

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

'Life is nothing but adjustment' or 'Adjustment itself is life'—Dr. Dasarathi Ranga Charya¹

By

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Introduction

In common parlance, differences of opinion or small altercation leaves traces of disputes and they become contentious matters.² A dispute means whether it is a commission or omission when one party raises a contention of law or fact. If one party asserts a right and the other party repudiates the same. It is nothing but disagreement between two parties regarding the interests, rights, and liabilities of the concerned parties. A dispute may develop into a conflict. Efficient business relationships and inter personal relationships should not be destroyed by disputes. Thus, there is a need to develop a dispute resolution mechanism, which can protect relationships, and at the same time find a workable solution to the dispute at an early stage.³

Causes of Disputes

Dispute arises to protect legal rights and they would arise due to difference in psychological and sociological factors. In case of disputes due to legal factors, there are rights as well as duties. Any duty which is omitted or performed in contravention of legal duty gets named or branded as liability. The legal liabilities are: 1) Civil liability, 2)

Criminal liability, 3) Remedial liability, 4) Penal liability, 5) Vicarious liability, 6) Strict or absolute liability.⁴

Litigation

Litigation may be between persons or body of persons. Litigation actually means a law suit. It is an outward development of disputes when it reaches its pinnacle, *i.e.*, "Critical mass."⁵ It means that the disputing parties have gone through the entire process and are unable to scuttle or settle the disputes. When the dispute is not solved between the parties they may institute a suit in the Court of law seeking justice, then it becomes litigation. The litigation exists until it is settled or finally decided by the ultimate appellate Court (apex Court), since, that alone can be a binding adjudication.

Preventive Litigation

The conflicting postures and position on issues are likely to threaten to generate wide ranging consequences, then the strategies of negotiation, mediation and conciliation can step in as the first step in the direction of preventive litigation. Avoidance of litigation can be resorted to through the processes of negotiation, mediation, arbitration or by decision of the Court.⁶

The legal system of India is characterized by technical proceedings, dominance legal profession and overwhelming use of

1. A Famous poet, who translated Divine Vedas into colloquial telugu language.
2. Dr. U. Pattabhiramayya, Arbitration and ADR (Including Conciliation, Mediation and Negotiation) First Edition, 2011, Asia Law House, Hyderabad, p.43.
3. Dr. Madabhushi Sridhar, Alternative Dispute Resolution Negotiation and Mediation, 1 edition, 2nd reprint, LexisNexis Butterworths Wadhwa, Nagapur, p.79.

4. *Supra*, n.2, p.45.
5. *Ibid*, p.46
6. *Ibid*, p.46

adversarial system of conflict resolution. The present strength of judges in various Courts is not in a position to reduce the pendency of cases. The administration of justice would crumble under the weight of pendency cases, if this situation is not remedied. It is important to note that the government is collecting money from the citizens of India by way of Fee, Tax, Stamp Duty, user charges *etc.*, and is fighting against its citizens at the cost of citizens. As per the rough estimate, 70% of the cases are pertaining to the State.⁷ The State is also responsible for increasing the weight of pendency of cases. Hence, it is the need of the hour to find out ways and means to minimise the litigation.

Section 9 of Civil Procedure Code has barred several disputes and kept them outside the purview of the Courts with a view to render Justice to litigant public in a reasonable time with fewer costs, like Service matters, Industrial disputes, Bank matters, Consumer disputes *etc.* Due to lack of sufficient number of Courts, unhealthy attitude of some of the Governments, the present justice delivery system is not giving good results. It is high time to change the mindset of Judges, Lawyers, litigant public and Administrators of the States and Central Government. The Justice delivery system must be in such a way that both parties to the litigation should feel that they would get justice which they are entitled.

The main delay in decision making process by the Courts is due to false claims or defences of the parties and it is the duty of every Court to find out the truth by following the Procedural laws and Evidence Act which require the process of producing witnesses in the Court of law and permitting the parties to examine them to their satisfaction and allowing them to prefer appeal or revision, if they are aggrieved. It may be mentioned here that parties/witnesses used to speak Truth outside the Court

instead of speaking the Truth in the Court before a Judge on oath. Hence, it can be said that people feel free to disclose facts pertaining to a dispute/litigation outside the Court, either in the negotiation or before the elders in mediation.

This article deals with settlement of disputes/litigation by means of mediation. "Mediation" is a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. Mediator has no stake in the dispute and is not identified with any of the competing interest involved. Mediator has no power to impose settlement on the parties, who retain the authority for making their own decisions. Mediator is, therefore, responsible in the conduct of the process while parties control the outcome.

