observed:

"I am unable to accept this contention altogether. In fact it is the language of the section which is against the petitioner. The section uses such language that it does not distinguish at all between the four methods of ADR available. It would be artificial to read into the section

any distinction between method (a) relating to arbitration and the other three methods of conciliation, judicial settlement and mediation. The language of Section 89(1) treats all the four dispute resolution mechanisms identically. .. The legislative wisdom of inclusion of all the four under one group cannot be questioned by any artificial interpretative process of exclusion of Arbitration. If we go by letter of the law, no doubt survives at all in my mind that all the four ADR. mechanisms must be treated identically and therefore what applies to conciliation, judicial settlement and mediation can never be held not to apply to the first, viz. arbitration. Language of the section cannot help the insistence on consent at all. Except the argument that arbitration by its nature is a process not available without the consent of the parties, no argument appears to be available against the course adopted by the court below. If insistence on consent can be made for arbitration, certainly the same argument can be adopted in the case of conciliation, judicial settlement and mediation and it is perfectly possible to hold that all these three can also be resorted to only if the parties consent. ..."

The judge having considered all the contentions raised for and against the proposition that courts have the power even when parties do not agree to make a reference for arbitration, held that it is plain and apparent tenor of Section 89 that in an appropriate case the option of referring unwilling parties to arbitration is certainly available with the court.

Can cost be imposed for refusing mediation on the party?

In *(1) Halsey; (2) joy v. (1) Milton Keynes General Nhs Trust; (2) Steel; (3) Halliday*[3] question arose "When should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution ("ADR")?". The observation of the Court on this aspect were:

"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. ...

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of'the ADR process. If a judge takes the view that the case is suitable forADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes

3 2004 EWCA(Civ) 576 [COURT OF APPEAL]

are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust...

In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable.

We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.

We recognise that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to judgment, although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terns; and an agreement by one party to do something without any existing legal obligation to do so. ...

Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable...

Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that for that reason alone his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is to be assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR...

Taking all these factors together, we are in no doubt that the first defendant has not proved that the second defendant acted unreasonably in refusing to agree to mediation in this case."

When a matter may be referred to mediation?

The family related disputes are held easily referable to mediation by the courts. In fact there is evidence of tendency on the part of courts to send such disputes to the Mediation Centre functioning in their premises.

In *Ajit Ranjan v. State and Others*[4], writ of habeas corpus was filed in Delhi High Court by a husband seeking custody of his wife who had married him and was not thereafter permitted to return to the company of the husband by the relatives of the wife.

The court found that it was love marriage between two different people belonging to different social and family structure and therefore the marriage was met with resistance.

The court observed that

"6. This Court has been sending such disputes when not resolved straightaway in Court, to the process of mediation in this Court. There has been a significant success in resuming the matrimonial status after the mediator's efforts or in any event of an amicable parting of ways. This process of mediation in matrimonial matters has thus avoided prolix litigation which embitters the relationship between an estranged couple and their families further and puts an avoidable burden on the legal system. On many occasions while the statement of the wife in Court has been, as in the present case, that she does not wish to go back to the husband; before a trained mediator, and after a session of counselling with and without the family, the response is to the contrary and restoration of the marital relationship with the husband is sought by the parties and granted by this Court. The role of the Mediation Centre of this Court in the present case has thus ensured that not only a couple is reunited but several potential civil and criminal proceedings are avoided. We appreciate the work put in by the Mediation Centre. We have been informed that substantial number of matrimonial matters, referred to Mediation Centre, are being resolved. We have also been informed that the other Mediation Centres in the city are achieving significant rates of success in amicably resolving such disputes."

In *Muthulakshmi v. The Deputy Commissioner of Police, The Inspector of Police, Ramanathan and Hemalatha*[5], on criminal complaint by wife, her husband was detained. Later wife filed petition seeking for direction to the respondents (police) to produce her husband, Eswari Prasad and set him at liberty. Pursuant to the direction of the Court, detenu Eswari Prasad was produced. The Court while granting anticipatory bail subject to certain conditions directed the parties to appear before the Mediation and Conciliation Centre to sort out their dispute.

The Supreme Court in *Shamim Ara's case*[6], held that there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife.

In *Ramdev Food Products Pvt. Ltd v. Arvindbhai Rambhai Patel and Ors.*[7], the Supreme Court relied on the MOU arrived at through the mechanism of mediation by the well-wishers of the family for the purpose of distribution of the properties and business between three brothers.

4 2007 (141) DLT 532

5 MANU/TN/8085/2006

6 (2002 (3) KLT 537 (SC)

7 AIR2006SC3304

Instances of failure of mediation:

However, courts should not dump all family or husband wife related disputes to the Mediation Centres and should be conscious of the fact that not all family matters are suitable for Mediation Centres. There are many cases which prove that mediation only gives temporary relief Like ordinary painkillers prove for headache. Long term solutions lie in courts.

In *Veeramani v. State rep. by Inspector of Police*[8] appellant Veeramani and his deceased wife Arasilankumari had troublesome marriage. After three years of the marriage, the appellant was having illicit intimacy with one Jayalakshnii and in that connection, panchayat was convened in the year 1999 and 2000 to hold mediation between the two and even then there was no happy and amicable life between the appellant and the deceased Arasilankumari. Further, they were frequently quarreling with each other. Later he caused the death of his wife Arasilankumari and made her to hang upon the rafter to make it appear as suicide. His case was registered and traveled from the door of trial court to the High Court which finally declared him guilty.

Sivakumar v. State by Inspector of Police[9], brings to light another family affair wherein appellant Sivakumar husband of deceased Rajeswari did stay calm for sometime due to mediation by panchayat but after sometime with the active assistance and help of another woman Mala with whom he was having affair murdered Rajeswari by strangulating her. The case traveled from trial court to the High Court and ultimately due to lack of evidence benefit of doubt was given to appellant.

In *Pothyamsetti Satyanarayana Reddy and Ors. v. State ofA.P.*[10], accused used to follow deceased, make indecent gestures uttering obscene words and was demanding her to fulfill his lust. The deceased reported the matter to elders and they admonished the accused and cautioned him not to repeat his conduct. This only stopped harassment of the deceased for 2 or 3 months. After some time, the accused started eve-teasing again. She complained to her husband and parents who consoled her and promised to shift her residence, after the marriage of her brother, to a different locality. In the meantime, accused provoked the deceased to commit suicide.

Shri Mukesh Kumar v. Smt. Chanchal[11] records that in a dispute between husband and wife wherein husband had filed divorce petition against wife on the ground of cruelty, a family friends and neighbours had called the parties (husband and wife) at their place when there was a matrimonial dispute between the parties for mediation. However after this mediation/meeting, the couple did not stay together.

Contrary to general notion that business disputes and claims are easily resolved through mediation, there are many precedents which caution otherwise and tell a different story. These cases tell us that there can be no generalization of category "fit" for mediation.

8 MANU/TN/8796/2006

9 MANU/TN/8045/2006

10 2006CnLJ27

11 133(2006)DLT643

In *Vaishnav Shorilal Pun and Ors. v. Kishore Kundalal Sippi and Ors.*[12] there was a dispute between two groups of business magnets, i.e. Puri Group and Sippy Group, to claim the general agency business with an International shipping company by name Contship Containers Lines Ltd. Both these companies are private companies. Initially efforts were made for mediation in through an Advocate acting as Mediator. However, since they were not fruitful, ultimately the negotiations were terminated by Sippys and they filed a suit.

In *Hillcrest Realty Sdn. Bhd. v. Hotel Queen Road Pvt. Ltd. and Ors.*[13], disputes between the petitioner and the respondent arose regarding division of businesses in the family. When attempts were made to resolve the disputes through the mediation of a renowned Solicitor, the respondent offered to go out of the Hotel and hand over its entire management to the petitioner. However, without doing so, the respondent manipulated the records of the company to show as if allotments were made including transfer of shares. He kept the alleged allotments of shares and the transfer of shares as a secret till he disclosed the same in the civil suit.

Some times land and management related disputes and claims too prove very hard cases and unfit for mediation. For instance in *Supreme Court Ear Assoc. M.S.C. v. Central Registrar of Coope. Soc*[14], there were allegations and counter allegations levelled by various parties against each other, claiming that each group wanted to grab the petitioner society and misuse the funds deposited with the petitioner society by various members. There was complete distrust between the various factions and the report filed by the Mediator made it clear that the matter has escalated to the point that there does not seem to be any likelihood of a negotiated settlement inter se the members. Taking leaf from the report of the mediator, and in view of the matter and in the larger interest of the members of the petitioner society who have contributed their hard earned money in the society in the hope of being allotted residential accommodation, as also to bring a quietus to the on going conflict inter se the members of the Board of Directors of the society who have lost trust in each other and in whom a large number of members appears to have lost confidence, the Court nominated and appointed Ms. Justice Usha Mehra (Retd) as a Court Administrator to take over the financial administration, general management and land administration of the petitioner society.