The settlement arrived at by the parties is not amenable to further litigation by filing appeal or revision as the settlement of the dispute is with the consent of both parties.⁸ Mediation is recognised as one of the Alternative Dispute Resolution Mechanisms (ADR) under Section 89 C.P.C.⁹ Section 89 of C.P.C., came for consideration before Hon'ble Supreme Court of India in *Salem Bar Association v. Union of India*—(I),¹⁰ (II).¹¹ After second *Salem Bar Association* case,¹² Civil Procedure Alternative Dispute Resolution and Civil Procedure Mediation Rules, 2005 are framed and they are brought into force with effect from 22nd February 2006.

In *Ajeans Infrastructure Ltd. and another v. Cherian Varkey Construction Co. (P) Ltd. and others*,¹³ the Hon'ble Supreme Court found fault with the drafting errors in respect of

7. *Supra*, n.3, p.58

8. Section 96(3) of CPC

9. Section 89(1)(b) & (d) of CPC, Settlement of disputes outside the Court

10. (2003) 1 SCC 49

11. (2005) 6 SCC 344

12. (2003) 1 SCC 49

13. 2010 (6) ALD 155 (SC)

mediation as mentioned in Section 89(2) and held that “the definitions judicial settlement and mediation in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman’s error and the above changes made by interpretative process shall remain in force till the Legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous.” The Law Commission of India, has also recommended for the following amendment of Section 89 of C.P.C.¹⁴

“Where it appears to the Court, having regard to the nature of the dispute involved in the suit or other proceeding that the dispute is fit to be settled by one of the non-adjudicatory alternative dispute resolution processes, namely, conciliation, judicial-settlement, settlement through Lok Adalat or mediation the Court shall, preferably before framing the issues, record its opinion and direct the parties to attempt the resolution of dispute through one of the said processes which the parties prefer or the Court determines. Where the dispute has been referred for mediation, the Court shall refer the same to a suitable institution or person or persons with appropriate directions such as time-limit for completion of mediation and reporting to the Court. On receipt of copy of the settlement agreement the Court, if it finds any inadvertent mistakes or obvious errors, it shall draw the attention of the mediator who shall take necessary steps to rectify the agreement suitably with the consent of parties.”

ADR Mechanism provides complete justice to the persons engaged in conflicts and legal disputes. Mediation is essentially a search for a solution, by the parties disputing themselves, under the guidance of a third party, who is a neutral facilitator. Under Section 89 CPC, the Court is empowered to refer the matters/

disputes to a mediator either with or without consent of both parties to the dispute as it is mandatory, if there is an element of settlement. After receipt of the records from the Court, the mediator has to issue notice to both parties to the dispute and shall proceed with the prescribed procedure, that is, joint session, private session and agreement or referring back the matter to the Court.

Joint Session

Initially, the mediator has to introduce himself and it shall be followed by introduction of the respective parties and their advocates, if any. After greeting each other and occupying their respective seats, the mediator has to explain his role in mediation and advantages of mediation.

Opening Statement by Mediator

This is the most important stage of mediation through which the mediator draws the attention of the parties by informing, what is mediation? What is the role of mediator? What is the role of parties? What is the role of advocates?, How the mediation process takes place? What are the ground rules to be followed? How the confidentiality is protected?, What if agreement is reached? and What if the agreement is not reached?¹⁵

The opening statement not only helps the mediator to instil confidence in the disputing parties but also enhances party’s confidence in the mediation process. By effective opening statement, the full attention of the parties can be drawn towards mediation and their effective co-operative and collaborative participation can be ensured. The parties feel free and comfortable to communicate their contentions.¹⁶

In *Joint Session*, the party (party 1) who has approached the Court will first speak about the facts of his/her case. He/she can give all information that can be disclosed in

14. Report No.238, Law Commission of India, recommended by Justice P.V. Reddy the then Chairman, Law Commission of India, dated 30.12.2011.

15. S. Susheela, Mediaion Readers’ Handbook 1st Edition, Asia Law House, Hyderabad, page No.8

16. Ibid p.9

the joint session, withholding the information which he/she does not want to disclose in the presence of the other side. After he/she completes, mediator will make a restatement of what he heard. That is to say he will tell the gist of it. If the party feels that mediator has not understood him/her correctly he/she can always correct him. Later his/her advocate will speak about the legal issues. Then the party (party 2) against whom the case is filed will be allowed to speak about the facts of his/her case. After he/she completes, mediator will restate the same in a nutshell. If the party feels that mediator has not understood his/her statements correctly he/she can always correct the mediator. Later his/her advocate will speak about the legal issues. But, there are certain ground rules to be followed. When one party is speaking, the other party should not interfere or intervene. While speaking, both should address the mediator and speak. Both the parties are not supposed to shout, abuse each other, or use any disrespectful language.