In *L. Jaganath v. State of Tamilnadu Rep. by its Secretary to Government Public Works (Irrigation) Department and Ors.*[15], the possession of the petitioner's lands were taken by the PWD Department for construction of Palar-Porunthalar land scheme. On question of compensation, matter reached Madras High Court. Justice Prabha Sridevan referred the matter for mediation. The petitioner agreed to go for mediation, but the respondents failed to avail of this opportunity. Therefore, the matter was argued again before the court.

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12 MANU/MH/0348/2006

13 MANU/CL/0002/2006

14 134(2006)DLT21

15 MANU/TN/9388/2006, High Court Of Madras, W.P. Nos. 10081 and 10082 of 2002, Decided On: 06.09.2006

In *Shiv Kumar Sharma v. Santosh Kumari*[16], the transaction envisaged an exchange of the two shops and payment of an additional sum by the defendant to equalise their prices. Possession of the shops was accordingly handed over by one party to the other. The defendant had to pay a sum of Rs. 1,50,000/- to the plaintiff over and above transferring the title and possession of Shop No. 598/1. The defendant did not admittedly pay that amount to the plaintiff. The result was that while the defendant enjoyed possession of the shop taken over by him, the plaintiff was denied the benefit of a similar advantage of an equivalent value. The shop with the plaintiff was lesser in value to the extent of Rs. 1,50,000/-. The question was - Whether the transfer of possession of the shop in possession of the plaintiff to the defendant would suffice and provide an equitable solution without any further direction to the defendant to compensate the plaintiff for the non-payment of the amount which the defendant had to pay to the plaintiff under the agreement executed between them. When this appeal came up for hearing before Delhi High Court on 3rd July, 2006, the parties sought an opportunity to explore the possibilities of an amicable settlement with the help of the Medication/Conciliation Centre in the High Court. They were accordingly referred to the Conciliation Centre for that purpose with the direction that the result of the mediation proceedings shall be reported to this Court by the 23rd August, 2006. On 23rd August, 2006, counsel for the parties submitted that the mediation proceedings had failed to yield any acceptable solution to the dispute. The appeal was therefore heard by High Court on merits for final disposal.

Shri Shorey Lal (D) through L.R. v. Smt. Urmila Devi (D) through her LR.[17] witnessed that a mutual settlement arrived between the parties was sought to be set at naught on account of the dishonest intention of one of the legal heirs of the deceased tenant.

What are the kind of cases that ought to be referred for mediation? To quote Justice Lokur, *"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!*

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."

Funding of mediation cell/court annexed mediation

In *Salem Advocate Bar Association, Tamil Nadu v. Union of India (UOI)*[18] the question arose about the payment made and expenses to be incurred where the court compulsorily

16 MANU/DE/9113/2006, IN THE HIGH COURT OF DELHI, RFA No. 229/2004, Decided On: 28.08.2006

17 MANU /DE/9024/2006, IN THE HIGH COURT OF DELHI, CM (M) No. 1297 of 2006, Decided On: 25.08.2006

18 AIR2005SC3353, Judges: Y.K. Sabharwal, D.M. Dharmadhikari and Tarun Chatterjee

refers a matter for conciliation/mediation. Considering large number of responses received by the Committee to the draft rules it has suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on conciliation/mediation is borne by the government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such ADR modes, it is likely to act as a deterrent for adopting these methods. The suggestion is laudable. The Central Government is directed to examine it and if agreed, it shall request the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under section 89 of the Code. In case, Central Government has any reservations, the same shall be placed before the court within four months. In such event, the government shall consider provisionally releasing adequate funds for these purposes also having regard to what we have earlier noticed about many statutes that are being administered and litigations pending in the Courts in various States are central legislations concerning the subjects in List I and List III of Schedule VII to the Constitution of India.

In *Shri Yash Pal Singh v. Union of India (UOI) and* Ors.[19], justices Mukul Mudgal and J.P. Singh, finding that there was inordinate delay and latches of 23 years in filing the petitions; concealment of material facts (regarding earlier petition) and false averments, dismissed the writ petition with Rs. 20,000/- (Rupees Twenty Thousand) each, as cost and directed the same to be deposited with Delhi High Court Mediation & Conciliation Cell.

In *Shri Shorey Lal (D) through L.R. v. Smt. Urmila Dew (D) through her L.R.*[20], Justice Sanjay Kishan Kaul finding no merit in the petition dismissed it with costs of Rs. 5,000/-. with direction that the costs should be deposited with the Delhi High Court Mediation and Conciliation Centre in UCO Bank Account No. 48852 within 15 days.