Private Sessions (caucuses)

In the private session, mediator will talk separately with each of the parties. Mediator may have private session with the advocate of each of the parties. At times, mediator may have private session with third parties, who can contribute for the progress of mediation or settlement.¹⁷ They can have any number of private sessions. In private sessions, parties can disclose any confidential information to mediator.

Settlement Agreement

Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced in to writing and signed by the parties. The advocates shall attest the signature of their respective clients. The agreement of the parties so signed and attested shall be submitted to the mediator who shall with a

covering letter, signed by him, forward the same to the Court in which the suit is pending. Where no agreement is arrived at between the parties, or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.¹⁸

After receipt of the settlement agreement, if any, the Court shall issue notice to the parties by fixing a day for recording the statement within the period of 14 days and the Court shall record the same if it is not collusive and thereafter the Court shall pass a decree in accordance with the settlement so recorded, if the settlement disposes of all issues in the suit.¹⁹

Cases Fit for Mediation

In *AFCONS Case*,²⁰ the Hon'ble apex Court enumerated several types of cases such as cases relating to trade, commerce, contracts, matrimonial causes, family properties, easementary rights, claims for compensation, tortious liabilities, and consumer disputes.

Conclusions and Suggestions

Disputes are inevitable in any society. In such circumstances, the disputing parties shall approach the Courts of law without resorting to illegal methods for resolving the disputes. The State Governments and Central Government should provide all necessary infrastructure and facilities to settle the disputes through process of law only, for observing rule of law. If the respective Governments neglect to perform their legal obligations, the disputing parties may approach the unruly elements in the society to the detriment of the weaker parties who may have to forego their valuable rights and

17. Ibid p.10

18. Rule 336 of Civil Procedure Mediation Rules, 2005.

19. Rule 337 of Civil Procedure Mediation Rules, 2005.

20. 2010 (6) ALD 155 (SC)

enter into compromises reluctantly and thereby purchase the peace to avoid unhealthy situations in their life. If the respective Governments provide all necessary infrastructure to the Courts and the Court annexed mediations the disputing parties may make use of the same and would get justice with minimum costs within a reasonable time. Parties should be encouraged to resort to ADR mechanisms as contemplated under Section 89 of Code of Civil Procedure Code so that the Courts can concentrate on the trial of serious nature of cases.

Since mediation is one of the ADR mechanisms, the mediator, who is a third party neutral assists the disputing parties to creatively resolve their disputes without going for trial. A mediator presents a unique opportunity for dispute resolution with the involvement and participation of all the parties and their advocate. The mediator shall use special skills and communication techniques to help the litigant to bridge their differences and find a solution to their dispute. The mediator shall leave the decision making power with the parties. He shall not decide what is fair or apportion blame; but he shall act as a catalyst to bring the two disputing parties together by defining issues and eliminating obstacles for communication and settlement. He must explain the entire

process of mediation, procedural guidelines, confidentiality in private session, substantive law in respect of their dispute and the likelihood of the decision of the Court, if they do not choose the ADR methods and facility to go back to the Court, if the dispute is not settled in the mediation process *etc.*, in the brainstorming session regarding the options available to them. It is high time to amend the law relating to mediation as recommended by the Law Commission of India.

For changing the mindset of presiding officers of the Courts, learned Advocates and the parties, who are approaching the temple of justice, the Central Authority, State Authority, District Authority and Mandal level Committee constituted under the provisions of the Legal Services Authorities Act, 1987 shall conduct workshops from time to time and shall give proper training to the mediators who are generally the professional Advocates with the participation of litigant public, who would be benefited more if their disputes are settled outside the Court purview, but, within the Court complex, since the mediation centres are located in the respective Court complexes.

“Hurt nobody by word or deed.

Be true and just in one’s dealings”.....*William Gilpin*

APPOINTMENT OF JUDGES

By

**—D. SRINIVASA PATNAIK, M.A., B.L.,
Senior A.P.P. 5th M.M.C. Court,
Anakapalli, Vishakapatnam District**

Confusion is being created due to long pending non appointments of constitutional Judges to various High Courts and Supreme Court of India in reasonable time. The feelings of the Chief Justice of India of Supreme Court cannot be left in lurch by

our law makers. Mutual respect is expected between The Judiciary and Parliament otherwise it leads to constitutional jeopardy, leading to annoy the intention of founding fathers of Constitution of India in this biggest Democratic Country.