When Mediation Fails? Possible Consequences

There is no fixed destination followed by counsels and parties pursuant to failure to mediation. Some would still give another try like the parties in *Bawa Masala Company v. Bawa Masala Company Private Limited and Another*[21] where there were a number of inter-linked disputes pending before the trial Court and even they were called for mediation to the Delhi High Court Mediation and Conciliation Centre. The mediators were successful in resolving all the other disputes but unfortunately one of the dispute was not resolved. The parties went to the court demanding that another effort should be made to resolve the disputes amicably by another alternative dispute resolution mechanism. They suggested that instead of the process of mediation, an endeavour be made through the process of 'Early Neutral Evaluation (ENE)'. The High Court after examining methodology of ENE and its differences from mediation and the process being covered under the ambit of section 89 of the Code of Civil Procedure allowed the parties to resort to ENE.

19 IN THE HIGH COURT OF DELHI, W.P. (C) 1466/2003. Decided On: 09.11.2006

20 MANU/DE/9024/2006, DELHI High Court, CM (M) No. 1297 of 2006, Decided On: 25.08.2006

21 2007 (142) DLT 599

Some parties would file civil suit back in the courts. Some would like to have their criminal complaints being revived as in *Jagdish Prashad Saboo, Delhi v. (1) State; (2) Navneet Saboo, Delhi*[22]. In this case the Mediation Judge, had ordered the respondent wife to withdraw the FIR registered under Section 498A Indian Penal Code, 1860 on receiving payment of Rs.10 lakh from the petitioner by way of Demand Draft. Husband petitioner without paying the full amount to wife as directed by mediation judge, prayed to the High Court to take action against wife for the non compliance of the orders of the Mediation court in regard to quashing of FIRs and or in the alternative to quash the FIR. The High Court held that

"Since, entire money has not been paid to respondent no.2, hence, she is justified in not moving an application for compounding of offence under Section 354 Indian Penal Code, 1860 and under these circumstances, the question of quashing of FIR in question does not arise and as such the present petition, for quashing of FIR is not maintainable and the same is hereby dismissed."

Requirements from mediator

These are aptly defined in *Maurice Joseph Hickman v. (1) Blake Lapthorn; (2) David Fisher.*[23] In this case, a claim was brought against solicitors and counsel for negligence in advising the claimant to settle at too low a value his claim arising from a road accident in which he had suffered serious head injuries. The court observed:

"Mediation involves the services of a skilled mediator. The process may take up time and can be expensive. In cases of difficulty, by reason of the ability of a mediator to oil the wheels of settlement in various ways, it is more likely to be effective than the simpler process of negotiation by discussion and offer and counter-offer. I suppose that the main task of a mediator is commonly to lower the proper expectations of the parties to a point where agreement is possible. As the process of settlement by negotiation is less time-consuming and cheaper than mediation, it may be suggested that parties should have the less reluctance to enter into it."

In *Venture Investment Placement Limited v. Hall*[24] an application for interlocutory relief in the form of an injunction to restrain the defendant from referring to, or disclosing, (either verbally or in writing) to any other person, natural or corporate, any discussions which took place during the course of a mediation relating to other proceedings between the parties was filed.

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22 CASE NO: Crl.M.C.(M).No.1104 of 2007, [DELHI HIGH COURT], decided on 20 Nov 2007

23 QUEEN'S BENCH DIVISION] 2006 INDLAW QBD 1.

24 2005 EWHC 1227 [CHANCERY DIVISION]

CASE LAWS

(2006) 2 Supreme Court Cases 327

(BEFORE ARIJIT PASAYAT AND TARUN CHATTERJEE, JJ.)

ETWARI DEVI AND OTHERS ....Appellants;

Versus

PARVATI DEVI ....Respondent.

Civil Appeal No. 1514 of 2000†. decided on January 17, 2006

A. Constitution of India — Art. 136 — Maintainability — Questions of fact — Findings/Questions of fact simpliciter — Interference when justified — Approach of courts below — Material evidence ignored — Suit for specific performance of contract — Decree passed by trial court and upheld by lower appellate court — High Court, in second appeal, reversing the decree on the ground that the plaintiff had neither specifically pleaded, nor adduced evidence, to establish his readiness and willingness in terms of S. 16(c), Specific Relief Act — High Court further observing that a certain amount directed to be deposited by the plaintiff was not deposited within the time granted — All the said findings of High Court found to be contrary to the material on record — In such circumstances, High Court's judgment reversed — Specific Relief Act, 1963, S. 16(c) **(Paras 3 and 4)**

B. Civil Procedure Code, 1908 — Or. 10 R. 1, Or. 6 R. 2 and Or. 8 R. 1 —Oral submission — Acting on, without affording opportunity to other party — Caveat against — Suit for specific performance of contract — Plaintiff depositing the requisite amount within the time granted by trial court but even then he filing an application for extension of time — Record revealing the said fact — In such circumstances, held, High Court should have ignored the said application and should not have relied thereon to hold that the plaintiff had not deposited the money within the time granted — Moreover, in the absence of a plea about non-deposit of the amount in time, High Court should not have acted upon the oral submission of the defendant's counsel in that regard without affording an opportunity to the plaintiff **(Para 4)**

Appeal allowed H-M/Z/33755/C

† From the Judgment and Order dated 11-5-1999 of the Patna High Court in Appeal from Appellate Decree No. 23 of 1984 (R)

Advocates who appeared in this case :

Gopal Prasad, Advocate, for the Appellants;

K.K. Gupta, Advocate, for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— Challenge in this appeal is to the judgment of the learned Single Judge of the Patna High Court holding that the appellants were not entitled to a decree for specific performance of contract. In a second appeal filed by the respondent, the judgment and decree of the trial court as affirmed by the first appellate court were reversed and suit of the plaintiff was dismissed. Originally, the suit was filed by Nunu Mahto, husband of Appellant 1, father of Appellant 5. After death of Nunu Mahto his legal heirs were substituted. The High Court proceeded on the basis that the plaintiff had not proved that he was ready and willing to perform his part of the contract.

There was neither pleading nor evidence was tendered in terms of requirement of Section 16(c) of the Specific Relief Act, 1963 (in short "the Act")- Learned counsel for the appellants highlighted as to how the judgment of the High Court suffers from various infirmities both factually and on principle of law. None appears for the respondent though she was represented by a counsel who did not appear on several dates of hearing and also is not present today.

2. The second appeal was admitted by the High Court and the following questions were framed which according to the High Court were substantial questions of law as required to be framed under Section 100 of the Code of Civil Procedure, 1908 (in short "the Code"):

   (i) Whether the finding that the plaintiffs were always ready and willing to perform their part of the contract is vitiated on account of absence of evidence on the point?

   (ii) Whether the decree passed by the lower appellate court is maintainable in absence of the evidence on the point referred to above?

3. The High Court recorded findings to the effect that there were no specific averments in the pleadings that the plaintiff was ready and willing to perform his part of the contract and also no evidence was adduced in this regard. As rightly pointed out by

learned counsel for the appellants, the findings are contrary to the materials on record. As noted by the first appellate court in various paragraphs of the plaint, more particularly paras 18 and 22, specific averments regarding readiness and willingness of the plaintiff to perform his part of the contract have been made. Additionally, the plaintiff Nunu Mahto who was examined as PW 9 has categorically stated that he had gone to tender the money, that is the consideration, to the defendant who was not agreeable to return the sale deeds and therefore the only course left open to the plaintiff was to file a suit.

4. On this ground alone, the judgment of the High Court is vulnerable. Another factor which appears to have weighed with the High Court is that even though one month's time was granted by the trial court to the plaintiff to deposit a sum of Rs 1500, this was not done. This again is a finding contrary to the materials on record. There can be no quarrel with the proposition that in a suit for specific performance of the contract, the plaintiff must prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. But the finding that the plaintiff has not proved his capacity to perform his part of the contract as he was not even ready to deposit the money in terms of the trial court's order is factually wrong. It appears that no such plea was raised by the defendant before the first appellate court. In the memorandum of appeal filed before the High Court in the second appeal also, there was no such plea taken. On perusal of the records, it appears that the deposit was made on 19-12-1978, that was well within one month's time granted by the trial court by its judgment and decree dated 25-11-1978. Confusion appears to have arisen because notwithstanding the deposit, an application for extension of time was filed. The High Court should have ignored the application and should not have put any emphasis thereon as verification of the records would have revealed that the payment had been made. Even otherwise there was no such plea taken by the defendant (the respondent herein) about the non-deposit within time granted by the trial court. The High Court should not have acted on an oral submission made by the learned counsel for the defendant, who was the appellant before it, without granting of an opportunity to the present appellants to have their say in the matter. Above being the position, the impugned judgment of the High Court is indefensible and deserves to be set aside which we

direct. The inevitable conclusion is that the judgment and decree passed by the trial court and the first appellate court are to be restored. The appeal is allowed accordingly. There shall be no order as to costs.

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